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# UNCOOPERATIVE FEDERALISM: THE STRUGGLE OVER SUBSISTENCE AND SOVEREIGNTY IN ALASKA CONTINUES

Karen Bridges\*

We're very mindful of the important role subsistence plays in rural Alaska, but as a sovereign state within the United States we can't tolerate this kind of incursion (by the federal government) into lands and waters that are clearly governed by the state.

Alaska Attorney General Bruce Botelho<sup>1</sup>

Because of its vast geographic area which extends from coastal forests in the southeast far north into the frozen Arctic circle, the state of Alaska finds itself in a unique situation, one strange to its sister states in the lower '48. In a state more than twice the size of Texas,<sup>2</sup> widely dispersed cities enjoy the benefits of booming resource extraction<sup>3</sup> and tourism industries while many Alaskans living in rural villages still must hunt and fish for at least some of their food, as many have done for centuries.<sup>4</sup>

However, such "subsistence" hunting and fishing does not fit neatly into traditional Anglo-American concepts of fish and game management, complete with artificial seasons and bag limits.<sup>5</sup> Subsistence is year-round

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1. David Hulen, *State Vows Subsistence Fight Not Over; Lawyers Plan Return to Court to Resist Federal Takeover Plan*, Anchorage Daily News, May 15, 1996, at 1B.

2. 29 NEW ENCYCLOPEDIA BRITANNICA 431 (15<sup>th</sup> ed. 1994). Alaska increased the area of the United States by twenty percent when it was admitted to the Union in 1959. *Id.*

3. The oil and gas industry accounts for ninety percent of Alaska's total revenues; Alaska produces approximately twenty-five percent of all oil in the United States. *Facts and Figures* (last modified Jan. 1998) <<http://www.state.ak.us>>

4. "Without subsistence hunting and fishing, many small communities of rural Alaska could cease to exist." Frank Rue, Alaska Department of Fish and Game, *Why a Rural Subsistence Priority Makes Good Sense* (1997). Rural Alaskans consume approximately 350 pounds of wild fish and game per person per year as opposed to 19 pounds per person per year in Anchorage or 16 pounds per person per year in Fairbanks. *Id.* Frank Rue is the Commissioner of the Alaska Department of Fish and Game (hereinafter Commissioner Rue).

5. This problem was illustrated in the case of *Bobby v. State of Alaska*, 718 F. Supp. 764 (D. Alaska 1989). This case also highlighted the conflicting philosophies of state and federal regulators. State regulations imposed individual bag limits and short seasons on residents of one of the most isolated and remote Native villages in Alaska. One village hunter who took several moose to share with non-hunters in the village challenged the regulations. The federal court sympathized with the hunter, and eventually the Federal Subsistence Board in 1990 adopted regulations allowing for year-round subsistence hunting in Lime village, with corresponding restrictions on non-local access. Natives found the regulations a triumph for the protection of traditional subsistence practices, while opponents

living off the land and often is, especially in many Native villages, a communal or family activity, intimately bound up with ancient traditions and rituals.<sup>6</sup> Many remote villages also are dominated by a mixed cash-barter economy, with few year round jobs and little industry.<sup>7</sup>

Most of these Alaskan villages, however, do not exist in splendid isolation, surrounded by abundant fish and game free for the taking. They face increasing competition for fish and game resources as the state's population becomes more and more concentrated in its few cities and accessibility to remote areas grows.<sup>8</sup> Alaska's "fortuitous oil wealth" spurred a tremendous growth in the population of Alaska's urban centers.<sup>10</sup> And, for several decades Alaska has been building an extremely lucrative sport and commercial<sup>11</sup> fishing industry, hiding some of Alaska's prime fishing waters "behind a wall of humanity."<sup>12</sup> Inevitably, this has created conflicts over access to Alaska's fish and wildlife that threaten to overwhelm the unique needs of the subsistence hunter or fisherman.<sup>13</sup>

said that such regulations went too far and proved that the federal government would ignore sound fish and game management and Alaska's equal access concerns in its zeal to protect subsistence.

6. "I come from a subsistence family. I grew up that way. I am very proud of it. I want my children to grow up that way." Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 U. MO. KAN. CITY L. REV. 645, 649 (1991) (quoting Susie Erlich, Inupiat Eskimo, at an Alaska Native Review Commission)

7. The Commissioner of the Alaska Department of Fish and Game, Frank Rue, has stated that subsistence is the "most reliable section of the [rural] economy." Rue, *supra* note 4. Rue added that jobs are scarce in rural communities and cash incomes low, with most cash invested in supplies and equipment for subsistence hunting and fishing purposes. *Id.*

8. Since the state of Alaska no longer recognizes a subsistence priority for rural Alaskan residents, those residents are restricted to hunting on the same terms and same times as the more numerous urban and non-resident hunters and thus face more difficulties in meeting their year round and communal needs. Frank Rue, Alaska Department of Fish and Game, *Rural Subsistence Priority: On the Ground Reality* (1995).

9. "If village access to fish and game is overwhelmed by competition from the tens of thousands of sportsmen who Alaska's fortuitous oil wealth has drawn to the urban centers, the effect on the rural village economy would be adverse and the effect on the health and welfare of rural residents would be even more so." *McDowell v. State*, 785 P.2d 1, 4 (Alaska 1989).

10. Alaska's "pre-pipeline" urban population remained small, but from 1965-1975 due to the construction of the Alaskan pipeline, Anchorage became America's third fastest growing city. DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 297 (1984). Rural population growth is also becoming a problem. See *Rural Population Growth a Looming Issue*, TUNDRA TIMES, Dec. 14, 1994.

11. During the 1980's, Alaska produced almost ninety percent of the world's salmon. UNITED STATES FOREST SERVICE WEB, ALASKA REGION, FISHERIES (1998). From 1970 to 1979, Alaska's annual commercial salmon harvest ranged from 20 million to 80 million salmon per year. From 1980 to 1989, that harvest ranged from 96 million to 154 million salmon. And, from 1990 to 1995, that harvest ranged from 155 million to 217 million salmon, a more than 50 percent increase in a little over 20 years. ALASKA DEPARTMENT OF FISH AND GAME, *ALASKA COMMERCIAL SALMON HARVESTS 1970-1995* (1996).

12. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 (1988) (citing *Combat Fishing*, ANCHORAGE DAILY NEWS, May 15, 1998, at J-1).

13. Over-fishing of salmon on the Copper River (in southeastern Alaska), largely by residents

Attempts by the federal government to remedy the situation and protect subsistence have struck an extremely tender nerve in Alaska, as Congress has placed itself fundamentally at odds with the Alaska Constitution and those Alaska citizens who wish to shake off the powerful federal presence that has continued to linger in Alaska since statehood in 1959. That presence threatens to loom even larger as a result of a decision by the Ninth Circuit Court of Appeals in *Alaska v. Babbitt*, giving federal regulatory authorities unprecedented power over Alaska's valuable fishing waters.<sup>14</sup> The decision has set Alaska at a crossroads. The state must decide whether to solve its problems internally and with the federal government or remain divided, bitter and subject to intrusive federal control over one of its most precious resources.<sup>15</sup>

This note analyzes the development of the current crisis over subsistence and state sovereignty in Alaska by discussing the various points of Alaskan political, cultural and legal history that have contributed over the years to the standoff between the state and federal government over subsistence. Part I gives a brief overview and analysis of the current status of Alaska's struggle with subsistence. Part II discusses the purely Native focus of what little subsistence policy existed in Alaska prior to the passage of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. Part II also discusses the battle over resources and land subsequent to statehood which led, eventually, to the passage of the Alaska Native Claims Settlement Act (ANSCA) in 1971 and ANILCA. Part III discusses the conflict between ANILCA's rural subsistence priority and the equal access clauses of Alaska's state constitution. Part IV analyzes a 1995 Ninth Circuit decision, *Alaska v. Babbitt*. Part V concludes by suggesting that currently, the best option for the state of Alaska is to amend its constitution to allow for a rural subsistence hunting and fishing preference. Failure to pass the amendment would result in continued state bitterness towards perceived federal arrogance, divided citizens, little incentive on the part of the state to cooperate or coordinate with the departments of the Interior and Agriculture in implementing the priority, and a continued costly duplication of fish and wildlife regulations on state and federal

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of Anchorage and Fairbanks, led the Board of Fisheries to allow fishing in the River only on Saturday and Sunday, conveniently, when most urban workers have time off. Kancewick & Smith, *supra* note 6, at 656 n.54. Native elders were arrested when they fished there during the week. *Id.* The Kenai peninsula, located near Anchorage has become a "center of commercial and sport fishing, subsistence has been crowded out by commercial harvesting and by sport fishing, the latter pursued with all the zeal of a Crusade." *Kenaitze*, 860 F.2d at 313.

14. *Alaska v. Babbitt*, 72 F.3d 698 (9<sup>th</sup> Cir. 1995) *cert. denied* 517 U.S. 1187 (1996).

15. "Nothing has torn the fabric of this state apart more than the debate and controversy over this, [subsistence]." Robert Kowalski, *Senate OK's Subsistence Ballot Item*, ANCHORAGE DAILY NEWS, May 30, 1998, at A-1.

lands. An amendment also would protect the needs of Alaska's isolated, rural residents.

# I. OVERVIEW OF ALASKA'S CURRENT CRISIS

The immediate cause of Alaska's dilemma is the word "rural." Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), enacted in 1980, granted a priority to subsistence hunting and fishing by *rural* residents over sport and commercial hunting and fishing by all residents on federal public lands in Alaska.<sup>16</sup> Building on its previously ill-defined policy of safe-guarding Native Alaskan hunting and fishing rights, Congress intended the priority to benefit primarily the large percentage of Native Alaskans living in rural areas.<sup>17</sup> Title VIII authorized the state of Alaska to manage the subsistence program on federal public lands if it passed state laws consistent with ANILCA's rural preference, thus continuing state control over all fish and wildlife in the state.<sup>18</sup>

This model of cooperative federalism continued for less than a decade. In 1989, the Alaska Supreme Court, strictly adhering to the egalitarian notions of the equal access clauses of its constitution, found that all of Alaska's citizens, regardless of their residency status, have a right to a subsistence priority.<sup>19</sup> As a result of this decision, the state could no longer pass any laws granting a subsistence priority based on rural residency. Congress did not change the rural residency requirement.

The Secretary of the Interior soon revoked the state's certification to manage ANILCA on federal public lands and published temporary subsistence regulations in July of 1990.<sup>20</sup> The regulations excluded most navigable waters from ANILCA's subsistence provisions and thus, from federal regulation, leaving Alaska in control of its profitable fisheries.<sup>21</sup>

16. Pub. L. No. 96-487, 94 Stat. 2422-2430 (Dec. 2, 1980) (codified at 16 U.S.C. §§ 3111-3126 (1994)). The priority is meant to apply when it becomes necessary to restrict takings of fish and wildlife to ensure the health and viability of the population or fish stock.

17. See Kancewick & Smith, *supra* note 6, at 645 n.5 (citing 126 Cong. Rec. 29,278-79 (1980)). Kancewick and Smith feel that this failure to make the priority expressly Native was a failure by Congress to "confront and resolve the issue of Native subsistence and its relationship to the land and natural resources." *Id.* at 647. They feel that the federal government should implement a Native-only subsistence priority in order to preserve Native cultural identity. *Id.*

18. 16 U.S.C. § 3115(d) (1994). The state passed such laws in 1978 and was certified by the federal government to implement the program in 1982. See *infra*, Part III.

19. McDowell v. State, 785 P.2d 1, 10 (Alaska 1989) (citing Alaska Const. art VIII, § 3, 15, 17). Kancewick and Smith see this result as "false and unnecessary," because individual Alaskans' rights can be distinguished from Native tribal rights. Kancewick & Smith, *supra* note 6, at 647.

20. See *Babbitt*, 72 F.3d at 701.

21. 55 Fed. Reg. 27,114, 27,115 (June 29, 1990). Permanent regulations were published in May of 1992. Fed. Reg. 22,940, 22,942 (May 29, 1992). The regulations found that because the Submerged Lands Act of 1953 and the Alaska Statehood Act of 1958 granted Alaska title to lands beneath navigable waters within the state's boundaries, that "navigable waters generally are not included within the

Recently, however, the Ninth Circuit Court of Appeals narrowed this exclusion by greatly expanding federal power under the Property Clause and giving the departments of Interior and Agriculture the authority to regulate the subsistence priority on those navigable waters in Alaska in which the United States has reserved water rights.<sup>22</sup> These federal departments are poised, reluctantly, to assume management of subsistence fisheries on more than one-half of Alaska's 196,000 miles of streams and rivers on December 1, 1998,<sup>23</sup> significantly expanding federal regulatory authority over subsistence hunting and fishing.<sup>24</sup> This ruling is also significant because approximately 80 percent of all subsistence hunting and fishing in Alaska takes place on navigable inland and marine waters, as does most of Alaska's commercial and sport fishing. This effect of the Ninth Circuit's decision has shocked Alaskans far more than did the 1990 federal revocation of state regulatory power over subsistence hunting and fishing which affected primarily lands, not waters. Now, the state stands to lose considerable control over a great many of its fisheries.

Presently, Alaska has two choices. It can amend the state constitution to allow a subsistence preference for rural residents and regain regulatory control over federal lands; or, the state can do nothing and face expanded federal control of fish and wildlife management. Essentially, Alaska's citizens hold three different views as to how best to approach these choices.

On one extreme, many sport and commercial hunters and fishermen, who are supported by state's rights activists and conservative politicians in Alaska, adamantly oppose the first option, going so far as to call a rural preference "apartheid by ZIP code."<sup>25</sup> They continue to hope that Con-

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definition of public lands." *Id.* See also *infra*, Part IV

22. *Babbitt*, 72 F.3d at 704. The Alaskan Supreme court quickly disagreed with the Ninth Circuit in 1996, holding that any interest the United States had in its reserved water rights in Alaska did not rise to the level of a proprietary interest in which the United States could hold title. *Totemoff v. State*, 905 P.2d 954, 965 (1996). However, the United States Supreme Court has refused to hear any appeals on *Babbitt* and so the ruling still controls on federal lands.

23. In 1996, Alaska's Congressional delegation first secured a moratorium on spending by the Departments of Interior and Agriculture on the implementation of a subsistence priority on Alaska's navigable waters. 144 Cong. Rec. S9499-01 (1998). That moratorium has been extended twice, most recently to December 1, 1998. Department of Interior and Related Appropriations, Pub. L. No. 105-83, § 316, 111 Stat. 1543 (Nov. 14, 1997). It most likely will be extended to the year 2000, as Alaska buys time to solve its problem. 144 Cong. Rec. H6137-02, H6144 (1998).

24. 62 Fed. Reg. 66216 (December 17, 1997). The waters designated include "all inland navigable waters within the exterior boundaries of listed Parks, Preserves, Wildlife Refuges, and other specified units managed by the Department of the Interior and all inland navigable waters bordered by lands owned by the Federal government within the exterior boundaries of the two National Forests." The Departments of Interior and Agriculture chose this "broad" alternative because they wanted to avoid "checkerboard jurisdiction" all around the state. *Id.* at 66218.

25. Don Hunter, *Subsistence Pitch No Hit in Fairbanks*, ANCHORAGE DAILY NEWS, Sept. 18,

gress will expunge the offensive rural preference from ANILCA, saying the federal government has no right to force the state to violate or change its own constitution in order to implement a "discriminatory public law [ANILCA]."<sup>26</sup> They also violently object to federal control of any kind in an area traditionally managed by the state, even state control based on a federal scheme of management.<sup>27</sup> They point to the federal government's disastrous management of fish and shellfish in the past as an excellent reason to avoid any federal regulatory taint,<sup>28</sup> and they fear the possible commercial competition posed by subsistence users.

At the other extreme, many Native Alaskans would prefer to rely on Federal management, which they consider generally more responsive to their communal and cultural subsistence needs than state management.<sup>29</sup> The state has not acted decisively in the past to protect local resources from the pressures of non-resident and urban, commercial and sport hunting and fishing, and Natives fear the state would not in the future.<sup>30</sup> Na-

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1997, at A-1 (quoting Ralph Seekins, president of the Alaska Wildlife Conservation Association, an Alaskan sport hunting and fishing group). Other sport and commercial groups support a severely limited rural preference, if only to escape from federal control. See Jon Little, *Plan Gets Hesitant Support; Subsistence Task Force Gets Cool Reception*, ANCHORAGE DAILY NEWS, September 27, 1997, at D-1.

26. *Letters from the People*, ANCHORAGE DAILY NEWS, January 27, 1998 (Letter from Rob Arno, president of the Alaska Outdoor Council).

27. "If we amend our constitution and our statutes, we have to amend them to mirror the federal system of management. So we don't really get state management. We get federal management, but we get a state name on it and we get to pay for it." Robert Kowalski, *Full Plate in Juneau: Subsistence, Children, Budget Top '98 Agenda*, ANCHORAGE DAILY NEWS, January 11, 1998, at A-1 (quoting Alaska Rep. Scott Ogan). Fourteen Alaska legislators who are members of the Legislative Council, including Ogan, have filed a lawsuit against the Department of the Interior, challenging the federal government's constitutional right to manage fish and game on Alaska's federal public lands. See Bruce Botelho, *ANILCA Challenge Doomed, Wastes Precious Time*, ANCHORAGE DAILY NEWS, January 6, 1998, at B-8. Alaska's Attorney General, Botelho, believes the suit is frivolous and will fail. *Id.* He was right. See *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19 (D.D.C. 1998).

28. See e.g. 62 Fed. Reg. 66216 (1997) (citing complaints over poor management of fish and shellfish by the federal government prior to statehood). "It is my hope that the State will soon provide for Alaska's rural residents while at the same time resolving the subsistence dilemma once and for all. But until that happens, I cannot stand by and watch the federal government move into the State and assume control of the Alaska fish and game resources. In 1959 Alaskan's caught just 25.1 million salmon. Under State management we caught 218 million salmon in 1995. Federal control would again be a disaster for the resources and those that depend on it." 144 Cong. Rec. S9499-01 (1998) (Statements of Senator Frank Murkowski, R-Alaska).

29. "Subsistence users cannot expect a fair hearing from the (state Fisheries Board), and they have in fact rarely gotten one. The result over the years has been a steady decline in subsistence rights for Native people. Our dependence on the federal government to protect our way of life has been because they are our last resort." Hulen, *supra* note 2 (quoting John Tetpon of the Alaska Federation of Natives). See also *infra*, Part II. About 30 Native villages in representative Richard Foster's district of Nome, Alaska have indicated to Foster that they would "rather have a federal takeover." Paul Queary, *Subsistence Bill Calls for Tradition Based Priority*, ANCHORAGE DAILY NEWS, April 10, 1998.

30. Congress passed Title VIII of ANILCA in part because the state failed to take any real

tives also see a broad rural priority guaranteed by the federal government as the best protection for their traditional way of life,<sup>31</sup> which to them encompasses far more than the mere gathering of food for survival, a purpose Title VIII specifically embraced.<sup>32</sup> At minimum, Natives want strong federal oversight of any state subsistence program.

In the middle, stands a majority of Alaskans,<sup>33</sup> including Tony Knowles, the governor of Alaska.<sup>34</sup> The majority is willing to amend the state's constitution to allow for a rural priority if it means that the state would regain full control over its fish and wildlife,<sup>35</sup> although it remains divided on the precise contours of a proposed rural residency requirement.<sup>36</sup> However, the amendment,<sup>37</sup> which must garner a two-thirds vote in both the house and senate before it sees a public vote, may never go before the voters in November because some state legislators threaten to

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steps to protect subsistence for Natives or in rural areas. *See infra*, Part II.

31. Perhaps illustrating Native fears, the Alaska Supreme Court found that under state subsistence laws, state regulatory authorities are not required to take into consideration traditional and customary methods of subsistence uses. *State v. Morry*, 836 P.2d 358, 369-70 (Alaska 1992).

32. 16 U.S.C. § 3113(1) (1994) finds that subsistence uses are vital to "Native traditional and cultural existence." Federal regulations and even state laws and regulations reflect this cultural emphasis. Regulations are based on traditional sharing of knowledge, long-term customary use of a particular fish stock, etc. *See* 62 Fed. Reg. 66216 (1997). "Subsistence to us is our spiritual way of life, our culture." Kancewick & Smith, *supra* note 6, at 649 (quoting Gladys Derendoff, Huslia, at an Alaska Native Review Commission hearing).

33. Recent polls showed that Alaskans favor the rural subsistence priority two to one. Don Hunter, *Poll Finds Alaskans Back Rural Preference*, ANCHORAGE DAILY NEWS, Dec. 3, 1997, at B-1.

34. Governor Knowles organized a Subsistence Task Force which drafted a plan meant to solve the subsistence impasse. *See* SUBSISTENCE TASK FORCE PLAN FOR A SUBSISTENCE PRIORITY AND RETURNING FISH AND GAME MANAGEMENT TO THE STATE (Sept. 23, 1997). The plan includes proposals for a state constitutional amendment allowing for a rural subsistence priority, statutory amendments also allowing for the priority, and accompanying amendments to ANILCA. *Id.* Representative Scott Ogan "shelved" Knowles proposal in January 1998, saying it would not "see the light of day." Robert Kowalski, *Ogan Riles Peers on Subsistence*, ANCHORAGE DAILY NEWS, Jan. 29, 1998, at B-1.

35. Fear of the potential havoc inexperienced federal regulators could wreak on Alaska's valuable and delicately balanced fishing industry fuels in part resistance to any federal control in the area. Frank Rue, Alaska Department of Fish and Game, *Subsistence Impasse Demands a Solution* (1997). Commissioner Rue fears that regulators and regulations would become less responsive to the resource because their only concern would be the protection of subsistence. *Id.*

36. In November of 1997, Congress passed amendments to ANILCA which clarify the hot-points of ANILCA, such as a more specific definition of rural and what is meant by "customary and traditional." Department of Interior and Related Appropriations, Pub. L. No. 105-83, § 316, 111 Stat. 1543 (Nov. 14, 1997). These new amendments will go into effect only if Alaska manages to amend its constitution. *Id.*

37. 1997 Alaska Senate Joint Resolution No. 101, Alaska 20<sup>th</sup> Legislature, First Special Session (May 26, 1998). The proposed amendment would be Section 19, reading "[t]he legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses in the taking of fish and wildlife and other renewable natural resources based on place of residence." *Id.* Interior Secretary Bruce Babbitt warned Alaska lawmakers that a subsistence solution that calls for too many changes to ANILCA and no constitutional amendment "will not fly." Babbitt, *Subsistence Fix Can't be Drastic*, ANCHORAGE DAILY NEWS, April 4, 1998, at B-1.



bury it.<sup>38</sup> If this occurs, nobody wins, not even the federal departments which, facing the likelihood of incurring substantial expenses,<sup>39</sup> have no desire to expand their regulation of subsistence hunting and fishing.<sup>40</sup>

## II. HISTORY OF ALASKAN SUBSISTENCE POLICIES

### A. Early Regulation

During the early years of this century, comprehensive management of fish and game in Alaska was impractical if not impossible, because the vastness of the Alaska Territory dwarfed its small population.<sup>41</sup> Congress, for the most part, geared wildlife management towards the protection of game in a few heavily trophy-hunted areas, such as the Kenai Peninsula, and allowed off-season hunting and license exemptions for Native populations and isolated travelers.<sup>42</sup> Congress established the predecessor to Alaska's Boards of Fish and Game, the resident Alaska Game Commission (Commission) in 1925<sup>43</sup> which also recognized exemptions for "Natives, explorers, prospectors and travelers" in "*absolute need*" of food.<sup>44</sup> While it lasted, the Commission, although responsive to some resident concerns, showed little understanding of the practices of Native hunters and fishermen.<sup>45</sup> As the territory's population grew, and territorial government involvement became more complex, "the potential for conflict between Native hunters and non-Native managers and agents" increased.<sup>46</sup>

Concurrently, the federal government, as it struggled to define its relationship with Alaska Natives,<sup>47</sup> carved out some minimal subsistence

38. Paul Queary, *Few Lawmakers Back Subsistence Plan*, ANCHORAGE DAILY NEWS, January 15, 1998. See also Robert Kowalski, *Legislators Again Hunt Subsistence Fix*, ANCHORAGE DAILY NEWS, May 25, 1998, at A-1 (quoting Anchorage Republican State Rep. Ramona Barnes - "I will not vote for rural vs. urban. I'm opposed to an amendment that would make second-class citizens out of my constituents.").

39. A Department of Interior official has estimated the cost of the implementation of a federal regulatory scheme at \$10 to \$20 million per year. See Hulen, *supra* note 1.

40. "There's not a single person in the Department of the Interior that wants to do this." *Id.* (quoting Deborah Williams, special assistant for Alaska to Secretary Bruce Babbitt).

41. Congress did not establish the Territory of Alaska until 1912. BRITANNICA, *supra* note 2 at 435. The United States purchased Alaska from Russia in 1867, and the first salmon cannery was built there in 1878. *Id.* at 434.

42. HENRY P. HUNTINGTON, WILDLIFE MANAGEMENT AND SUBSISTENCE HUNTING IN ALASKA 24 (1992). The Alaska Game Law, passed in 1902, authorized some of the Territory's first wildlife management regulations. Act of June 7, 1902, 32 Stat. 327 (1902).

43. HUNTINGTON, *supra* note 42, at 24 (citing Act of Jan. 13, 1925, 43 Stat. 739 (1925)). The Commission's duties were to make regulation recommendations to the Secretary of Agriculture and to "oversee the administration of game laws in the Territory." *Id.* at 26.

44. *Id.* at 25-26. The Commission continued in existence until the new state of Alaska took over management in 1960.

45. *Id.* at 26.

46. *Id.* at 27.

47. The federal government recognizes a sometimes murky land-related trust relationship with

protections for Alaskan Natives through various international treaties and federal laws.<sup>48</sup> But, the federal government never instituted a broad, consistent policy protecting Native Alaskan hunting and fishing, or subsistence, rights. Most Native Alaskans lived in scattered, remote villages that made it difficult for the federal government to address comprehensively all of their vastly divergent needs and claims. Instead, the federal government created an inconsistent and mercurial "patchwork" of rights and exemptions.<sup>49</sup>

Congress signed no treaties with Alaska Natives and unlike most of their counterparts in the continental United States, few Native Alaskans lived on reservations.<sup>50</sup> Any Native hunting or fishing reserves created by the executive branch provided inconclusive and temporary protection at best for Natives,<sup>51</sup> subject to what one commentator has termed "characteristic" swings of the Indian policy pendulum.<sup>52</sup> However, before Alaska statehood in 1959, few political incentives existed to settle or protect any Native aboriginal claims or rights,<sup>53</sup> mainly because the Territory's popu-

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Native Americans, which it assumed only minimally in Alaska. CASE, *supra* note 10, at 112. However, a broader "guardian" relationship exists independent of Native title to land and extends to Native hunting and fishing rights, and subsistence rights: *Id.* at 113. This duty arises in part from Native dependency on the power of the federal government to protect their interests. *Id.* at 5. However any obligation of the federal government to Natives must be specifically recognized by treaty, statute or such to be legally enforceable. *Id.*

48. Kancewick & Smith, *supra* note 6, at 653 n.35 (citing 25 U.S.C. § 500 (1988)). The Federal Reindeer Industry Act of 1937, for example, allowed Alaska Natives to raise reindeer free of non-Native competition, as a "means of subsistence" and a way to help "the Eskimo" preserve their "native way." *Id.* Other Federal Acts and treaties include the Marine Mammal Protection Act of 1972 and various whaling and early migratory bird treaties. See HUNTINGTON, *supra* note 42, at 48-58.

49. CASE, *supra* note 10, at 13.

50. In Alaska, Congress established only two reservations by statute similar to those that exist elsewhere in the United States, first Metlakatla in 1901, then Klukwan in 1957. CASE, *supra* note 10, at 87. Most Alaska Natives lived in small, isolated village groups not conducive to the formation of larger reservations. *Id.*

51. Several executive order Indian reserves were created until 1919, when Congress revoked the president's power to create such reserves. CASE, *supra* note 10 at 86. After 1919, the president withdrew a few "public purpose" reserves, meant to help Alaska Natives, and under the authority of the amended 1936 Indian Reorganization Act, the secretary of the Interior also made withdrawals. *Id.* Congress amended the Indian Reorganization Act (IRA) in 1936 to apply to Alaska Natives. *Id.* at 10 (citing Act of June 18, 1934, 48 Stat. 984 (codified as amended in 25 U.S.C. §§ 461 et seq.)) The IRA, among other things, prevented any further allotment of Indian lands, allowed Natives to form their own governments and allowed the Secretary of the Interior to withdraw land in trust for Native uses, and it gave Alaska Natives essentially the same status as other Natives. *Id.* See *Id.*, ch. 3 for a detailed history of federal reservation policy in Alaska. Of 215 recognized Native villages, 70 adopted provisions of the IRA, and 145 retained traditional methods of government. See WILLIAM RHODES ET AL., SPECIAL JOINT TASK FORCE REPORT ON ALASKAN NATIVE ISSUES, AMERICAN INDIAN POLICY REVIEW COMMISSION 21 (1976).

52. MARY CLAY BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 21 (1975).

53. See Note, Karen J. Atkinson, *The Alaska National Interest Lands Conservation Act: Strik-*

lation remained small<sup>54</sup> and Native Alaskans were both shielded and isolated by the Alaskan wilderness.<sup>55</sup> With the approach of Alaskan statehood and the drafting of the Alaska constitution, access to and control over Alaska's natural resources became the paramount issue<sup>56</sup> and subsistence and other Native concerns, generally, were ignored.<sup>57</sup> Alaskans were anxious to escape from federal control and what they saw as horrendous federal management of state fish and wildlife resources.<sup>58</sup> Many Alaskans were opposed to the establishment of large Native reservations which could close vast areas of Alaska to exploitation, yet they dismissed Native claims as a Federal problem that could not and should not stand in the way of statehood.<sup>59</sup>

### *B. Alaska Statehood and the Alaskan Native Claims Settlement Act*

Even as Alaska hoped that Native claims would resolve themselves, statehood forced them, eventually, to confront the issue. The Statehood Act of 1958 granted the new state of Alaska the right to select approximately 102.5 million acres of "vacant, unappropriated and unreserved" public land, and provided for the transfer of control over fish and game from the federal government to Alaska as soon as the state implemented a program satisfactory to the Secretary of the Interior.<sup>60</sup> The Act also included a section requiring Alaska to disclaim "all right and title to any

*ing the Balance in Favor of "Customary and Traditional" Uses by Alaska Natives*, 27 Nat. Resources J. 421, 422 (1987). Also, a deadline for filing "Indian Claims" with the Indian Claims Commission, established by Congress in 1946, expired in 1951, long before most Native Alaskans even knew the Commission existed. *Id.*

54. The Territory's population in 1939 was about 70,000. BERRY, *supra* note 52, at 23. By 1950, the population reached about 138,000 and continued to grow at a rapid rate as the economy "boomed." *Id.* Alaska's current population is over 600,000.

55. However, even though the white population in Alaska did not begin to grow significantly until after 1939, as the federal government expanded militarily in Alaska, private industries interested in exploiting Alaska's resources were "frightened by the specter of unsettled Native land claims." BERRY, *supra* note 52, at 23.

56. HUNTINGTON, *supra* note 42, at 27. "The question of how fisheries and wildlife resources were to be managed gave rise to one of the deepest controversies of the [Alaskan constitutional] convention." *Id.* (citing V. FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION (1975)). The growth of the Territory's economy in the 1950's was almost entirely based on Alaska's natural resources. BERRY, *supra* note 52, at 24.

57. The Special Congressional Joint Task Force reporting to Congress on Alaska Native issues 1976 found that Native Alaskans remained "largely silent" in the debate over statehood and that the Natives were mostly unaware of how statehood could affect them. RHODES, *supra* note 51, at 5.

58. Immediately after gaining control from the federal government over state natural resources, the state banned the use of fish traps which had been liberally allowed by the federal government and which had contributed to a massive depletion in fish populations. CASE, *supra* note 10, at 109.

59. RHODES, *supra* note 51, at 3.

60. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (1958). Alaska was certified by the Secretary in 1960.

lands or other property (including fishing rights), which may be held by any [natives] or is held by the United States in trust for said natives.<sup>61</sup> Despite this sweeping disclaimer, Native hunting and fishing rights remained in a "curious limbo" because Congress had not extinguished or conclusively acknowledged native rights, yet state law governed most Native hunting and fishing.<sup>62</sup>

This uncertainty created administrative and legal headaches for Alaska as the Natives, no longer unaware of how Statehood might affect them, began filing a "flood" of land claims, many conflicting with the state's land selections made pursuant to the Statehood Act.<sup>63</sup> The Ninth Circuit went so far as to state that traditional Native "trapping, hunting and camping" could not "constitute a condition which would deprive [state] selected lands of being vacant, unappropriated and unreserved."<sup>64</sup> In 1964, Secretary of the Interior Stewart Udall refused to grant land patents to Alaska, and in 1966, he froze all land selections and sales of oil and gas leases until Native claims were settled.<sup>65</sup> In 1968, the discovery of vast reserves of oil at Prudhoe Bay 200 miles southeast of Barrow further fueled the state's, Natives', and oil companies' desire to settle land Native land claims.<sup>66</sup> Congress, in response to the looming crisis in Alaska and after nearly three years of intense debate, passed in 1971 the Alaska Native Claims Settlement Act (ANSCA).<sup>67</sup>

ANSCA "shielded" Native village lands from state selection, granted

61. Kancewick & Smith, *supra* note 6, at 654 (citing Alaska Statehood Act, § 4, Pub. L. No. 85-508, 72 Stat. 340 (1958)). Congress also retained jurisdiction over Native lands or lands held in trust for Natives, until "disposed of under its authority." *Id.*

62. *Id.* at 655. It wasn't until two years after the passage of ANSCA in 1971 that a federal court acknowledged that "Native lands in Alaska were historically and as a matter of law held under valid claims of title." CASE, *supra* note 10, at 71 (citing *Edwardson v. Morton*, 369 F. Supp. 1359 (1973)). Congress nearly failed to add a disclaimer regarding Native hunting and fishing rights to the Statehood Act. RHODES, *supra* note 51, at 5. This waffling resulted in part from confusion and uncertainty in Congress about the precise state of any Native claims. *Id.*

63. RHODES, *supra* note 51, at 6. In the early 1960's, the Bureau of Indian Affairs encouraged the filing of Native claims, while the Interior Department routinely threw them out. *Id.*

64. CASE, *supra* note 10, at 69 (citing *State of Alaska v. Udall*, 420 F.2d 938, 940 (9<sup>th</sup> Cir. 1969) (internal citations omitted)).

65. RHODES, *supra* note 51, at 6.

66. HUNTINGTON, *supra* note 42, at 43. The state of Alaska wanted land for the new Alaska pipeline which would cross mostly public lands. *Id.* Before construction on the pipeline even began, the state of Alaska had already received \$900 million from the sale of oil and gas leases on the North Slope and the industry-poor state eagerly awaited the royalties and boom the building of the 800-mile pipeline would bring. William S. Ellis, *Will Oil and Tundra Mix? Alaska's North Slope Hangs in the Balance*, National Geographic, October 1971, at 490-94.

67. Act of December 18, 1971, Pub. L. No. 92-203, 85 Stat. 689 (1971) (codified as amended in 43 U.S.C. §§ 1601 et seq.) The governor of Alaska testified to Congress in February 1971 that the state, suffering from a limited tax base, would be broke by 1976 if the pipeline were not built, emphasizing the state's vital interest in the settlement of Native claims. BERRY, *supra* note 52, at 143.

Alaskan Natives, who were divided into village and 12 regional corporations, a large cash settlement (\$962.5 million) and gave them the right to choose approximately 44 million acres of federal land in order to achieve "a fair and just settlement of all claims by Natives and Native groups based on aboriginal land claims."<sup>68</sup> However, ANSCA required Natives to pay a heavy price for "settlement." It extinguished all aboriginal land, hunting and fishing rights and did not provide for subsistence uses.<sup>69</sup> Despite this compromise, Congress did not intend that ANSCA obliterate Native subsistence rights, even though Congress itself had never clearly delineated those rights in the first place. The ANSCA conference committee report stated that it expected "both the Secretary and the State to take any action necessary to protect the subsistence needs of the Native."<sup>70</sup>

Soon, however, it became increasingly obvious that "neither the state nor the secretary were likely to protect subsistence in the manner Congress had contemplated."<sup>71</sup> No lands had been withdrawn for subsistence uses and no protection had been given to local hunters and fishermen.<sup>72</sup> Sport and commercial interests "with little allegiance to and slight knowledge of the subsistence way of life" dominated the state Department of Fish and Game.<sup>73</sup> Granted, the vesting of land and cash in Native corporations by ANSCA was meant to encourage Native independence from state and federal governments,<sup>74</sup> a goal which the Natives themselves encouraged. But the reality was that few "corporate" opportunities awaited villagers immediately after the passage of ANSCA, and year-round "cash" jobs still were extremely difficult to find in rural villages.<sup>75</sup> Any protection of sub-

68. 43 U.S.C. § 1601 (1994). Natives actually received shares in village and 12 regional Native corporations; the corporations received the money and the land. Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villager's Subsistence*, 7 FORDHAM ENVTL. L.J. 211, 233 n.82 (1996).

69. 43 U.S.C. §§ 1601(a), 1603(b) (1994). Section 1603 extinguished all claims "based on use and occupancy," which is the traditional definition of aboriginal claim. Early drafts of ANSCA submitted to the Committee on Interior and Insular Affairs in 1967 and 1969 did include some subsistence provisions for the Natives, but drastically less land and monetary compensation. H.R. Rep. No. 523, 92nd Cong., 1st Sess. 1971, 1971 U.S.C.C.A.N. 2192.

70. 1971 U.S.C.C.A.N. 2192, 2195. Congress also expected after passing ANSCA that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." 1971 U.S.C.C.A.N. 2192, 2247-50.

71. CASE, *supra* note 10, at 295.

72. *Id.* Although many Native groups, or "corporations," attempted to choose lands for subsistence uses, they often ran into conflicts with already patented or chosen state lands or with huge Federal reservations made under the authority of ANSCA or earlier. Often the state had already chosen land with the most prime resource value, such as land rich in timber. RHODES, *supra* note 51, at 44.

73. CASE, *supra* note 10, at 296.

74. See e.g. Jeremy David Sacks, *Culture, Cash or Calories; Interpreting Native Subsistence Rights*, 12 ALASKA L. REV. 247 (1995) (arguing that the cultural basis of Alaska's subsistence laws is inappropriate since ANSCA and modern progress dictated a new path for Natives).

75. The Bureau of Land Management severely delayed approving Native land selections made

sistence resources for the over-matched and over-burdened Native population<sup>76</sup> would have to come from Congress.<sup>77</sup>

### C. Enactment of ANILCA

As it finally attempted to address these shortcomings of ANSCA, Congress found that "in order to fulfill the policies and purposes of [ANSCA]. .," it had to act on its *longstanding* concern for the protection of subsistence resources in Alaska.<sup>78</sup> ANSCA § 17(d)(2) had authorized the Secretary of the Interior to withdraw large areas of unreserved "national interest" public lands in Alaska "for possible addition to or creation of national parks."<sup>79</sup> Congress acted on the Secretary's withdrawals in 1980 when it enacted the 15 titles of ANILCA.<sup>80</sup> ANILCA designated a total of 105 million acres of federal Alaskan land for protection of their resource value and to continue and complete "the public land allocation process in Alaska which began with the Statehood Act of 1958" and ANSCA in 1971.<sup>81</sup> More importantly, Title VIII of ANILCA picked up where the state and the Department of Interior had neglected to act. Title

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pursuant to ANSCA, in large part because of the Department of the Interior's unreasonable public easement policy with regards to Native lands. RHODES, *supra* note 51, at 14, 25. The delay prevented Natives from developing their lands, and thus from generating cash flow for Native "corporations," and from protecting subsistence activities from non-Native access. *Id.* Natives also ended up with no choice of any known oil lands, Alaska's most profitable resource. BERRY, *supra* note 52, at 214.

76. At the rate the BLM was conveying land under ANSCA, about 100,000 acres per year, the total conveyance time added up to almost 160 years. RHODES, *supra* note 51, at 14 n.2. Native funds received under ANSCA and otherwise were being depleted to pay for legal and administrative fees to fight the BLM. *Id.* at 17.

77. Alaska Governor Jay Hammond stated: "I would hope this Congress establishes a the priority of subsistence use where there is a conflict on national interest lands." CASE, *supra* note 10, at 297. See RHODES, *supra* note 51, at 63-90 for Native views on the frustrations inherent in the application of ANSCA.

78. 16 U.S.C. § 3111(4) (1994); 1980 U.S.C.C.A.N. 5070, 5175; Alaska Natives pushed hard for the inclusion of subsistence provisions in ANILCA, and enlisted the support of conservation groups who "sought to keep whole ecosystems and complete watersheds within federal control, preserved from development in conservation reservations." Naiman, *supra* note 68, at 239. ANILCA, for the most part, adopted this predominantly conservationist tone, although not nearly on the scale conservationists and the House had pushed for. *Id.* at 242-43.

79. 43 U.S.C. § 1616(d)(2) (1994). This was popularly known as the "d-2 lands bill." Naiman, *supra* note 68, at 239.

80. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in 16 U.S.C. §§ 3101-233 (1994)). "The 180-page Act was the culmination of nine years of debate, some 40 bills and well over 25,000 pages of legislative history." Naiman, *supra* note 68, at 243. Naiman also found that ANILCA was "never smoothed by floor debate and the Act contained ambiguities affecting its implementation." *Id.* Those ambiguities included what was meant by "rural" or "customary and traditional."

81. 1980 U.S.C.C.A.N. 5071. Even under the more conservative Senate version which eventually became law, ANILCA more than doubled the national parks in America, "trebled the refuges and quadrupled the area of wilderness." Naiman, *supra* note 68, at 243.

VIII recognized the essential nature of subsistence uses<sup>82</sup> on public lands to rural Alaskan residents and the need to shield those uses from increasing urban and population pressures.<sup>83</sup>

During the drafting of ANILCA, rural Alaskan residents, mostly Natives,<sup>84</sup> bombarded the Committee on Interior and Insular Affairs with evidence of their heavy reliance on subsistence hunting and fishing for their survival and for the continuation of their traditional way of life.<sup>85</sup> ANILCA itself expressed these concerns, and established non-wasteful subsistence uses as the priority consumptive uses of all renewable resources on Alaska's federal public lands.<sup>86</sup> The priority applies to all rural residents, Native and non-Native, who depend on subsistence resources when it becomes necessary to restrict takings on public lands to assure "the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population."<sup>87</sup> Congress also provided for a second tier of subsistence use if further restrictions on the takings of a fish stock or game population were necessary.<sup>88</sup> ANILCA authorized the Sec-

82. Title VIII defined subsistence uses as "customary and traditional" uses of renewable resources by rural residents, although it did not define "customary and traditional." 16 U.S.C. § 3113 (1994).

83. 16 U.S.C. § 3111 (1994): Congress finds and declares that: (1) The continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Native and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to *Native* physical, economic, traditional, and *cultural* existence and to *non-Native* physical, economic, traditional and *social* existence; (2) The situation in Alaska is unique in that in most cases, no practical alternative means are available to replace food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses; (3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management; (4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act, and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.

84. The Alaska Federation of Natives (AFN) was founded in 1966 and became a powerful lobbying organization in the debates over ANSCA and ANILCA. BERRY, *supra* note 52, ch. 1.

85. "The importance of subsistence uses of such resources to the physical, economic and cultural well-being of Alaska Natives and other rural residents has been exhaustively chronicled in testimony presented at hearings, town meetings and workshops held by the committee during consideration of both [ANSCA] and [ANILCA]." 1980 U.S.C.C.A.N. 5175. Congress found that in some areas, subsistence hunting and fishing provided rural villagers with up to 80 percent of their food supply. H.R. REP. NO. 95-1045, Pt. II.

86. 16 U.S.C. § 3112(2) (1994); Interestingly, the Alaska Constitution does allow for prioritizing among beneficial uses, and in 1973 the state boards of Fish and Game had adopted a policy granting subsistence the highest priority among beneficial uses. CASE, *supra* note 10, at 295. However, this policy never amounted to much. *Id.*

87. 16 U.S.C. §§ 3112(1)-(2), 3114 (1994).

88. 16 U.S.C. § 3114 (1994). Second tier restrictions are based on 3 criteria: local residency,

retary of the Interior to establish a regulatory scheme to implement Title VIII unless the state enacted laws based on ANILCA's rural subsistence priority provisions.<sup>89</sup> ANILCA § 807 mandated federal judicial review of the state's program once it was in place.<sup>90</sup> Therefore, if the state wished to retain regulatory control over federal public lands, it had no choice but to adopt ANILCA's provisions as state law and suffer federal oversight.

Not surprisingly, the state of Alaska did not remain a silent bystander in the debate over ANILCA's provisions. The state initially, in conjunction with industries favoring development and various Alaska sport hunting groups, opposed any version of ANILCA other than a limited one granting the state the lion's share of Alaska's lands, a goal it did not realize.<sup>91</sup> The state also requested that Congress not grant an exclusive subsistence priority to Natives,<sup>92</sup> arguing that the Alaska constitution's racial neutrality clause would not allow the state to grant a preference to Natives over other Alaska residents.<sup>93</sup> Congress compromised with the state on this issue and passed a "racially-neutral" preference for all *rural* Alaskan residents, reasoning that this would protect the majority of Natives who lived in rural areas.<sup>94</sup> As discussed *infra*, use of the vague term "rural" caused a great deal more problems than it solved, nor did it ultimately escape scrutiny under the Alaska constitution.

### III. ALASKA'S SUBSISTENCE PRIORITY LAWS: CONFLICT WITH ANILCA AND THE EQUAL ACCESS CLAUSES OF THE ALASKA CONSTITUTION

Faced with the imminent passage of ANILCA, Alaska was "anxious to maintain its role as the sole regulator of fish and game in the state."<sup>95</sup> The state therefore passed its first state laws granting a priority to subsistence hunting and fishing in 1978, two years before Congress enacted the

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customary and direct dependence on the resource and the availability of alternative resources. *Id.*

89. 16 U.S.C. § 3112(2) (1994).

90. 16 U.S.C. § 3117 (1994). The Secretary must also monitor state compliance. *Id.*

91. Nauman, *supra* note 68, at 239-40. The state and its allies, approximately 70 members of the "Real Alaska Coalition," wanted the mineral character of unreserved lands determined before the federal government could reserve the lands for other purposes. The state also pushed for a limited amount of parks and wilderness areas. *Id.*

92. Congress had granted such an exclusive priority or exemption before, for example, in the Endangered Species Act and the Marine Mammal Protection Act.

93. Kancewicz & Smith, *supra* note 6, at 658 n.62.

94. Congress believed the rural residency requirement would have essentially the same effect as granting a purely Native priority and would be consistent with Congress' invocation of its Constitutional authority over Native affairs in Title VIII because most Natives at that time resided in rural areas. *Id.* at 646 n.6.

95. *Katie John v. United States*, No. A90-484, 1994 WL 48730 at \*3 (D. Alaska 1994) (hereinafter *Katie John II*). Much of Alaska's "anxiety" most likely stemmed from the fact that "public lands" as defined by ANILCA applied to an enormous percentage of Alaska's land, nearly two-thirds of Alaska's total land mass. Atkinson, *supra* note 53, at 422 n.10.



final version of ANILCA.<sup>96</sup> "Given the choice between federal regulation or self-regulation with federal oversight, Alaska chose the latter."<sup>97</sup> The laws essentially mirrored Title VIII and required the state Boards of Fish and Game to adopt regulations permitting fishing and hunting for "subsistence uses."<sup>98</sup> "Subsistence uses" were defined as "customary and traditional" uses of wild, renewable resources for direct personal or family consumption.<sup>99</sup> The state also adopted the two-tier system provided for in ANILCA which allows for further prioritizing among subsistence users if stocks of fish and game become dangerously low.<sup>100</sup>

Unlike the federal emphasis in Title VIII on the protection of Native Alaskans, the state laws demonstrated that Alaska did not view a rural requirement or subsistence laws in general as central to a policy of furthering Native hunting and fishing rights. The 1978 laws did not establish a rural residency preference as required by ANILCA<sup>101</sup> and the preamble to the state subsistence law actually stated quite the opposite, that the "beneficial use" of Alaska's fish and game resources by *all* state residents "should be carefully monitored."<sup>102</sup> Only the state statute providing for a second tier of subsistence users mentioned restrictions based on "local residency"

However, the state joint Boards of Fish and Game originally chose an essentially rural definition for those areas where the subsistence priority would apply.<sup>103</sup> Secretary of the Interior James Watt certified the state to implement ANILCA on federal lands in May of 1982 partly because of

96. 1978 Alaska Sess. Laws 151 (legislative determination that it is in the public interest to *clearly establish subsistence use as a priority use of Alaska's fish and game resources*). Former state laws had allowed for the issuance of 25 cent pauper hunting and fishing permits, but not a comprehensive program protecting subsistence uses. ALASKA STAT. § 16.05.258(c) (Michie 1978) established procedures for identifying subsistence uses and adopting regulations pursuant to a subsistence priority based on "customary and traditional" uses.

97. *Kenaitze*, 860 F.2d at 314.

98. ALASKA STAT. §§ 16.05.251(b), 16.05.255(b) (Michie 1978).

99. ALASKA STAT. § 16.05.940(23) (Michie 1978). The term "customary and traditional" was not defined. Subsistence use was to be the priority use of fish and game whenever it became necessary to restrict hunting or fishing to assure continuation of stocks on "a sustained yield basis." ALASKA STAT. §§ 16.05.251(b), 16.05.255(b) (Michie 1978).

100. ALASKA STAT. § 16.05.258 (Michie 1978). The first tier established a priority over other consumptive uses of a resource, such as sport and commercial fishing, for *all* subsistence users (no rural requirement was added to Alaska's first subsistence law) and the second tier only applied where even subsistence uses must be restricted in order to protect a fish or game stock. *Madison*, 696 P.2d at 176.

101. Alaska essentially adopted the language of an earlier draft of ANILCA that did not contain a rural resident requirement and which Congress later modified and passed as ANILCA in 1980. *Madison*, 696 P.2d at 176 n.13 (citing H.R. 39, 95<sup>th</sup> Congress, § 703 (1978)).

102. 1978 Alaska Sess. Laws 151.

103. *Kenaitze*, 860 F.2d at 314. Rural was defined as "any area other than a community with a population of 7,000 or more. *Id.*

this state regulation.<sup>104</sup> Demonstrating their vocal opposition to ANILCA early on, equal access enthusiasts in Alaska tried in 1982 to pass an initiative which would have shot down any state rural subsistence priority, but Alaska residents defeated it two to one.<sup>105</sup>

In 1980, the Board of Fisheries restricted its earlier rural definition, basing it in part on the residency of the subsistence user.<sup>106</sup> The Board of Fisheries subsequently denied subsistence permits to several Cook Inlet subsistence fishermen who failed to qualify under the definition. The fishermen filed suit in state court, leading to *Madison v. Alaska Department of Fish and Game*, a case which first illustrated the Alaska Supreme Court's hostility towards any type of rural priority.<sup>107</sup> The court, agreeing with the plaintiff fishermen, struck down the criteria placing restrictions on first tier users based on area of residency.<sup>108</sup> The court in general found the regulations too restrictive and contrary to the state's 1978 laws.<sup>109</sup> It determined that the term "customary and traditional" defining subsistence in the statute modified "uses" not "users," and that only in the second tier did the legislature expressly authorize any restriction based on a user's residency.<sup>110</sup> The 1978 laws were meant to protect all subsistence uses, including uses by residents in more urban areas, not to drastically restrict or eliminate them.<sup>111</sup>

After *Madison*, Secretary of the Interior Watt warned the state that it was no longer in compliance with ANILCA and that he would have to withdraw the state's certification to manage subsistence on federal public lands if the laws were not changed.<sup>112</sup> In 1986, the state legislature

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104. Letter from Secretary of the Interior James Watt to Alaska Governor Jay Hammond, May 14, 1982. See *Bobby*, 718 F. Supp. 764, 788 (appendix). "We are confident that Alaska's subsistence authority will be exercised in the best interests of rural residents engaged in subsistence uses." *Id.*

105. See Knowles, *supra* note 34, at section entitled *Thirteen Subsistence Myths*.

106. ALASKA ADMIN. CODE tit. 5, § 01.597. The boards established these criteria in part because the state had not defined "customary and traditional." *Kenaitze*, 860 F.2d at 314.

107. *Madison v. Alaska Dep't of Fish and Game*, 696 P.2d 168 (Alaska 1985). The court flatly rejected the idea that the 1978 laws granted a rural preference similar to that established by Title VIII, in part because the court felt that the legislature clearly wanted to include Fairbanks residents in the priority. *Id.* at 176 n.13.

108. *Id.* at 174.

109. *Id.*

110. *Id.* at 175. The court also stated that "there is no indication that the [state] legislators understood the 1978 subsistence law to restrict subsistence use to either a rural or a community context." *Id.* at 176.

111. *Id.* at 178.

112. Letter from Assistant Secretary of State Bill Horn to Alaska Governor Bill Sheffield, September 23, 1985. *Bobby*, 718 F. Supp. 764, 788. "I regret the unexpected decision by the Alaska Supreme Court that has moved the State subsistence program out of compliance with the requirements of ANILCA." *Id.*

amended the laws<sup>113</sup> to define a rural area as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area for both tiers of subsistence users."<sup>114</sup>

More litigation followed the 1986 amendments, this time in federal court, further illustrating the tensions and weaknesses inherent in the subsistence laws. In *Kenaitze Indian Tribe v Alaska*, the state's new definition of rural came under attack. The court in *Kenaitze* found that the legislature had, in re-defining rural, validated the restrictive subsistence regulations struck down in *Madison*, rather than changing them.<sup>115</sup> The court held that the state's definition of rural was too restrictive, excluding many areas "normally understood to be covered by the term," and found that the state was again out of compliance with ANILCA.<sup>116</sup> The federal court's view differed from the state court's in *Madison* in that the federal court focused on the meaning of "rural," while the state court questioned any limitations on subsistence hunting and fishing based on a restrictive residency requirement.

Finally, in 1989, the Alaska Supreme Court, with the support of equal access advocates and contrary to the view of a majority of Alaskans, picked up where *Madison* left off and declared that Alaska's rural subsistence priority laws violated the state constitution. The court held that "the 1986 Act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional."<sup>117</sup> The court found that all 3 clauses of the Alaska Constitution<sup>118</sup> with which the rural preference conflicted shared a common meaning, that "exclusive or special privileges to take fish and wildlife are prohibited."<sup>119</sup> The Alaskan legislature did not at that time amend the

113. 1986 Alaska Sess. Laws 56.

114. Senator Fisher, a member of the Senate Resource Committee declared that the 1986 laws "will assure the state will retain management of fish and game throughout Alaska by meeting the requirements of the federal subsistence law (ANILCA)." *McDowell*, 785 P.2d at 4, n.7.

115. *Kenaitze*, 869 F.2d at 314.

116. *Id.* at 316, 318. The court also found that Congress did not intend to limit benefits of title VIII to only those who might qualify under the more restrictive second tier. *Id.* at 317.

117. *McDowell*, 785 P.2d at 5.

118. Alaska Const. art. VIII §§ 3, 15, 17. Section 3 is the "common use" clause, generally interpreted as embodying the state's duty to manage state resources for the benefit of the public, not individuals. See Stephen M. White, "Equal Access" to Alaska's Fish and Wildlife, 11 ALASKA L. REV. 277, 279 (1994). Section 15 is the "no exclusive right of fishery clause" which states that no special privilege of fishery "shall be created or authorized in the natural waters of the state." *Id.* at 284-85. Section 17 is the "uniform application clause," which states the laws and regulations governing the use or disposal of natural resources "shall apply equally to all persons similarly situated." *Id.* The state must have an important purpose to countervail the important interest all individuals have in equal access to fish and game. *Id.* at 289 (citing *Gilbert v. State*, 803 P.2d 391 (Alaska 1990)).

119. *McDowell*, 785 P.2d at 6. The court found the means (rural residency requirement) used to

state constitution to allow for the now unconstitutional rural preference.<sup>120</sup>

More recently, the Alaskan Supreme Court clarified its holding in *McDowell*, stating that the state's subsistence priority applied to all Alaskan residents, regardless of residence.<sup>121</sup> Finally, that court has found that even residency restrictions on second tier subsistence users violate the equal access clauses of the Alaska Constitution.<sup>122</sup> The court also has held that the state could close areas to subsistence uses, and designate them solely for sport and commercial uses,<sup>123</sup> although the 1992 revision of the state subsistence law which allowed for this expired in October of 1997, and the 1986 law took its place.<sup>124</sup> The legislature perhaps was hoping that the very equal-access minded Alaska Supreme Court would change its mind about the unconstitutional law, and allow the state to avoid a constitutional amendment.

#### IV ALASKA V BABBITT

*Alaska v. Babbitt* dramatically illustrates the confusion and conflict surrounding the implementation and interpretation of ANILCA by state and federal authorities. It also highlights the federal determination to continue a rural hunting and fishing priority

The struggles of Katie John, Doris Charles and the Village Council of Mentasta (Katie John), Native plaintiffs in *Babbitt*, to re-open their subsistence fishery at Batzulnetas in Southeastern Alaska actually began in 1984, 11 years before *Babbitt* was decided. The Batzulnetas village was abandoned in the 1940's, but a subsistence fishery continued to exist there until the state of Alaska closed it and several others in 1964.<sup>125</sup> After the

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ensure that Alaskan residents who must "engage in subsistence hunting and fishing may continue to do so," extremely crude. *Id.* at 10.

120. The state of Alaska obtained a stay of the operating effect of the *McDowell* decision until the state legislature met in the summer of 1990. *Babbitt*, 72 F.3d at 700. The legislature failed to resolve the problem, either in the regular or special session. *Id.*

121. *Morry*, 836 P.2d at 368. The court also found that even though the state boards of fish and game may "recognize the needs, customs and traditions of Alaska residents," they are not required to do so. *Id.* at 370. The court further added that "customary and traditional" defines how the resource is used, not how it is harvested. *Id.*

122. *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

123. *Id.* at 640-41. "The fact that residents of non-subsistence areas must travel in order to utilize subsistence permits is not a limitation to their admission to a user group." *Id.* at 641. A non-subsistence area is an area "where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community" essentially the opposite of "rural." ALASKA STAT. § 16.05.258(c) (Michie 1992).

124. ALASKA STAT. § 16.05.258(b)(4)(B)(ii) (Michie 1992).

125. *Katie John II*, 1994 WL 487830 at \*10; The Batzulnetas fishery is located at the confluence of Tanada Creek and the Copper River. The Copper River empties into Prince William Sound, south-east of Anchorage.

enactment of ANILCA in 1980, the Batzulnetas fishery was enclosed within the boundaries of the newly created Wrangell-St. Elias National Park.<sup>126</sup> The fishery then became subject to the application of ANILCA's rural subsistence priority under state authority. In 1984, Katie John and Doris Charles submitted a proposal that the fishery be re-opened to subsistence fishing, which proposal the state denied.<sup>127</sup> Katie John then sued the state in 1985 pursuant to section 807(a) of ANILCA, claiming the state violated the subsistence priority mandated by ANILCA because commercial salmon fishing continued at the mouth of the Copper river, while subsistence fishing was restricted.<sup>128</sup> This suit produced limited regulations from the state Board of Fisheries, a preliminary injunction allowing full-time fishing from June 1 to September 1,<sup>129</sup> and finally an order in 1989 invalidating the state fishery regulations on the grounds they were too limited.<sup>130</sup>

However, the *McDowell* decision soon came down and the state lost control over federal public lands, including Wrangell-St. Elias Park. But, Batzulnetas and other fisheries, conceded to be located in navigable waters, were excluded from the subsistence priority by the federal government.<sup>131</sup>

Katie John brought a new action against the federal agencies responsible for the regulation, challenging the exclusion of navigable waters from ANILCA's definition of public lands.<sup>132</sup> The state also sued the federal government, challenging its authority to regulate in this area under any circumstances.<sup>133</sup> Other actions similar to Katie John's were brought

126. *Id.*, 16 U.S.C. § 410hh(9) (1994) (reserving Park lands and referring to ANILCA's subsistence priorities).

127. *Katie John II*, 1994 WL 487839 at \*10.

128. *Katie John v. State*, No. A85-698 (D. Alaska 1989) (hereinafter *Katie John I*). ANILCA allows aggrieved parties to bring an action in United States District Court against state or federal officials for a failure to provide for the subsistence uses set out in 16 U.S.C. § 3114. 16 U.S.C. § 3117 (1994).

129. *Katie John II*, 1994 WL 487839 at \*10.

130. ALASKA ADMIN. CODE tit. 5, § 01.647(i), invalidated by Order of June 6, 1989 (No. A85-0698-CV).

131. In September of 1990, Katie John and others petitioned the newly created Federal Subsistence Board for a reconsideration of the federal regulation excluding navigable waters from federal subsistence management. *Katie John I*, No. A85-698 at 5. The board determined that management of the fishery remained with the state precisely because it was located in navigable waters. 50 C.F.R. § 100.3(b) (1998).

132. *Babbitt*, 72 F.3d at 701. ANILCA defines public lands as "lands situated in Alaska which, after [Dec. 2, 1980] are Federal lands." 16 U.S.C. § 3102(3) (1994). Federal lands are "lands the title to which is in the United States after [Dec. 2, 1980]. 16 U.S.C. § 3102(2) (1994). Lands are "lands, waters and interest therein." 16 U.S.C. § 3102(1) (1994).

133. *Id.* Recently, the Alaska Legislative Council, some of whom were angry with the Governor's later withdrawal of the suit, have tried again, filing another lawsuit against the federal government, which they soundly lost. *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19

and the district court ordered all of the cases to be jointly managed and consolidated with the state's.<sup>134</sup> The district court addressed the "fundamental issue of whether navigable waters are public lands" and that was the only issue before the Babbitt court.<sup>135</sup>

Katie John argued that, by virtue of the interest the government has in the federal navigational servitude, almost all navigable waters are included in the definition of public lands.<sup>136</sup> Prior to oral argument before the district court, the Departments of Interior and Agriculture agreed with the state that the definition excluded most navigable waters.<sup>137</sup> The federal agencies later decided, however, that public lands included those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine.<sup>138</sup> The district court decided to follow Katie John's position.<sup>139</sup>

The Ninth Circuit, with one dissenting opinion, adopted the federal agencies' second argument and held that navigable waters in which the United States has an interest by virtue of its reserved water rights are public lands as defined by ANILCA.<sup>140</sup> The court also held "the federal agencies that administer the subsistence priority are responsible for identifying those waters."<sup>141</sup>

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(D.D.C. 1998); see also *supra*, note 25.

134. *Babbitt*, 72 F.3d at 701; See *id.* at 700 n. 4 for a list of the jointly managed cases.

135. *Id.* at 701; All of the parties, including the state of Alaska, stipulated on appeal to the dismissal with prejudice of the state's issue of whether federal agencies are authorized to manage subsistence hunting and fishing on public lands absent "consistent state laws." *Id.* at 700 n.2. Again, the state Legislature was not happy with such a relinquishment of state control and the *Babbitt* court characterized the lawmakers as "angry" with the Governor for requiring the Attorney General to agree to this stipulation. *Id.*

136. *Id.* at 701. Katie John primarily relied on a footnote to a U.S. Supreme Court decision, where the Court stated that under ANILCA's definition of public lands, the United States could hold title to an interest in submerged lands that did not rise to the level of a fee interest. *Katie John II*, 1994 WL 487830 at \*14 (citing *Amoco Production, Co. v. Hodel*, 480 U.S. 531, 548-49 n.15 (1987)). She reasoned that the federal government therefore could hold title to its interest in the federal navigational servitude. *Id.*

137. *Id.*

138. *Id.* At the District Court level, Katie John had also pled in the alternative that the reserved water rights doctrine applied to her case. *Katie John II*, 1994 WL 487830 at \*11. Specifically she claimed federal reserved water rights by virtue of the land set aside for the plaintiffs in the Alaska Native Allotment Act of 1906. *Id.*

139. *Katie John II*, 1994 WL 487830 at \*14.

140. *Babbitt*, 72 F.3d at 700.

141. *Id.* The original opinion in this case was filed on April 20, 1995. *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995). That opinion was withdrawn and superseded on December 19, 1995, by the opinion cited in this Note, the only change being the inclusion of Circuit Judge Cynthia Holcomb Hall's dissenting opinion.

*Babbitt and Reserved Water Rights*

The dilemma which vexed the Ninth Circuit Court of Appeals here arose from the clash of judicial good intentions to further the federal goal of protecting subsistence fishing with the reality of Alaska's title to the lands beneath its navigable waters, including the lands beneath the Batzulnetas fishing camp. Ostensibly, when Alaska was admitted to the Union on an equal footing with the other 48 states,<sup>142</sup> Alaska gained title to its submerged lands by virtue of the Submerged Lands Act of 1953,<sup>143</sup> which title included title to the natural resources within those waters, including fish.<sup>144</sup> ANILCA exempts from its definition of public lands "lands which have been granted to the Territory of Alaska or the State under any other provision of Federal law," an exemption which should include submerged lands.<sup>145</sup> However, the U.S. Supreme Court has stated in *United States v. New Mexico* that "whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union Congress did not intend thereby to relinquish its authority to reserve *unappropriated* water on appurtenant lands withdrawn from the public domain for a specific, federal purpose."<sup>146</sup>

Given that the United States does have a right to reserve Alaska's navigable waters, the issue that the court sidesteps in *Babbitt* is whether this indefinite right also grants the federal government the right and power to control the resources in that water, such as fish.<sup>147</sup> Instead, the court found that the federal agencies' application of the reserved water rights doctrine was a permissible construction of ANILCA<sup>148</sup> given that Congress "clearly" indicated that subsistence uses included subsistence fishing.<sup>149</sup> Further, the court stated that "subsistence fishing traditionally has

142. Alaska Statehood Act, 72 Stat. 339 (1959). The Ninth Circuit has stated that "given the longstanding policy of holding land under navigable waters for the ultimate benefit of the states [the Supreme Court] will not infer an intent to defeat a State's equal footing entitlement from the mere act of the reservation itself." *Alaska v. Ahtna*, 891 F.2d 1401, 1406 (9th Cir. 1989) (citing *Utah v. United States*, 482 U.S. 197, 202 (1971)).

143. Submerged Lands Act (SLA) of 1953, 67 Stat. 29 (May 22, 1953) (codified as amended at 43 U.S.C. §§ 1301 et seq.)

144. 43 U.S.C. § 1311(e) (1994) (defining natural resources to include "fish and other marine animal life.")

145. 16 U.S.C. § 3102(3)(A) (1994); thus, Alaska's title to its submerged lands granted by the SLA of 1953 and the Statehood Act of 1958 would seem to fall into this category of exemptions.

146. 438 U.S. 696, 698 (1977).

147. *Arizona v. California*, 373 U.S. 1468, 1498 (1964). The *Totomoff* court noted that the SLA specifically excludes U.S. proprietary interests in navigable waters in terms of the navigational servitude. 905 P.2d at 964-65 (citing 43 U.S.C. § 3113(a)).

148. The *Totomoff* court found that this determination by the federal agencies was not entitled to deference because it had been made at the last minute, under pressure of a lawsuit. 905 P.2d at 967.

149. *Babbitt*, 72 F.3d at 701-703. The court uses the test for evaluating an agency's construction of a statute laid out in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

taken place on navigable waters.”<sup>150</sup> Therefore Congress must have intended some navigable waters to be subject to ANILCA’s rural priority. That conclusion, however, clashes with the limited scope of the reserved water rights doctrine.<sup>151</sup>

The reserved water rights doctrine essentially states that when the federal government withdraws land and reserves it for a specific federal purpose, the government, by implication, reserves unappropriated, appurtenant water to the extent needed to accomplish the purpose of the reservation.<sup>152</sup> The federal government’s reserved rights apply only to fulfill the very purposes for which the reservation was created, not the secondary purposes of the reservation.<sup>153</sup> The “implied reservation of water doctrine” was first stated in *Winters v. United States*, essentially allowing the United States to circumvent state prior appropriation laws to ensure that Native Americans on arid reservations could access enough water to irrigate their crops.<sup>154</sup> *Winters* relied in part on an earlier opinion in *United States v. Rio Grande Dam & Irrigation* which stated “the power of the Government to reserve waters and exempt them from appropriation under state laws is not denied, and could not be.”<sup>155</sup> The doctrine asserted in *Winters* and *Rio Grande* has become more defined and restrictive through succeeding opinions, but the Supreme Court has made it clear that the

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150. *Id.* at 702.

151. *Id.* at 702; The court swiftly rejected the argument that the United States could hold title in the navigational servitude, pointing out that it is a “concept of power not property.” *Id.* at 702-03 (citing *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir. 1982)).

Similarly, even though Congress expressly invoked its constitutional powers under the Commerce and Property Clauses as authority for regulating rural subsistence uses, the court here also rejects the suggestion that Congress intended to flex its Commerce Clause power to gain control over Alaska’s navigable waters. *Id.* at 703 (referencing 16 U.S.C. § 3112(4)). Instead, the court states that the “invocation of that authority is also consistent with an implicit reservation of waters under the reserved water rights doctrine.” *Id.*

152. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). This decision involved the withdrawal by President Truman in 1952 of “Devil’s Hole” and 40 surrounding acres from the public domain under the American Antiquities Preservation Act, 16 U.S.C. § 431 (1994). *Id.* at 131. The withdrawal included a pool of water of “outstanding scientific importance” which contained an endangered pupfish species. *Id.* at 140.

153. *New Mexico*, 438 U.S. at 702.

154. *Winters v. United States*, 207 U.S. 564, 575 (1908). Prior appropriation means that the first person to use the water and put it to “beneficial use” has a superior right to its use. Jennele Morris O’Hair, *The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future*, 10 B.Y.U. J. PUB. L. 263, 264 n. 4 (1996). Federal reserved rights do not require beneficial use. *Id.* at 270.

155. *Winters*, 207 U.S. at 577 (citing *United States v. Rio Grand Dam & Irrigation*, 174 U.S. 690 (1899)). The *Rio Grande* court proposed sources for federal authority over the river as the Property, Commerce and Supremacy clauses of the U.S. Constitution.



doctrine applies both before<sup>156</sup> and after<sup>157</sup> statehood. Most recently, a 1978 case stated that "many of the contours" of the reserved water rights doctrine remain "unspecified."<sup>158</sup> However, the right has consistently been exercised and interpreted in response to the *specific initial purposes* of a particular withdrawal of *land*, not in response to later needs the government may have for nearby waters.<sup>159</sup> Any secondary purposes of a withdrawal do not entitle the federal government to reserved water rights. This reserved water right generally has not been exercised to give the federal government control over the resources in navigable waters, except for the water itself. Granted, the federal government has reserved water up to a certain amount *protect* a resource, such as an endangered species of fish.<sup>160</sup> However, regulating the resource for the use of particular individuals, here rural residents, without also reserving actual quantities of water, seems in many ways a tortured application of the doctrine of reserved water rights itself.

The federal government on occasion has asserted an express right to reserve waters for use by particular individuals, rather than impliedly reserve quantities of water with appurtenant lands, when it withdrew waters prior to Alaskan statehood for Native fishing reserves and Native reservations.<sup>161</sup> However, the Supreme Court has held that only aboriginal fishing rights derived from a federal preemptive law or under the reservation system are exempt from state control.<sup>162</sup> Unfortunately for Alaska natives, ANSCA abolished all Native fishing reserves and reservations in Alaska, except for the Metlakatla reservation.<sup>163</sup> Therefore, the only federal reservation that currently may be said to expressly reserve waters for Native hunting and fishing use would be Metlakatla.

The court in *Babbitt* stated that to adopt the state's position denying the federal government's power to regulate subsistence in reserved waters would effectively give definition to "title" as used in ANILCA.<sup>164</sup> Though the court was not clear in its explanation of why reserved rights

156. *Winters*, 207 U.S. at 577 (holding the federal government that had reserved water rights for the Indians of the Fort Belknap Reservation in 1888 by virtue of a treaty signed at that time).

157. *Arizona v. California*, 373 U.S. 1468, 1496 (1964).

158. *New Mexico*, 696 U.S. at 700.

159. See e.g. *Cappaert*, 426 U.S. at 128 (restricting Cappaerts' use of water in order to preserve endangered pupfish); *Arizona*, 373 U.S. at 1498 (designating a specific amount of water to be reserved for the use of Indian reservation, measured in practicably irrigable acres).

160. *Cappaert*, 426 U.S. at 128.

161. *CASE*, *supra* note 10, at 103-04.

162. See *Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962).

163. *CASE*, *supra* note 10, at 111. "Any right of exclusive Native fishing depended on the water reservation originally granted. " and ANSCA "probably eliminated any right of exclusive fishery" otherwise available to Natives. *Id.*

164. *Id.* at 704.

could be "public lands" without giving meaning to the term "title," what it did, in effect, do was to extend the United State's title to its lands in Alaska to encompass those navigable waters in which the federal government had reserved water rights. Thus, the court seems to indicate that reserved rights are not a separate interest in which the United States needs to claim title, but that they are part and parcel of the rights the United States already had as the fee owner of its federal lands. As such, the court had no need to address the issue of whether the federal government has the right to regulate the fish resources in its "reserved" waters (although no measurable amount of water had been reserved), because under its holding, the enormous power the federal government has over its public lands, and the wildlife living on those lands, would extend to its reserved waters.<sup>165</sup>

The Ninth Circuit thus derived its application of the reserved water rights doctrine to ANILCA's definition of public lands from the Federal Government's plenary power over its public lands; the court could make such an application only after it placed reserved rights within the Federal Government's panoply of property rights. Such an application of the doctrine could be seen as a direct expansion of Federal power over state-owned lands under the Property Clause, which indicates why many Western states were uneasy with the idea of such an outcome.<sup>166</sup>

Assuming then, as the court does, that the federal government indeed has the authority to regulate the fish resource in its impliedly "reserved" waters, the federal agencies at best should only be able to argue that the waters running through Metlakatla (expressly reserved waters) and through lands reserved by ANILCA and designated as open to subsistence hunting and fishing (impliedly reserved waters) were reserved for the primary purpose of protecting subsistence hunting and fishing. However, the federal agencies, taking their duty to protect rural subsistence very seriously, instead have broadly interpreted the reserved water rights doctrine. They have chosen the boundaries of most of Alaska's federal lands as the boundaries of Alaska's waters subject to the federal subsistence priority, regardless of the purpose for which the lands were reserved.<sup>167</sup> They have proposed that the Federal Subsistence Board have the power to "restrict or eliminate" interference on state or private lands with the subsistence priority on Federal lands.<sup>168</sup> Reserved rights under ANILCA thus

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165. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (holding the Property Clause of the United States Constitution entrusts Congress with a power over public lands that is without limitation, which power includes the power to regulate and protect wildlife living on such lands, state law notwithstanding).

166. Arizona, California, Idaho, Montana, Nevada and Oregon all filed as amici curiae in support of the state of Alaska in *Babbitt*.

167. 62 Fed. Reg. 66216 (1997).

168. *Id.*

have imbued the federal government with enormous powers over Alaska's waters that it did not previously hold and did not previously believe it held.<sup>169</sup> Hence, the tension in Alaska grows and the struggle for power continues.

## V CONCLUSION

The Statehood Act expressly provided for the transfer to the State of the authority to regulate fish and game on Alaskan Federal lands. And, the federal government has traditionally deferred to state fish and game regulators with respect to federal lands.<sup>170</sup> Alaska also has a legitimately vital interest in managing its own fish and wildlife resources for the benefit of all of its citizens, and its constitution abundantly reflects this concern. Further, the state does not have a special legal relationship with Natives similar to the relationship Congress may have with Natives, and so has no real or perceived obligation to protect them in any way, except as Alaskan citizens.

The alarm that the Alaskan legislature feels at the spread of federal regulatory power over Alaska's many valuable fisheries thus is not surprising.<sup>171</sup> Moreover, the federal government has not put Alaska in an easy position. In order for the state to regain control of subsistence management in Alaska, it must pass laws with a rural resident requirement and the only way to accomplish that task is to amend the state's constitution. Thus the rhetoric of state sovereignty and freedom from federal interference in an area of traditional state concern intensifies, further polarizing the subsistence issue.<sup>172</sup>

However, federal power over lands belonging to the federal government is virtually plenary, and if reserved water rights fall within the umbrella of rights associated with the federal government's "title" to its lands, then federal power over those waters also is nearly absolute. Congress remains stubbornly faithful to its original intent in granting a rural subsistence priority, seeing it as the best way to protect the needs of ru-

169. Alaska's alarm here is echoed by the large number of western states that filed *amicus curiae* in support of Alaska in *Babbitt*.

170. The District Court noted it had found in 1985 during the early stages of implementation of the priority that the "state subsistence program was working," just more slowly than rural Alaskans would have liked." *Kate John II*, 1994 WL 487830 at \*3.

171. "The people of Alaska waged a long, hard fought battle to achieve statehood and state management of fish and wildlife resources of Alaska." 1997 AK H.J.R. 21 (SN).

172. "To every one of my colleagues their respective state's right to manage fish and game is absolute-every other state manages its own fish and game. In Alaska, this is not the case, and therefore, action must be taken to maintain the sovereign right of our state. There is no precedent in any other state in the union for this kind of overreaching (by the federal government) into state management prerogatives." 144 Cong. Rec. S9499-01 (1998) (Statements of Senator Frank Murkowski, R-Alaska).

ral/Native communities. If the state cannot satisfy Congress that it will protect rural residents as Congress wishes, federal management of fish and wildlife on federal lands will continue, or at least the threat will continue.

Alaska's least disruptive course of action then, is to amend its constitution, or at least to put the choice before its people, ninety percent of whom now want to vote on the issue.<sup>173</sup> The majority upheld the priority once, and it seems that they are willing to do this again. Since every resident of the state is now eligible for a subsistence hunting or fishing permit anywhere on state lands in Alaska, regardless of the needs of local populations,<sup>174</sup> Congress likely does not view the state as sensitive to the needs of rural communities.

A harsh reality for Alaska is that the federal government still owns nearly two-thirds of Alaska's public lands. Continuation of federal subsistence management on federal lands means the continuation of the awkward, dual-system of fish and wildlife management in the state that began in 1990,<sup>175</sup> which will only increase tensions in the state as soon as the federal government takes over the fisheries.<sup>176</sup> The threat of such a take-over already bitterly divides Alaskans. But, as Commissioner Rue has pointed out, a rural priority "makes sense," because in reality, urban residents and rural residents in Alaska certainly are not "similarly situated," and their lives and needs continue to be very different.<sup>177</sup> The rural residency requirement is also a reasonable way to make up for the weaknesses inherent in ANSCA by ensuring that Natives may continue to practice a traditional lifestyle.

The *Babbitt* court's decision had the effect of protecting subsistence

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173. Robert Kowalski, *Legislators Again Hunt Subsistence Fix*, ANCHORAGE DAILY NEWS, May 25, 1998, at A-1.

174. *See supra*, note 121.

175. One author has diagramed the formidable state and federal bureaucracies that stand between a subsistence hunter and a caribou, depending on whether the hunter plans to hunt on state/private land or federal land, which land itself is classified in several different ways, each subject to different regulations, e.g., National Park Service lands, BLM lands, and Forest Service lands. HUNTINGTON, *supra* note 42, at 2.

176. "You watch the divisiveness grow when the feds take over the fisheries." Tom Kizzia, *Alternative Subsistence Plan Offered*, ANCHORAGE DAILY NEWS, Sept. 7, 1997, at B-1 (quoting Rod Arno, president of the Alaska Outdoor Council, a statewide sportsmen's group that supports an individualistic approach to subsistence and who believes that pressure from "commercial fishermen and others" will force Congress to remove the rural priority). Alaskan House speaker Gail Phillips of the Knowles task force said that Congress would never vote against Native concerns, adding that "things will just keep getting worse and worse." *Id.*

177. Commissioner Rue has stated that "it is unlikely that the hunting opportunities of urban Alaskans will change noticeably under a rural priority implemented by the state it will ensure that those with the greatest dependence on subsistence harvest and the fewest alternatives will be provided continued hunting opportunity." Frank Rue, *Rural Preference Need Not Hurt Urban Hunters*, ANCHORAGE DAILY NEWS, May 4, 1998, at B-8.

fishing on navigable waters running through Federal Public lands in Alaska. Perhaps the court honestly felt it had no choice in the matter given the express language of ANILCA. But, the state of Alaska is no closer to solving its problems, either internally or with the federal government, than it was in 1995 and the litigation surrounding the priority most likely will continue. The *Babbitt* court looked to legislative action to end the conflict and it may have a very long wait before it sees any resolution of this complex issue.