

**DOI Secretarial Commission on
Indian Trust Administration and Reform
Meeting 7
August 19, 2013
Anchorage, AK
Meeting Summary**

Table of Contents

Executive Summary 2

Monday, August 19, 2013 3

 Opening Remarks 3

 Commission Operations, Reports, and Decision Making 4

 Commission Review and Discussion of Preliminary Recommendations 5

 Panel Session: Trust Land and Trust Responsibility in Alaska 8

Appendix A. List of Acronyms 14

Appendix B. Trust Commission Meeting Attendees 16

Appendix C. List of Documents Distributed and/or Presented at Commission Meeting 18

Appendix D. Panel Session: Trust Land and Trust Responsibility in Alaska 19

Appendix E. Public Comments Submitted to the Commission 82

Secretarial Commission on Indian Trust Administration and Reform

Executive Summary

The seventh and final public meeting of the Secretarial Commission on Indian Trust Administration and Reform was held August 19, in Anchorage, AK. Commissioner Robert Anderson chaired the meeting and Chair Fawn Sharp participated telephonically. Sarah Palmer of the U.S. Institute for Environmental Conflict Resolution (U.S. Institute or USIECR) facilitated the meeting.

During the public meeting the Commission heard from Alaska tribal leaders and nationally recognized advocates for Alaska Native tribes about strategies to improve the trust relationship with special emphasis on the unique aspects of the trust relationship in Alaska. The Commission also received comment from members of the public who were present in Anchorage or participating online.

Members of the Commission are:

Chair, Fawn R. Sharp is the current President of the Quinault Indian Nation, the current President of the Affiliated Tribes of Northwest Indians, and a former Administrative Law Judge for the State of Washington and Governor of the Washington State Bar Association.

Dr. Peterson Zah is a nationally recognized leader in Native American government and education issues. Dr. Zah served as the last Chairman of the Navajo Tribal Council and the first elected President of the Navajo Nation.

Stacy Leeds, citizen of the Cherokee Nation, is Dean and Professor of Law at the University of Arkansas School of Law and former Director of the Tribal Law and Government Center at the University of Kansas, School of Law.

Tex G. Hall is the current Chairman of the Three Affiliated Tribes and past President of the National Congress of American Indians. Mr. Hall currently serves as Chair of the Inter-Tribal Economic Alliance and is the Chairman of the Great Plains Tribal Chairmen's Association.

Robert Anderson is an enrolled member of Minnesota Chippewa Tribe (Boise Fort Band), currently Professor of Law and Director of the Native American Law Center at the University of Washington. Mr. Anderson worked as Associate Solicitor for Indian Affairs and as counselor to the Secretary of the Interior on Indian law and natural resources issues from 1995-2001.

Sarah Harris, Chief of Staff to the Assistant Secretary for Indian Affairs, Mr. Kevin Washburn Department of the Interior, serves as the Designated Federal Officer (DFO) for the Commission.

Monday, August 19, 2013

Commissioner Anderson called the meeting to order and welcomed attendees on behalf of Chair Fawn Sharp who was participating telephonically. On behalf of the Commission, he thanked the Eklutna tribal government and Eklutna Corporation who hosted the Commission on Saturday. The Commission appreciates being here in Dena'ina territory.

Mike Williams of Akiak Native Community provided the opening blessing.

Commissioner Anderson asked the audience to offer introductions (Appendix B) and reminded attendees that the Trust Commission welcomes comments at any time via the Commission website, <http://www.doi.gov/cobell/commission/index.cfm>. He noted that approximately 25 people were participating in the meeting by phone and/or online. Commissioner Anderson reviewed the agenda and outlined the objectives for the meeting that included:

- Attend to operational activities of the Commission
- Gain insights and knowledge from invited speakers, and attendees about trust relationship, trust reform including other trust models, and other aspects of the trust that are unique to Alaska
- Gain insights and perspectives from members of the public

Opening Remarks

Commissioner Anderson: Thank you again everybody for attending the Commission meeting. The purpose of the Commission in being here today goes back two years ago, DOI Secretary Salazar appointed us to look for ways to improve trust service delivery and trust management. We came here to Anchorage to hear about hunting, fishing gathering rights, the ways federal subsistence rights have played out and not worked very well, and of course any other matters that people are concerned about. We anticipate completing our work in November turning a report over to the Secretary. We are especially interested in including Alaska-specific concerns in our report. We heard some very specific concerns from Eklutna tribal council that were given to us on Saturday afternoon.

I now want to introduce the Commission's new Designated Federal Official (DFO) Sarah Harris. Sarah, thank you for coming out here. I am really happy that Sarah came up to learn about Alaska issues from the people who know the most all of you [to the audience].

DFO Harris: I look forward to hearing more from everyone here. We have a new secretary in DOI, Secretary Sally Jewell. In June Deputy Secretary David Hayes left the Department. Despite these changes, I want to assure everyone that the Department is very supportive of the Trust Commission and taking the recommendations of the independent management consultant, Grant Thornton seriously and will be moving forward on these and the recommendations from the Commission. Having done my work in the lower 48, it was a very enlightening experience to visit the village of Eklutna. There is a lot of commonality between many Indian tribes in the lower 48, but the circumstances surrounding those are so very different. I look forward to hearing more from each of you.

I also want to reiterate the Obama Administration's commitment to Indian tribes. The recent formation of the White House Council on Native American Affairs encourages all the federal agencies to work together to provide better service to Indian tribes. The Council's work focuses on four areas: quality of life, encouraging self-determination, fulfilling treaty and trust responsibility, and self-governance. Secretary Jewell convened the first Council session on July 29. As we speak, agencies are providing recommendations to Secretary Jewell. Having to go to all the different agencies is hard, hopefully will be able to break down silos and improve service to tribes and Alaska Natives. I'm also happy to share information about other things the administration is doing.

Commissioner Hall: A few years ago I invited Mike Williams down to my area. Being a former NCAI President, I was up here in Fairbanks and Barrow. I flew over ANWR seeing the pipeline and doing some salmon fishing. The scenery and wildlife are just incredible. I've heard a lot of issues about upholding hunting and fishing rights, the sacredness of the whale and upholding the sacredness of what the creator has given you brings home why Alaska Natives fight the way they do for what they have. They are unique only to here, so you have to be here to get an understanding of your issues. I'm honored to be here, look forward to hearing your comments.

Chair Sharp: It was truly an honor and privilege to visit Alaska Native lands and peoples. I too appreciate all those in attendance here today. The Commission has been working for nearly two years and we had a great site visit in Alaska. We've had a great opportunity to see the issues that affect Alaska Native people. We are eager to hear especially from you about the issues that are affecting you. Thank you for being here.

Commission Operations, Reports, and Decision Making

April and June Meeting Summaries

Commissioner Hall made a motion to approve the minutes of the April 29, 2013 public meeting in Nashville TN. Chair Sharp seconded the motion. The Commission approved the minutes from the April 2013 meeting. Commissioner Hall made a motion to approve the minutes of the June 7, 2013 public meeting in Oklahoma City, OK. Chair Sharp seconded the motion. The Commission approved the minutes from the June 2013 meeting.

The final minutes from each meeting are posted on the Commission website:

<http://www.doi.gov/cobell/commission/index.cfm>.

Outreach Activities

Chair Sharp: I didn't have any activities since June. But I did have a session with the Affiliated Tribes of Northwest Indians (ATNI) in September.

Commissioner Hall: I met with the tribes in the Great Plains last week in Rapid City. We talked about the Indian Trust Commission activities as well as the end of July Tribal-Interior Budget Council (TIBC). I'll start with TIBC. They asked for an update on the agenda, so I reported on how the Commission is working to improve the trust. At that time we had contracted with Grant Thornton, they are a looking at how the trust administration is currently administered, so I shared that with the TIBC. They talked about the various budget activities if the OST was to be folded into the BIA, what are the budget implications on that and how would it be administered and also some of our activities like cultural resource protections, go to other bureaus (BLM, Fish, forestry) what are the implications.

Finally in Rapid City. Everyone one of the Great Plains tribes have treaties with the US government so they are really strong on protecting our treaty rights. In lieu of millions of acres of land, US would provide health and education, among other things. The tribes are concerned that Bureau of Indian Education (BIE) is considered a non-trust item. The Great Plains tribes recommend combining all services to Indians as trust activities. I have provided those comments back to the Commission, and we're in our last meeting. We're hoping to hear everyone's comments and then hand everything off in November to Secretary Jewell.

Commissioner Anderson: As for my activities, as usual I've heard a lot of discussion about Indian water rights matters in the lower 48. We, as a Commission, early on have had some internal discussion about how we're not decision-makers, just advising, but we want to learn about matters so we can make specific recommendations on things that are of concern to us. There's a lot of discussion about how the government carries out its trust responsibilities for irrigation and farmers but also protection of habitat and in-stream flows. I've received several calls from various tribes about those matters. The topic is a good bridge to some issues here in Alaska. As many of you know the Katie John decision came down in June. The court affirmed the rules that the Secretaries of Agriculture and Interior had set about how far the subsistence rules ought to extend. The 9th Circuit left the door open for leeway in the fisheries context at least. I've had a number of calls with the lawyers involved and that's why we made that a particular focus of today's conversation.

On the lower 48 water rights issues and the Alaska water rights/ hunting and fishing rights issues that's something that we must address in the final report. We're eager to hear about other issues today as we go forward.

If members of the audience have anything to send to the Commission by email, please do. We want to continue to receive information until we're done. The email is: trustcommission@ios.doi.gov and the website is: <http://www.interior.gov/cobell/commission/index.cfm>

Commission Review and Discussion of Preliminary Recommendations

Draft Trust Responsibility Statement

Commissioner Anderson: This is a work in progress. I'll take credit or blame for it. We've gotten a lot of comments since June including great comments from lawyers who are online today. Attached to the draft Trust Responsibility Statement is Chapter Four of the American Indian Policy Review Commission from 1974. That commission was established by Congress and had about 20 members. The commission produced a huge report encompassing two volumes and was backed up by another ten volumes including recommendations on trust reform. Many of those recommendations were carried out like: self-determination, contracts, self-governance compacting. It [the report] was really important in Alaska and the idea that there should be ICWA and several other items. I put it in here to remind us that this has been recommended before, and that many of our recommendations are identical. Commissioner Hall was making points yesterday about explicitly covering some things in this draft statement. I want to ask him to list those again so I can include them in my next draft. We've gotten helpful comments from Navajo Nation along with many other comments online. You won't see those comments included here, but you will see them in the next draft.

Commissioner Hall: Thank you Commissioner Anderson. The two points are treaty rights and trust responsibilities across other bureaus. On treaty rights, the Indian nations in the Great Plains all feel that these treaties are legal transactions with the United States. The trust responsibility comes from those treaties, especially when we're in sequestration which makes it hard for programs to even be a program. Roads, education are all seen non-trust programs. That's why we want to make sure the treaties are put front and center because the treaties are the basis for the trust responsibility. The responsibility of the US government does not end because of sequestration. Programs are on the chopping block but those services must still be provided to tribes. President Obama is very adamant about defending the treaty rights, if you're not going to provide services, give us our land back.

Outside of BIA and IHS there are other agencies that have responsibility to tribes. How it's carried out by all departments is important.

Chair Sharp: On page five of the draft statement, first full paragraph where it says '*recent Presidential administrations...*' I think we need to separate out those two concepts. One concept is 'meaningful and timely consultation'. The other concept is 'free prior and informed consent' which means we arrive at things by agreement. Many tribal leaders agree that one of the problems with consultation is that it's become a box to check. The federal agencies check the box and then proceed regardless of objection. If we can separate those two concepts, free prior and informed consent vs. consultation. Consultation is much deeper when it's embedded in UNDRIP.

Commissioner Anderson: I'm separating that out and will make a note to describe how consultation is administered. I'll also include that article [about consultation] by Colette Routel. I'll put it in, but Chair Sharp, I'll count on you to review it and make changes as well. I really appreciate folks' willingness to not only state concerns but also suggest wording to correct the problem. We need to include some Alaska-specific language because of amending ANCSA and ANILCA. And as I said before, those topics around water rights as well.

Draft Conflict of Interest Protocols

Commissioner Anderson: Bureaus have interests that tribes also have [and at times these interests are counter to one-another]. Commissioner Leeds has taken the lead on writing this section about protocols for the Department to manage potential conflicts of interest. At the April Commission meeting Reid Chambers testified about a case in which DOI filed a separate brief in the case that IRS asserted Indian interests were taxable. They were not taxable and the Department (DOI) won on behalf of Indians. The US stopped that practice [of filing separate briefs], so we don't have that protection anymore. The Commission is proposing a group of lawyers to protect Indian rights from the US government side (as a trustee) of course tribes would still have their own lawyers. Then when tribes have independent interests from US government we want tribes to have a fair shake in the situation.

Public Comments About the Draft Documents

Mike Harrison: I want to thank Roger Hudson for making me such an advocate for trust relationship.

We've got a Native allotment and we've had trespassers on it. We fought it ourselves and to date they've stolen 11 acres out of the middle of our allotment. You'll notice on the list of people who are supposed to get money from this trust we're on it. The state of Alaska took this case to court. The ladies there said the state of Alaska was looking pretty bad and wanted to know why the federal government didn't uphold its trust responsibility. They ended up dismissing the case because the court said we were filing sovereign immunity. We fought it again after I blocked some coal trucks. Then we lost our attorney and that's when the US said we lost our standing in the courts. It's the

lack of someone helping us when we knew they were supposed to. We had someone putting a road over our allotment. It's worth so much, we owe you damages but we never got compensated. They said ask us again, ask us again later. Then we did and they said too much time's passed, sorry. There's no follow-through with this trust for the indigenous people who have the Native allotments. And it started in 1980, so it's been a long time that I've been trying to get this to happen.

I also wanted to let people know a little history of Alaska that most people don't know. In 1824 or so, Russia tried to claim sovereignty over Alaska. The US and Great Britain protested so Russia could not proclaim sovereignty. The US and Great Britain said Russia could not claim it, because all the [Russian] forts in mainland Alaska had been burned to the ground by Native people. They had two forts one at Kodiak and one at Sitka. If you read the treaty, it says the US is only selling to Russia this monopoly on trade with the indigenous people. They assumed our land and rights, but they purchased trade rights only. Assumed means taken without law. In the 1930s the US sent colonists to the Matanuska Valley. I went to school there, part of the time. I learned that they were supposed to decolonize Alaska after World War II.

The UN Charter says they were supposed to bring us up to our political, social and many other aspirations. What happened was the US people (who became the state of Alaska). There were supposed to be other things in that vote, like free-association, independence. I went to a decolonization meeting once in Antigua, and in Gibraltar, they said only aboriginal people are supposed to be voting on decolonization. Yet in Alaska you had to speak and write English. You also have to have five white people sign that you're competent. When the vote came around who voted? The military was paid \$5 extra if they could prove that they'd voted. And the miners, prospectors voted. None of this treaty has ever been upheld.

So where are we now? We need to be back on the decolonization list, so we can have the rights and responsibilities that we're supposed to have and get back our resources that we're supposed to have. And it's polluting mother earth. Now we're supposed to have black carbon (coal, wood smoke). In-stream flows for salmon, we spend over \$1 million to restore the stream, now coal companies want to take that stream and put it in a pipe so they can avoid EPA and USACE regulations.

After this recent lawsuit where we were supposed to put more land into trust so that he (indicating person nearby) could protect it. We still don't seem to be getting any movement out of the federal government. We're not getting anything out of the US to protect our sacred rights. I have more to say, but I'll stop at that.

Commissioner Anderson: Allotment issues have come up in every place we've been.

Commissioner Hall: Prior consent is also a standing issue.

Paul Mayo: Alaska is not part of the Indian Land Consolidation Act and there's \$1.9 million in the settlement act and we're not getting any of that. In Alaska we'd like to see at least \$10 million to help hire attorneys. I'm happy to provide written comments on that. We've had the same trespass issue, we're asking for reimbursement and so on, and I can articulate that in writing.

Commissioner Anderson: Please do.

Panel Session: Trust Land and Trust Responsibility in Alaska

Commissioner Anderson opened the panel session. Panelists were asked to share their perspectives about the recent US District Court decision regarding *Akiachak Native Community, et al. v. Salazar* and its implications for taking land into trust in Alaska and panelist responses to the following questions:

- Do you have any recommendations to improve or streamline delivery of services to trust beneficiaries?
- What are your top three recommendations that you think would improve or strengthen trust management and/or administration for the Commission to consider?
- Do you have any suggestion of other trust administration models the ITC should examine as it looks towards improving the DOI trust administration and management?
- Do you have any recommendations specific to Alaska regarding the federal trust relationship with Alaska Native tribes, trust lands, or subsistence hunting and fishing rights?

Mike Williams: I am pleased stand all my relations from Akiachak. Give them a hand. I won't take all my time, but welcome to Alaska. It is a great honor to speak to the Commission on issues of trust in Alaska. I will get down to the questions about trust in Alaska and will try to answer them as best I can. I applaud the judge's decision for the Akiachak people against Salazar. Mr. Williams then read from his statement see Appendix D.

Commissioner Anderson: Great, thank you very much Mike.

Commissioner Hall: I have a question. Mike, you mentioned that tribes don't have the authority to take lands into trust. And you recommended 25CFR151 be amended? Have the tribes pursued that in terms of requesting from the DOI?

Mr. Williams: Yes, our tribe and several others have been pursuing this but because of ANCSA. The state felt they could not put lands into trust in Alaska. Our tribe some time ago put in a resolution to NCAI in light of not allowing Alaska tribes to put lands into trust. And our tribe put in a resolution in Sacramento [to NCAI] and requested that Alaska be included to be afforded putting lands into trust if they so desire.

Commissioner Hall: A follow-up question. What is the Alaska Congressional delegation's position?

Mr. Williams: Yes, we have mentioned this issue to them. Congressman Young hasn't been quite supportive. With the other Senators, we have not really pursued that 100% because of the nature of the position of the state of Alaska and their adamant refusal to allow putting lands into trust in Alaska.

Commissioner Hall: You mentioned in your comments the jurisdiction problems and also a tribe that's doing quite well.

Mr. Williams: Yes, Chilkoot put 72 acres into trust in their village it would make a big difference in providing services in their land. Though we don't have trust at Akiak, we do our best to provide services locally and we've had some resistance in the past by our regional non-projects to provide services by BIA. In the past because the Akiak community passed a resolution to service our schools until Senator Stevens took the money out of Alaska schools. We were going to form our own school district and we were successful doing that. We withdrew from our regional non-profit and we were successful in

providing all of these services out of Akiak and it has improved quality of life in the village with providing those adequate services. With training those young people and furthering their education and training to meet all these requirements. It has really benefited the condition of our homes, roads, children's issues. Thanks to some of those important court cases that were won concerning children it has greatly improved but we have a long way to go. There's no Indian land here and our tribes are not afforded the same protections and services that our women and children deserve under the Violence Against Women Act. Those things have adversely affected us. We're dealing with issues of fishing rights and hunting rights and those continue to hamper our lives and the condition of communities.

We need to deal with those issues because, even in 1980 with passage of ANILCA, it hasn't really made that difference and we're struggling to survive out there. Our suicide rate is the highest in the nation in Alaska. Our young people are unfortunately killing themselves and we have to deal with hopelessness and violence in the community. We're trying to deal with alcohol and other bad things but we always struggle with the issue of jurisdiction.

Sometimes our hands are tied, but we want to deal with things at the local level. What we need to do it with those small communities. We have to protect our lands, children, women, hunting and fishing rights. Because of cost of living, energy, transportation, we live with that every day. I don't know how a lot of our communities are surviving. We need to turn that around so our children can be secure into the future. That's what all our great leaders have done in this country. We need to continue to have our lands to be together and to have our languages and cultures be intact. In spending 40 years with the elders and explaining these policies coming down. It's adversely affected life in the village. Good intentions, but we need to look at what is working, what's not, and strengthen all of it. Native corporations, some of our brothers and sisters have created these corporations. We still can achieve that to strengthen our holdings. We know that corporations cannot become tribes. And my final recommendation is that we respect the federal recognition list of 221 federally recognized tribes and that the federal government has the obligation to respect that. I think we can make these policy changes to invest in the future.

Heather Kendall-Miller, Native American Rights Fund

Ms. Kendall-Miller: Thank you for coming out on this dreary rainy day. I'm an attorney in the Native American Rights Fund. I've litigated in a number of tribes that have brought suit against the government, challenging not bringing land into trust. Welcome to Alaska, home to 229 federally recognized tribes. Ms. Kendall-Miller then read from her statement, see Appendix D.

Commissioner Anderson: Thank you. I have some questions, but I'm going to hold them until after Julie speaks.

Julie Kitka, President of Alaska Federation of Natives

Ms. Kitka: I am grateful for opportunity to make comments. We share similar ideas (Mike Williams and Heather Kendall-Miller). Here is one particular example. During the five years that we worked on the "1991 Amendments"¹ to ANSCA. Under the legislation, any Native corporation could buy a shareholder vote, transfer any or all of its land and other assets to a "Qualified Transferee Entity," (QTE). The stock was to be called in and it would have devastated Native people and resulted in the loss of all our land. For that five-year period of time in which we were looking at protecting our

¹ See *Alaska Federation of Natives Newsletter*, Volume VI, Number Two, April 20, 1987
http://www.alaskool.org/projects/ancsa/articles/afn_newsletters/afn_newsletter.htm

stock and lands, we allowed for elders to transfer land to their Native corporation. I bring that to your attention because it was between 1983 and 1988 when it was signed into law. During that time we had many challenges. Specifically on the transfer of land – we would have been helped greatly by the Secretary of the Interior. There was money appropriated to do that, but the study was done only to a point. That's how politicized DOI was, that they killed a report that Congress paid for, rather than put out the report that had specific recommendations in it.

What's particularly important is the absolute failure of the 13th corporation. We've sent a letter to the Secretary and Assistant Secretary of the Interior. All we want is an election for the board of directors so they can become active again. The 13th corporation is in limbo now and it has 5,000 shareholders involved. The documents are in some storage room. But we're talking about complete disenfranchisement of 5,000 Native people. It was alerted in the aborted study but now we need an election to get started on the project.

I also share with Heather's comments that the [Commission] report should be action-oriented rather than a study for study's sake. This comes right from the local folks all the way up to the Secretary. We need a bias toward action rather than a bias for studying. As far as specific things we put all our examples and legal stuff in our written comments (Appendix D). I also urge the Commission to support a range of actions that the Secretary can take right now without any cost or additional study to make our lives better in terms of hunting and fishing. We've put together hundreds of hours of recommendations that weren't adopted. The Secretary is not prohibited by law, it's not prohibited by statute, so just do it.

That said we have many changes we'd like to see that would require regulatory action. So we're going forward in our testimony for two demonstration projects. One is to establish co-management arrangements. There will be a hearing in early September, please encourage the Secretary to move forward. The second project is administrative actions. A third component is things that require changes in federal statutes. Basically, it's moving toward the Native priority.

An item I bring to your attention that's not in the written testimony is urging the Department to get involved with DOJ to draft legislation that was introduced by Senators Begich and Murkowski to clarify the federal role. Specifically, that the DOI work on the side of Native people, public safety, women and children. The only way the DOI can be helpful is if they are active now while things are going on. I urge that you have an expedited section to prevent missed opportunities.

Another item is allocation and federal budget for DOI. Notable presentations have been put together on this topic by Tlingit President Thomas. It called into question that decision-making process that, again when funding is applied, you're entrenching these arguments of the bureaus against one another.

Sequester. If the resources going to our tribes are reduced, there are an awful lot of programs with good track records that will dissolve over the next 10 years. We need Native American programs held harmless from the sequester. If we wait years the damage will have already been done.

Last item: voting rights protection and the Supreme Court decision. Changes to voting procedures. This is before the Supreme Court there's no decision on that. You'll see disenfranchisement over time. This [issue] rises to the Secretarial level and she needs to say we're not going to put up with this. Put forward an agenda and then move forward on it.

Commissioner Anderson: Thank you Julie, Heather, and Mike. One question about the *Akiachak* case, could the Department take land in trust as it is, or would they have to rule them as unlawful anyway?

Heather: They would have to do some sort of rule-making. We have decisions that have languished. We've put an application together this summer and moved forward with the process and discovered that Alaska is without a clue in terms of how to put forward an application. DOI is ill-equipped. They don't know how to put an application forward. We're concerned they will continue to exercise the Secretary's discretion and continue to do nothing.

Commissioner Anderson: Julie, I remember a lot of bad memories with that QTE discussion. Has AFN had any changes to allow corporations to transfer land to tribes without shareholder suits?

Julie: That hasn't come up for some time. People mostly focused on legislation. One big concern people have is subsurface rights. The village corporations do not want to be in a situation of owning surface but not subsurface rights. We need subsurface owners involved early to avoid a lot of litigation. Historic note on subsurface: if you look at land settlements since 1971 no subsurface rights went to Native peoples. It was all reserved to US/ Canada government. Eastern Canada tribes do not have ownership of subsurface rights. As you go forward on taking land into trust be cautious of split ownership estates.

Heather: Although litigation was brought on behalf of tribes that own land in fee, we would expect that tribes with ANCSA land in fee would be allowed to participate. That's why it makes sense to have a curative rule-making. Split-estate is not uncommon in lower 48 either. I did some research lately and most of fee-to-trust applications concern parcels where estate is split. We can't work this out under the current system. We need DOI to step up and allow Native corporations, the state of Alaska, and the tribes to give their views on what would be a fair system for split ownership. Where do our legislators stand on this? Begich speaks in favor of tribes. Murkowski speaks in favor of Alaska. DOI should actually take responsibility and put a process in place so we don't have a situation where we're running to senators asking them to fix it for us.

Commissioner Hall: Julie can you shed light on the 5,000 people?

Julie: It's a group of people who were primarily out of state for medical reasons, employment, or whatever else, at the time ANSCA was passed. There was an option in the land claims if people were out of state, they could be the 13th region. There were 4,500 Alaska Natives who signed up. They didn't get land just money under the ANCSA. Today they have no money, not enough to call an election to create a board of directors to speak on behalf of these shareholders. They are put aside for all intents and purposes. They need DOI to help them form a legally authorized board to move them forward on congressional remedy.

Commissioner Hall: Any final thoughts on strengthening legal remedy?

Heather: AFN has tried to communicate to the Secretary things that can be done and don't need money, including trust fulfillment to tribal members. That's all been spelled out clearly over the course of the past few years. We'd like the DOI to take those recommendations seriously.

Commissioner Anderson: We've got those specific recommendations that went to the DOI as part of ANILCA. This will be very helpful to the Commission.

Chair Sharp: Mike, thank you for presenting to the Commission today. My question is around consolidation and streamlining of services. Last year the DOI undertook a \$12 million survey enterprise, and I'm interested in hearing the recommendations that our Alaska delegation might have made last year in terms of streamlining. Will it be detrimental? If so, where? I'm open to having some of those recommendations that were put forward last year be added to our documentation as well. Our challenge as a Commission is to find things that look good on paper but might have unintended consequences.

Mike Williams: I'm a little hard of hearing, but I really appreciate your tuning in and wish you were here for all of these discussions. What's interesting in Alaska is 229 recognized tribes should be afforded to continue this conversation along with the DOI. Many of the communities cannot afford to send their representatives and consultation sessions. When there are consultations in health care and other issues affecting us. The DOI Secretary has to honor a lot of those small or needy tribes that don't have the capacity, that they are afforded the opportunity to address their concerns to the Secretary. There are so many voices out there that are not being heard. We need to afford that conversation, for our cousins in the lower 48 and the federal government. I appreciate this opportunity for further conversation down the road and this report will hopefully improve the quality of life here in Alaska.

Commissioner Anderson: There is an online question about the buyback of fractionated parts of allotments. The question: *Have the tribes been selected for the pilot?*

DFO Harris: Yes, the Department has been working on that and we're expecting to reach out to tribes directly.

Julie: You're probably all aware of the Obama Council on Native Affairs. I'd recommend this [trust] commission brief them as soon as possible, it's critical to brief them right away.

DFO Harris: The Trust Commission will present their report to the new White House Council for Native Affairs. There will be in dialogue to see how they can interact on those intersections of rights and responsibilities. We will be briefing them [the council].

Commissioner Anderson: That is right and when our report comes out it will be a public document. People will be able to urge the Secretary to take action on our report if they agree with our findings and recommendations. Thanks to each of our panel speakers.

Public Comment

Gary Harrison: When you read the UN charter, it says it's a sacred trust. I urge you to look it up. When the Land Claims Act was enacted, it was genocide. It was intended to destroy the land of peoples in whole or in part. And that is another piece of genocide as well. I've heard that once people hear these things and know and understand them, they have to do something about it, or they are complicit in genocide. Do you have any answers about that?

Commissioner Anderson: The problems with ANCSA are well-documented particularly people born after 1971. Tied up with trust lands issues and we'll certainly include that in our report.

Rick Harrison: One barrier I haven't heard mentioned is enrollment. I've had two different cases come to me. One is someone who's not from the region. For enrollment outside of the region it should be online so that you don't have to go to your region to enroll. The second case, like many tribes across the country, is about children being adopted out of their homes. The children end up not knowing where they came from. They were adopted and/or their mother was as well and they cannot get a BIA card despite being Alaska Native. There needs to be some other model for it. See Appendix E for a written comment submitted by Mr. Rick Harrison.

Question from Audience: What pilot program is starting in two weeks?

DFO Harris: That's the buyback program that we're piloting in two weeks in the lower 48 only.

Commissioner Anderson: Someone handed over a question about probate and wanted to remain anonymous. *"Alaska doesn't have a probate code. Who would the tribes discuss this issue with?"* Mike Smith can you help us address that?

Mike Smith: Yes.

Sarah Obed: I work with Robin Renfrew. I'll share some things she shared with me.

She intended to testify on her own behalf. She was trying to purchase an allotment and the process for that piece was long and arduous, not very clear. She wanted to raise that issue. In another sale she was assisting with the village corporation wanted to purchase the allotment and they had all settled it, but the BIA said the negotiated price wasn't the true value of the land and the entire sale was stopped. She's very concerned about fractionalization of the allotments. I'll make sure she emails her statement.

Meeting Wrap-Up

Commissioner Anderson: Thank you everyone for attending in-person and on-line and for the allottees sharing their thoughts. Thank you to the staff from the Udall foundation. They've been fantastic recording everything. They've compiled the record for us. There's no way we could have done it without them. I also want to thank the DOI staff in BIA, OST, AS-IA from Albuquerque, Washington DC. They've been great telling us things to make sure we had the information we needed, whether we wanted to hear it or not. The whole commission appreciates the input and information. Grant Thornton, the management consultant has been great. We'll make great use of all this assistance that we've had. Hopefully to produce something that will be useful to the Secretary and Alaska Native tribes.

Thank you and we're adjourned.

Appendix A. List of Acronyms

ANILCA	Alaska National Interest Lands Conservation Act
ANSCA	Alaska Native Settlement Claims Act
ANWR	Alaska National Wildlife Refuge
ArcGIS	GIS Mapping Software
ASIA	Assistant Secretary for Indian Affairs (DOI)
ATNI	Affiliated Tribes of Northwest Indians
BIA	Bureau of Indian Affairs
BOR	Bureau of Reclamation
CADR	Office of Collaborative Action and Dispute Resolution (DOI)
COLT	Coalition of Large Land Based Tribes
CTMP	Comprehensive Trust Management Plan
DFO	Designated Federal Officer
DOI	Department of the Interior
DOJ	Department of Justice
EOP	Explanation of Payment
ESRI	Technology Company Developing GIS Tools
FACA	Federal Advisory Committee Act
FOIA	Freedom of Information Act
FTM	Fiduciary Trust Model
GIS	Geographic Information System
GPTCA	Great Plains Tribal Chairman's Association
HLIP	High-level Implementation Plan
IA	Indian Affairs (DOI)
IFMAT	Indian Forest Management Assessment Team
IIM	Individual Indian Money
ILWG	Indian Land Working Group
ITMA	Intertribal Monitoring Association on Indian Trust Funds
ITT	Information Technology Trust
LCC	Landscape Conservation Cooperative
LTRO	Land Titles and Records Office
MOU	Memorandum of Understanding
NARF	Native American Rights Fund
NCAI	National Congress of American Indians
NCLB	No Child Left Behind
NEPA	National Environmental Policy Act
NIFRMA	National Indian Forest Resource Management Act
NMFS	National Marine Fisheries Service
NRCS	Natural Resources Conservation Service
NRDAR	Natural Resource Damage and Assessment Restoration
OEA	Office of External Affairs (OST)
OHTA	Office of Historical Trust Accounting
OITT	Office of Indian Trust Transition
OMB	Office of Management and Budget
ONRR	Office of Natural Resources Revenue
OST	Office of the Special Trustee for American Indians

OTRA	Office of Trust Review and Audit
PSA	Public Service Announcement
QTE	Qualified Transferee Entity
RACA	Office of Regulatory Affairs and Collaborative Action (IA)
SOL	Office of the Solicitor
TAAMS	Trust Asset Accounting Management System
TEK	Traditional Ecological Knowledge
TFAS	Trust Fund Accounting System
TIBC	Tribal/Interior Budget Council
USET	United South and Eastern Tribes Incorporated
USIECR	U.S. Institute for Environmental Conflict Resolution
USGS	U.S. Geological Survey

Appendix B. Trust Commission Meeting Attendees

Name	Affiliation	Monday, August 19, 2013
Commission		
Fawn Sharp	Chair	Telephonically
Robert Anderson	Commissioner	X
Tex Hall	Commissioner	X
Sarah Harris	DFO	X
Commission Support Staff		
Nedra Darling (on-line)	DOI BIA	X
Mark Davis	OST	X
Joshua Edelstein	SOL	X
Patricia Gerard (on-line)	OST	X
Genevieve Giaccardo	OST	X
Regina Gilbert	BIA	X
Sarah Palmer	USIECR Facilitator	X
Paula Randler	USIECR Facilitator	X
Bryan Rice	BIA	X
Helen Riggs	OST	X
Tiffany Taylor	OST	X
Public Attendees In-Person		
Tammy Buffone	OST	X
Melvin E. Burch	OST	X
Jody Cummings	Office of the Solicitor	X
Carol Daniel	AFN	X
Amy Sparck Dobmeier	North Star Group	X
Gina R. Douville	Association of Village Council Presidents	X
Desiree Duncan	CCTHITA - NLR Realty	X
Ida Ekamrak	ANC	X
Mildred Evan	Akiachak Native Community	X
Amber Garib	Grant Thornton	X
Elizabeth Gobeski	Office of the Solicitor, DOI	X
Eileen Grant	Tanana Chiefs Conference	X
Tracy Greene	Grant Thornton	X
Chief Gary Harrison	Chickaloon Village Traditional Council	X
Rick Harrison	Chickaloon Village Traditional Council	X
Marc Hebert	Grant Thornton	X
Tom Hoseth	Bristol Bay Native Services	X

Roger L. Hudson	Office of the Solicitor, DOI	X
Melanie Kasayulie	Akiachak Native Community	X
Julie Kitka	Alaska Federation of Natives	X
Eric Larsen	Land Management Services	X
Thomas Leonard	Celista Corporation	X
Brenda Lintinger	Tunica-Biloxi Tribe of LA	X
Paul Mayo	Tanana Chiefs Conference	X
Heather Kendall Miller	Native American Rights Fund	X
Glenda Miller	OST	X
Sarah E. Obed	Doyon, Limited	X
H. F. Katuk Pebley	Inupiat Community of the Arctic Slope	X
Mike Smith	BIA	X
Mike Williams	NCAI - Alaska Region	X
Roberta Wolfe	CCTHITA - NLR Realty	X
Kate Wolgemuth	Office of the Governor - Alaska	X
Public Attendees On-line		
Adam Bailey	Hobbs Straus	X
Violet Bowling	OST	X
Tamara Dietrich	Alaska Native Tribal Health Consortium	X
Teresa Gaudette	Kake First Nations	X
Jeremy Geffre	BIA	X
Brenda Golden		X
Cody Halterman	BIA	X
Chad Hutchinson	Alaska Legislature	X
Charlotte Hicks	Upper Mohawk Inc	X
Bill Holway	Muckelshoot Tribes	X
Maribeth McCarthy	Mastercard	X
Ginger Morris	OST	X
Bonita Nipper	BIA	X
Dan Rey-Bear	Nordhaus Law	X
Melodie Rothwell	HHS	X
Michele Saranovich	Accenture	X
Jacquelin Schafer	State of AK	X
Christina Tippin	Tikigaq	X
William White	Deloitte	X
Ted Wright	Sitka Tribes	X

Appendix C. List of Documents Distributed and/or Presented at Commission Meeting

- Agenda
- Draft Trust Responsibility Statement
- Draft Conflict of Interest Protocols
- Land into trust - Mike Williams
- H. Kendall-Miller 8192013_ to ITC
- Trust Statement of Julie Kitka 81913
- AFN Comments on Fulfilling the Federal Trust Responsibility
- 010709 AFN Comments to the Secretarial Review

Appendix D. Panel Session: Trust Land and Trust Responsibility in Alaska

Speaker 1. Mike Williams

Speaker 2. Heather Kendall-Miller

Speaker 3. Julie Kitka

Mike Williams
Akiak Native Community
"Remarks to the Indian Trust Commission"
Sheraton Hotel
Anchorage, Alaska

August 19, 2013

Good morning to all of you, Honorable Chair Fawn Sharp and the Commission. It is a huge honor to speak to you today on the issues of trust in Alaska, I thank you so much for the opportunity. I will get down to the questions on Trust Reform and Models that were posed and will try to answer them the best I can.

First of all, I applaud the Judge's decision on the Akiachak Native Community vs. Salazar which is long overdue in Alaska. It is not right to deny putting lands into trust in Alaska because of the passage of the Alaska Native Claims Settlement Act of 1971. Prohibiting putting lands into trust has caused irreparable harm to all of our Tribes, being with no land and no Indian Country to have jurisdiction to protect our lands, women, children and waters. The lands that are put are in fee simple title and lands in Alaska are vulnerable for loss in the future. That law extinguished the aboriginal title we held on to our ancestral lands and gave them to the State Chartered for profit corporations of its own making. It left our Tribes and Children landless and in utter poverty and poured out inheritance into corporations it had made. It has divided our People and we are witnesses to that, but we do not blame our relatives who manage these corporations, they are implementing what was planned for them, by the framers of ANCSA.

Getting back to the lands into trust, in Haines, Alaska, the Chilkoot Native Association has applied for 72 acres of land that they were denied the petition stating that ANCSA prohibited putting lands into trust for Alaskan Tribes.

Our President of the United States, Barack Obama made a statement at his summit with the Tribal Nations in November, 2010, which I attended, his desire to allow "all Federally Recognized Tribes to put lands into Trust which will protect it for future generations with the establishment of "Indian Country" in our traditional lands is necessary. We have been unable to put them until now. I would recommend that the Department of the Interior quickly implement in reviewing and approving the applications that the Federally Recognized Tribes had made, to protect our land holdings for future generations of our Tribes with no impacts on pending applications for the Federally Recognized Tribes. I have three recommendations for land acquisitions for land transfer into trust:

- 1) Amend 25 Code of Federal Regulations part 151, land acquisitions, to include Alaska;
- 2) Provide Funding for boundary surveys for Tribes that acquire Lands into Trust;
- 3) Provide direct Consultations with Tribal Governments on issues related to Land Acquisitions of Trust Lands.

I am recommending that each of the 229 Federally Recognized Tribes provide ALL the needed delivery of services to Trust Beneficiaries at the Tribal level. Each Tribe knows its communities and its needs. Each

Tribe must be afforded adequate funding to implement these services at the local level, many communities have implemented the Indian Self Determination and Education Assistance Act of 1975 and have greatly improved the quality of services. Capacity building for each Tribe must be on going into the future. It still is up to each Tribe to consider forming coalitions or consortium of Tribes to provide services. But to continue to honor their Sovereign Status. The three recommendations for the Commission to consider to improve would be:

- 1) Provide adequate technical support for each Tribe to make sure they are in compliance;
- 2) Provide adequate contract support costs for each Tribe;
- 3) To provide ongoing meaningful consultation with each of the 229 Federally Recognized Tribes

There are many other models to consider from our sister Tribes in the south 48, but in Alaska, we need to see each successful Tribe, such as Fort Yukon and Akiak Native Community who are providing great services to its members/citizens. Some of the examples to look at other tribally managed models would be Eskimo Whaling Commission, Nanook Commission, Migratory Bird Treaty, Marine Mammal Protection, etc. Some of these models have been successfully managed that benefited the tribes in Alaska.

I have several recommendations for Alaska regarding trust relationship with Alaska Native Tribes, Trust Lands, and Hunting and Fishing Rights. My recommendations on these issues, we need Alaska Native Restoration Act by the administration and Congress to allow:

- 1) That the Federal Government honor its Trust Obligations solely with the 229 Federally Recognized Tribes of Alaska;
- 2) Transferring ownership and control of village and regional corporation lands back to the Federally Recognized Tribes and by recognizing these lands as "Indian Country" under the jurisdiction of the Tribal Governments;
- 3) Restoring the Aboriginal Hunting and Fishing Rights of Alaska Natives that Section 4(b) of Alaska Native Claims Settlement Act had summarily "extinguished" and affirming the right of Alaska's Indigenous People to hunt, fish and gather in traditional and accustomed places in perpetuity, and
- 4) Mandating the enrollment of all Alaska Natives and Alaska Native Children born before, on, or after December 18, 1971 into ANCSA regional and village corporations regardless of blood quantum, eligibility to be determined by a Tribal Government.

I would like to thank you very much for the opportunity to speak and recommend of our hopes and dreams to have the quality of life that our ancestors had and worked hard from time long ago.

Thank you for the consideration of my recommendations on the trust issues.

Mike Williams

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August 19, 2013

**Testimony Before the Secretarial Commission on
Indian Trust Administration and Reform
by Heather Kendall-Miller**

Report on *Akiachak Native Community v. Salazar*, No. 06-969 (RC) (D.C. March 31, 2013).

Esteemed Commission Members:

Welcome to Alaska, the home to 229 federally recognized Tribes. Thank you for your time today and the opportunity to speak with you about trust lands in Alaska. I have been asked to present my perspectives about the recent U.S. District Court decision *regarding Akiachak Native Community v. Salazar* and its implications for taking land into trust in Alaska.

Background:

Let me begin by drawing from the leading Indian law treatise, the Cohen Handbook of Federal Indian Law, a statement that says that "understanding history is crucial to understanding doctrinal developments in the field of Indian law." So, here too, in Alaska.

The Alaska experience shows that Federal officials, often draw from their experience of Indians on reservations in the Lower 48 states, and mistakenly assume that the same legal principles applicable there do not apply in Alaska. This is due in large part to the perception that Alaska's history is somehow "different," and that the 1971 Alaska Native Claims Settlement Act ("ANCSA") altered the legal principles that apply to federally recognized Tribes in Alaska.

But in fact and law, federally recognized Tribes in Alaska have the same legal status as other federally recognized Tribes singled out as political entities in the Commerce clause of the United States Constitution.

Prior to enactment of ANCSA, Congress adopted statutes that imposed trust responsibilities on the Secretary over lands in Alaska for Alaska Natives, including statutory obligations over Alaska Native allotments, fiduciary responsibilities over restricted Native town sites, general trust authority over Indian Reorganization Act (IRA) tribal reserves, and specific responsibilities related to leases on executive order reserves.

In 1934, as part of the Indian Reorganization Act of 1934, Congress in section 5 authorized the Secretary of the Interior to take real property into trust on behalf of Tribes and individual Indians; and in section 7 empowered the Secretary to declare newly acquired lands Indian reservations or to add them to existing reservations.

In 1936, the IRA was amended to facilitate application to the Territory of Alaska. Section 1 of the 1936 amendments extended sections 1, 5, 7, 8, 15, and 19 of the IRA to Alaska. Section 2 of the 1936 amendments gave the Secretary authority to designate certain lands in Alaska as reservations but placed special conditions on Secretarial creation of any new reservations in Alaska. A total of six reservations were created in Alaska pursuant to the Act. Among those was the 1.8 million acre reserve set aside for the Neet'sai Gwichin of Arctic Village and Venetie.

In 1971, Congress enacted the Alaska Native Claims Settlement Act revoking all existing reservations in Alaska (except for the Metlakatla Reserve). Importantly, however, ANCSA did not repeal any portion of the IRA, nor any portion of the 1936 amendments.

In 1976, Congress enacted the Federal Land Policy Management Act (FLPMA). Section 704(a) of FLPMA repealed section 2 of the 1936 amendments which had placed conditions on the Secretary's creation of new reservations in Alaska. Section 704(a) of FLPMA did not repeal any other part of the IRA or the 1936 Amendment, nor otherwise amend or repeal the amended IRA's application to Alaska.

In 1978, in response to a request by Arctic Village and Venetie to have their former reservation lands placed back into trust pursuant to section 5 of the IRA, then Associate Solicitor for Indian Affairs, Thomas Fredericks, issued an Opinion which stated the conclusion that ANCSA precluded the Secretary from taking land into trust for Native in Alaska.

In 1980, the Department of the Interior ("DOI") for the first time promulgated a regulatory process to make fee-to-trust transactions more uniform. Those regulations expressly excluded acquisition of trust land by the Secretary for Tribes or tribal members situated in Alaska other than Metlakatla. The Department's preclusion of Alaska Tribes (other than Metlakatla) was based upon the 1978 Fredericks Opinion.

In 1994, the Chickaloon Indian Association, along with other Tribes, filed a petition for rulemaking with the Secretary of the Interior requesting that the Secretary revise 25 C.F.R. § 151 Part 1 (the Alaska prohibition) to include Lands in Alaska. The petitioning Tribes further urged the Secretary to revoke the Fredericks Opinion as erroneous and contrary to existing law.

In January of 1995, the agency published notice of the Tribes' petition and requested comment on the petition for rulemaking concerning Alaska Native land acquisitions. Four years later in April 1999, the Secretary proposed a revision to Part 151. The notice of proposed rulemaking specifically addressed discretionary land acquisitions in Alaska as follows:

Both the current and proposed regulations bar the acquisition of trust title in land in Alaska, unless the application for such acquisition is presented by the Metlakatla Indian Community or one of its members. The regulatory bar to acquisition of title in trust in Alaska in the original version of these regulations was predicated on an opinion of the Associate Solicitor, Indian Affairs, which concluded that the Alaska Native Land Claims Settlement Act precluded the Secretary from taking land into trust for Natives in Alaska.

Although that opinion has not been withdrawn or overruled, we recognize that there is a credible legal argument that ANCSA did not supersede the Secretary's authority to take land into trust in Alaska under the IRA.

The Notice of Proposed Rule-making specifically invited comment on the continuing vitality of the prohibition, the Frederick's opinion, and issues raised by the Tribe's petition.

On January 2001, the Secretary published a final rule amending Part 151 Trust Lands Regulations and specifically addressing the comments submitted by the petitioning tribes, the agency stated:

The Solicitor has considered the comments and legal arguments submitted by Alaska Native governments and groups on whether the 1978 Solicitor's Opinion accurately states the law. The Solicitor has concluded that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion ... Accordingly, the Solicitor has signed a brief memorandum rescinding the 1978 Opinion.

Notwithstanding the rescission of the Fredericks Opinion, the final rule continued in place the Alaska prohibition against acquisition of trust lands in Alaska. However, the final rule explained the decision to continue the prohibition as a temporary measure stating that:

The position of the Department has long been, as a matter of law and policy, that Alaska Native lands ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust.

On January 20, 2001, George Bush was sworn in as President. On the same day President Bush's administration ordered a delay in the effective date of these and other pending regulations in order for review by the President's own new appointments. On November 9, 2001, the Secretary of the Interior formally withdrew the final rule, leaving in place the regulatory prohibition against taking lands into trust status in Alaska (except for Metlakatla) notwithstanding the rescission of the Fredericks Opinion which formed the basis for that prohibition bar. The regulatory prohibition prohibits Alaska Tribes from petitioning the Secretary to take lands into trust, and prohibits the Secretary from acting favorable on any such petition.

Litigation:

Litigation was commenced in 2006, when four Tribes and one Native individual-the Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association, Tuluksak Native Community (IRA), and Alice Kavairlook-brought suit to challenge the Secretary of the Interior's decision to leave in place Part 1 of 25 C.F.R. § 151 (the Alaska prohibition) that as it pertains to federally recognized Tribes in Alaska.

Plaintiffs argued that this exclusion of Alaska Natives-and only Alaska Natives-from the land into trust application process is void under the IRA section 476(g), which provides:

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(g). The State of Alaska intervened to argue that the differential treatment is required by the Alaska Native Claims Settlement Act (ANCSA). The Secretary defended the regulation by reference to ANCSA and argued that while ANCSA did not revoke Secretarial authority to take lands into trust, it supported the policy and practice of the Secretary's discretion to exclude Alaska tribes from the land into trust regulatory process.

Decision:

The court disagreed. On March 31, 2013 Judge Rudolph Contreras issued a decision granting summary judgment to plaintiff Tribes. The Court rejected the State's argument that ANCSA's extinguishment of aboriginal claims and Congress's declaration of purpose implicitly extinguished the Secretary's authority to take lands into trust in Alaska, and held that the Secretary's Alaska land-into-trust authority was conferred in 1936 with the IRA's application to Alaska, which has not been explicitly revoked by ANCSA or any other legislative action.

Having established that ANCSA did not revoke the Secretary's authority to take Alaska lands in trust, the Court next examined the legality of 25 C.F.R. § 151.1 (the Alaska bar) and found it to be inconsistent with the Congressional mandate that the Secretary not diminish the privileges available to tribes relative to the "privileges ... available to all other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(g).

The Court then ordered briefing as to the scope of the remedy in this case and whether it is only the Alaska exception that is deprived of "force or effect," or whether some larger portion of the land-into-trust regulation must fall.

The State filed a motion for reconsideration in May 2013, as well as a motion to alter the judgment so it could take an interlocutory appeal, rather than having to wait for the completion of rule-making following a remand to the Secretary. The Plaintiffs and the Secretary opposed the State's Motion for reconsideration.

On the issue of remedies, Plaintiffs urged the Court to sever the Alaska exception from 25 C.F.R. 151 and remand to the agency so that it could engage in curative rule-making to develop a process and criteria for Alaska lands. The federal government, however, joined the State of Alaska in requesting that the court NOT remand to the agency for curative rule-making but simply enter final judgment so the case can be immediately appealed to the D.C. Court of Appeals.

In addition, the Secretary filed her own motion and argued that the case should be reconsidered to hold that it violated the Administrative Procedures Act only and not the IRA. In particular, the Secretary in her briefing argues that the Court's holding on IRA subsections 476 (f) and (g) is "sweeping in its broad, unlimited statements regarding the 1994 Amendment to the IRA and could potentially have unintended consequences across the federal government. Accordingly, she asks the Court to avoid relying on those subsections of the IRA and to limit its decision to the holding that Interior's prior rationale relying on ANCSA in support of the Alaska exception was legally flawed.

Briefing has been completed and we are awaiting a decision from the court.

That is the summary of the litigation and the Department of Interior's pattern and practice over the last thirty years when it comes to trust lands in Alaska. For a federal agency that has a moral obligation to uphold and abide by the highest fiduciary standards when it comes to its trust responsibility, the agency's track record in Alaska can fairly be described as abysmally entrenched in a bureaucratic attitude and preference to do nothing.

This atrocious record leads me to the questions that were posed to each of us here today.

Questions:

1. The first, do we have any recommendations to improve or streamline delivery of services to trust beneficiaries?

Yes. Stop treating Tribes in Alaska differently. As stated earlier, under the law federally recognized Tribes in Alaska have the same legal standing as Tribes elsewhere and are therefore entitled to the same immunities and privileges enjoyed by all federally recognized Tribes.

2. What are the top three recommendations that you think would improve or strengthen trust management and/or administration for the Commission to consider?

In response I would suggest the following. The briefing in the Akiachak case shows that the Department of the Interior is more concerned about avoiding the task of taking on difficult issues and instead falls back on its institutional bureaucratic lethargy. This avoidance, or let the courts figure it out, attitude is antithetical to the trust relationship. Thus, the Commission should recommend that the Department of the Interior engage in a curative rule-making that develops a process through notice and comment for taking lands into trust in Alaska.

Second, this Commission should make clear that the federal government's trust responsibility extends to Tribes *even when trust assets are not at issue*. The trust responsibility should extend to government to government consultation on issues like climate change impacts. The number of tribal communities in Alaska that are facing relocation due to erosion and climate change are staggering. They need the help of the federal government in facing this challenge.

Third, this Commission should recommend that the BIA and IHS stop fighting Indian Tribes and Health Consortia on issues of contract support costs, money that is vitally necessary to the delivery of Indian health care in Alaska but denied by the federal agencies that administer those funds.

3. Do you have any suggestion of other trust administration models the ITC should examine as it looks towards improving the DOI trust administration and management?

I would suggest that you confer and consult with the Honoring Nations Program of the Harvard Project on American Indian Economic Development. That program has a wealth of information and expertise that can be tapped for purposes of trust administration models for Indian country.

4. Do you have any recommendations specific to Alaska regarding the federal trust relationship with Alaska Native tribes, trust lands, or subsistence hunting and fishing rights?

Obviously, tribes in Alaska like our sister tribes in the Lower 48 States need land in trust for a wide range of beneficial purposes. By acquiring land in trust, tribes are able to provide essential governmental services to their members, including health care, education, housing, jobs and other economic development opportunities, as well as court and law enforcement services. Trust land is also necessary for tribes to promote and protect historic, cultural, and religious ties to the land. Trust status further enhances the protections of the tribal land base by making the lands free from taxation and foreclosure. It is thus an important and necessary tool to promote tribal self-determination. As stated earlier, it is important for the federal agencies to stop treating Tribes in Alaska differently and undertake curative rule-making.

With respect to subsistence hunting and fishing rights, the Commission should support the range of administrative and regulatory changes that have been put forth by AFN and other Native groups in recent years.

And last and finally, I emphasize again that this Commission should make clear that the federal government's trust responsibility extends to Tribes *even when trust assets are not at issue*. I thank you for your time today.

Statement of Julie Kitka, President, Alaska Federation of Natives

Before the
Secretarial Commission on Indian Trust Administration and Reform

Monday, August 19, 2013
Anchorage, Alaska

Good Morning Mr. Chairman and members of the Committee. You have asked me to address the role of village corporations as well as to share my perspectives about trust land issues in light of the recent U.S. District Court decision in *Akiachak Native Community v. U.S. Department of the Interior* decided March 31, 2013. You also expressed an interest in my perspectives and suggestions about trust reform, and also for my recommendations specific to Alaska regarding the federal trust relationship with Alaska Native tribes, trust lands, or subsistence hunting and fishing rights. Thank you for the opportunity to address these issues.

For those of you who are not familiar with the Alaska Federation of Natives (AFN), I would like to first share with you a little bit of our history and mission. AFN was formed in October 1966, when more than 400 Alaska Natives representing 17 Native organizations gathered for three days to address Alaska Native aboriginal land rights. At this time there were no computers or cell phones. Native people had little money and everyone was focused on surviving the harsh winter and feeding their families. So it was a historic gathering—driven by fear of loss of traditional lands. AFN was formed from this gathering

From 1966 to 1971, AFN devoted most of its efforts to passage of a just land settlement in the U.S. Congress. On December 18, 1971, those efforts were rewarded when Congress passed the Alaska Native Claims Settlement Act (ANCSA). Today, AFN is the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional for-profit Native corporations (established by Congress pursuant to the Alaska Native Claims Settlement Act), and 11 regional Native nonprofit tribal consortia that offer a broad range of human services to their member villages. AFN's primary mission is to enhance and promote the cultural, economic and political voice of all Alaska Natives. Our priorities are decided through a resolutions process at our Annual Convention in October.

Alaska Village Corporations: To understand the role of Village Corporations in Alaska, one must understand the role ANCSA has played and continues to play. Prior to the passage of ANCSA, Alaska Natives, represented by over 200 villages or tribes, held aboriginal claim to most of Alaska – about 365 million acres of land. Unlike prior settlements with indigenous peoples, the lands and other assets conveyed to Alaska Natives under ANCSA were not held in trust or subject to any other form of permanent protection. Instead, they were conveyed to state-chartered business corporations, subject to the restriction that the stock could not be sold or otherwise disposed of for 20 years (until December 18, 1991). The shares in these corporations were issued to approximately 80,000 individual Alaska Natives who were alive on the date of ANCSA's enactment.

Where Alaska Natives resided on April 1, 1970, the date of the last census, determined where Alaska Natives were enrolled – to a village corporation or at-large; and in which region. Natives in four historically Native communities (Sitka, Juneau, Kenai and Kodiak) did not meet the requirements to form village corporations. Instead, they formed “urban” corporations. Finally, nine or 10 communities were too small to form village corporations and were instead organized as “group” corporations. Section 4 of ANCSA extinguished all aboriginal claims, including our hunting and fishing rights. Section 6 authorized payment of approximately \$1 billion for those claims (half from the State of Alaska and half from the federal government).

Of the approximately 45.7 million acres, the surface estate of 22 million acres was divided among the village corporations. The 12 regional corporations located in Alaska received the subsurface estate to the lands conveyed to the village corporations. This in itself was historic – many large land settlements that have occurred since ANCSA, especially in Canada, retained the subsurface rights in their federal governments.

ANCSA also extinguished all existing Indian reservations in Alaska (except the Annette Islands Reserve) and allowed the village corporations on those former reservations to select the surface and subsurface estate of and to forego all other ANCSA benefits (including cash payments) in settlement of their land claims. Four large reservations took advantage of this provision, with a combined land claim of nearly four million acres. The four reservations (and associated villages) were: St. Lawrence Island (Gambell and Savoonga), Elim (Elim), Chandalar (Venetie and Arctic Village), and Tetlin (Tetlin). In 1976, Congress amended ANCSA to allow the village corporation (Klukwan, Inc.) to select a township under ANCSA if it conveyed the lands of the former reserve (800 acres) in fee to the Chilkat Indian Village tribal government. ANCSA Section 14(f) required village corporation consent for regional subsurface mining activity “within the boundaries of the Native village.”

So, with the passage of ANCSA, Congress abolished the reservation trust land system in Alaska, and began its major experiment in federal public policy – imposing the for-profit corporate structure on traditional Native people and their land and resources. ANCSA did not abolish the preexisting tribal governments. This became a source of significant litigation in the 1980’s and 1990’s and into the twenty-first century as the tribes, left without any land, struggled for recognition and definition of their political existence and jurisdiction.

Since enactment of ANCSA, Alaska Natives have succeeded in persuading Congress to adjust the status of the corporations so that stock is restricted indefinitely against alienation (unless the shareholders vote otherwise), the land cannot be taxed unless it is developed, and it is further protected from creditor’s claims, court judgments, and bankruptcy. With the 1998 ANCSA amendments, the corporations can also provide benefits to their shareholders without regard to the stricter state law requiring equal benefits per share.

Thus, under ANCSA, village lands are, for the most part, owned by the Village Corporation. However, after the *Venetie* Supreme Court decision, ANCSA land is not considered “Indian Country.” That means the only “Indian country” in Alaska today, aside from the Metlakatla Indian Community (Annette Island Reserve), would be allotments or other trust or restricted lands set aside under federal superintendence, and a few small parcels held in trust for the

villages of Kake, Klawock, Angoon, and Hydaburg in southeast Alaska. AFN attempted for a number of years to persuade Congress to authorize a tribal transfer option, but was ultimately unsuccessful in that effort.

Today, it is estimated that well over one million acres of fee land in Alaska is tribally owned. Some of these lands were transferred to Alaska's tribes by village corporations in the years following the 1971 Settlement Act, some were acquired through the Alaska Native Townsite Act, and others by gift or purchase. These fee lands in tribal or Native ownership lack even the basic protections afforded undeveloped ANCSA lands held by ANCSA village or regional corporations under the provisions of the automatic land bank established by ANCSA. These lands are thus subject to loss. Alaska's tribes believe that the most secure means of ensuring these lands stay in Alaska Native ownership is through the federal land into trust process. It is for that reason, that AFN has historically supported allowing Alaska's tribes and individual Native land owners to petition the Secretary of the Interior to acquire and hold their lands in trust.

The Akiachak Case and Land-into-Trust in Alaska: Heather Kendall-Miller, one of the attorneys who litigated the Akiachak case, is scheduled to testify today, so I will not go into a great deal of history or background about the litigation as I'm sure that will be part of Heather's presentation. But I will share with you our perspectives on the case.

As noted previously, with the passage of ANCSA, Congress abolished the reservation trust land system in Alaska and created a system of lands held by Native corporations. Section 19 revoked the trust status of all 23 reservations that had been established in Alaska between 1891 and 1943, except for the Metlakatla Reservation. All of the core traditional lands of the native villages were patented in fee, not to tribal entities, but to newly established Village Corporations existing under state law.

Since passage of ANCSA, the Department of Interior has established by regulation that taking land into trust for Alaska tribes would be inconsistent with the enactment of ANCSA. And, as you know, the current regulations in 25 C.F.R., part 151 do not apply to Alaska. The Supreme Court in *Venetie* held that lands conveyed to Native corporations under ANCSA are not Indian country, and thus do not become Indian country when conveyed by a Village corporation to a tribal government.

The *Akiachak* court affirmed the ability of the Secretary of the Interior to take land into trust on behalf of Alaska Natives and Alaska's tribes. None of the lands involved in that case were ANCSA lands, and many in our state continue to question whether lands conveyed to a corporation under ANCSA should be among the lands eligible for trust status. Because the subsurface estate of village lands was conveyed by ANCSA to the regional corporations, many strongly believe that consent by the regional corporation in the region in which the land to be transferred into trust is located, must be a precondition for any such transfer of ANCSA land into trust.

On the other hand, tribes for the most part want the option of having their lands taken into trust. The State of Alaska is also strongly opposed to allowing tribes in Alaska to have their fee lands placed into trust.

In 1999, following the decision in *Venetie*, then Governor Knowles, established a Commission on Rural Governance and Empowerment to recommend ways the State government should respond to the reality of tribal governance. In its Final Report to the Governor, the Commission recommended that the State cooperate with tribal efforts to transfer land into trust status as a way to enhance local control and economic opportunities. That recommendation was consistent with the earlier Alaska Natives Commission Report issued in 1994, which called upon the Secretary to “at a minimum, . . . “take lands owned by tribes in Alaska into trust when requested by a tribe to the extent such lands have been transferred from an ANCSA village corporation pursuant to a vote of the ANCSA village corporation shareholders.” The Commission reasoned that “some tribes in Alaska are acquiring lands from their ANCSA village corporations independent of the process that led to the settlement of Alaska Native aboriginal claims. For that reason, there is questionable justification for treating tribes in Alaska any differently from tribes elsewhere in the United States by denying the protection of trust land status.” In the AFN Implementation Study, completed in December 1999, one of the proposals forwarded to Congress was to “Amend ANCSA to authorize land transfer of 14(c)(3) municipal lands to tribes and to include lands acquired by Alaska tribes as trust lands.”

By acquiring land in trust, tribes would be in a better position to provide essential governmental services to their members, including health care, education, housing, jobs and other economic development opportunities, as well as court and law enforcement services. The lack of recognized geographic delineation of tribal government jurisdiction frustrates Alaska’s tribes’ ability to fulfill needed governmental functions in rural Alaska. Alcohol control, economic development, land use, environmental regulation and other services are impacted as a result of the U.S. Supreme Court’s decision in *Venetie* holding that ANCSA lands are not “Indian country.”

As noted earlier, fee lands owned by a tribe do not have any special protections from taxation. Tribal trust lands, on the other hand, enjoy complete protection from state or local taxation, as well as from the exercise of imminent domain. For these reasons, even some opponents of taking ANCSA land in trust agree that a total ban in Alaska goes too far. There are situations where it may be appropriate for protection of cultural and religious sites or existing Native allotments.

In summary, there are a great many questions that must be addressed with respect to whether lands transferred under ANCSA should be eligible for trust status, and if so under what preconditions. How will the subsurface owners be assured that they will retain their ability to access and develop their interests? Some of our Corporations have called for legislation that would amend the IRA to prohibit the taking of ANCSA lands into trust under the Act without the approval of a majority of the shareholders of the Regional Corporation. Others have suggested that Congress should first direct the Secretary of Interior to undertake a comprehensive study of the political, social and economic needs of Alaska Native peoples, the current legal structures in place to address them, and the means and manner in which those structures can be improved into the future.

Whether these issues are clarified by Congress in legislation or through the regulatory process that results from the *Akiachak* case, we believe there will have to be a full and fair hearing and opportunity to allow all interested Alaska Native entities to be heard. Thoughtful consideration

must be given to the future land needs in Alaska, and all options need to be on the table for consideration.

The Federal Trust Responsibility to Alaska Natives: On May 17, 2011, AFN submitted written comments to the Senate Committee on Indian Affairs on the federal government's trust responsibility to Alaska Natives as part of an Oversight Hearing on Fulfilling the Federal Trust Responsibility. I am attaching a copy of those comments which trace the history of Alaska Natives relationship with the federal government. For today's purposes, it is important to understand that Alaska Natives are entitled to the benefits of the special trust relationship that all other Native Americans enjoy.

Federal officials, often drawing from their experience with the "Indians" on reservations in the lower 48 states, sometimes have assumed the same legal principles applicable there do not apply in Alaska. This is perhaps due to the perception that Alaska's history is "different," and that ANCSA untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's history is that it began with the Alaska Treaty of Cession in 1867¹ rather than with the adoption of the United States Constitution in 1789. This meant that Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the Commerce Clause of the United States Constitution, which grants Congress the power: "To regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."² Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) "all the other inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.³ Nonetheless, until perhaps the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same "trust" relationship with the United States and that, notwithstanding the 1867 treaty, federal Indian law did not apply in Alaska.⁴ Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975, and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

¹ Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat-539, TS No. 301 (1867).

² U.S. Const., Art. I, §8, cl. 3.

³ *In re Minook*, 2 Alaska Repts. 200, 220-221 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). See generally David S. Case and David A. Voluck, *Alaska Natives and American Laws*, 44-46 (2d ed., Univ. Alaska Press 2002) (discussing the application of the 1867 treaty to Alaska Natives).

⁴ Case and Voluck, *supra* at 6-8.

Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.⁵

The federal trust responsibility is considered to arise out of the inherently unequal relationship between the federal government and the “distinctly” Native communities that are federally recognized as tribes. Whether, to what extent and for what time those tribes are to be recognized by the federal government is exclusively a matter left to Congress and the executive (“the political branches of government”). The power of the United States asserted in the field of Indian affairs, under both the Commerce Clause and federal common law, has been held to impose upon the United States a responsibility of trust when dealing with Indian tribes. Congressional exercise of the power is unreviewable so long as it is not inconsistent with other provisions of the United States Constitution. But once Congress has delegated power to the federal executive to administer Indian resources and has sufficiently described the standards by which those resources are to be managed, then the United States executive can be held accountable as would a private trustee.

The general trust responsibility is manifested primarily in the “government-to-government” relationship between the United States and the federally recognized tribes and the plenary authority of Congress to legislate on their behalf. The executive branch has also long been understood to have the authority to recognize the tribes, much as it has the authority to recognize foreign nations. In 1994 Congress confirmed this authority with the enactment of the Federally Recognized Indian Tribe List Act that required the Secretary of the Interior to publish an annual list of federally recognized tribes, and prohibited tribes from being removed from the list except by an act of Congress.⁶ Congress has gone even further in Alaska, where it has frequently defined the Alaska Native corporations established under ANCSA as “tribes” for particular purposes.

In summary, it is now beyond doubt that Alaska Native villages, as well as ANCSA regional and village corporations, are federally recognized “tribes.” The “Native villages” defined in ANCSA, the ISDEA and other statutes and listed under the requirements of the Federally Recognized Tribe List Act are tribal governments with political jurisdiction over their members. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of particular statutory programs and services, including preferences in government contracting as authorized under federal law. As the United States Supreme Court decided nearly a century ago in the case of “distinctly Indian communities ... whether to what extent and for what time they shall be recognized ... is to be determined by Congress.”⁷ In this respect, Alaska Native villages and ANCSA regional and village corporations are squarely within the scope of Congress’s plenary authority and trust responsibility over Native American

⁵ Cohen, *Handbook of Federal Indian Law* (2007 ed. LexisNexis Mathew Bender) at 336, n. 1068, citing among other authorities, AMERICAN INDIAN POLICY REVIEW COMMISSION, Final report, 95th Cong., 1st Sess. 489 (Comm. Print 1977) (“Alaska Natives did not differ markedly from other American native peoples. They organized themselves into social and political units (groups or tribes) as various and multiform, but of the same general nature, as those evolved by the Indians in the lower 48.”); David S. Case & David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 428-431 (2d ed. Univ. Alaska Press 2002).

See authorities cited there.

⁶ Act of Nov. 2, 1994, 108 stat. 4791 (25 U.S.C. §479a, note and §479a-1).

⁷ *U.S. v. Sandoval*, 23 U.S. note 8 supra at 46.

policy under the commerce clause of the United States Constitution. Congress therefore has the same authority to legislate on behalf of all the “distinctly Indian communities” of Alaska as it does throughout the United States.

Alaska Native Hunting and Fishing Rights (Subsistence): Protection of Native hunting, fishing, and gathering rights is a part of federal law throughout the United States. Nowhere is it more important than in Alaska. What we call subsistence is not a relic from the past. It continues to be the foundation of Alaska Native society and culture. A vast majority of Alaska’s 120,000 Native people (nearly 20% of the population of Alaska) still participate in hunting, fishing and gathering for food during the year. Subsistence resources remain central to the nutrition, economies and traditional of Alaska Native villages. The ability of Alaska Natives to continue to pursue their subsistence activities is closely linked to their food security. The average harvest of subsistence resources in pounds per person in rural Alaska is estimated at 544 pounds, equivalent to 50% of the average daily caloric requirement. The economic significance of subsistence in rural Alaska is best appreciated in light of one study that suggested that replacing subsistence foods would range between \$98 and \$164 million, or about \$2,000-\$3,000 per person.⁸ Alaska Natives remain dependent on subsistence hunting and fishing for their economic and cultural survival.

Unfortunately the legal framework in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods. Native leaders sought protection of their hunting and fishing rights in the settlement of their aboriginal land claims, but instead the Alaska Native Claims Settlement Act (ANCSA) extinguished those rights. Instead of explicit protection of Native hunting and fishing rights, Congress expected the State of Alaska and the Secretary of the Interior “to take any action necessary to protect the subsistence needs of Alaska Natives.”

Neither the Secretary nor the State fulfilled that expectation. As a result, Congress enacted Title VIII of the Alaska National Interest Land Conservation Act (ANILCA) in 1980. ANILCA’s scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the priority. Again, Native leaders sought explicit protection for “Native” hunting and fishing rights, but the State objected. Ultimately, the law was crafted to provide a subsistence priority for “rural residents” with the expectation that the State would enact laws that conformed to federal requirements. That system operated for less than a decade before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the program. Consequently, the State lost regulatory authority over subsistence uses on federal lands.

Today, after more than 20 years of dual federal and state management, it has become abundantly clear that the State will not do what is required to regain management authority over subsistence uses on federal lands and waters. The State subsistence law has been effectively gutted – large areas of the state have been classified as “nonsubsistence use areas,” where subsistence users receive no priority, and “all Alaskans” have been declared eligible for the subsistence priority on all remaining state lands.

⁸ Scott Goldsmith, *The Remoter Rural Economy of Alaska* at 37-38, published by the University of Alaska Anchorage, Institute of Social and Economic Research (April 12, 2007); Alaska Department of Fish and Game, Division of Subsistence, *Subsistence in Alaska: A Year 2000 Update*.

ANILCA does not provide long-term protection for the Native subsistence way of life. Instead, subsistence harvests have been marginalized by other users and ineffective management regimes. Alaska Natives have been made criminals for feeding their families and communities, and penalized for practicing their ancient traditions. The fact that Alaska Natives were given only a very limited role in the management of their hunting and fishing rights through ANILCA – even on their own lands -- critically undermines all attempts to protect customary and traditional uses, practices and needs.

Congress settled our land claims in ANCSA, but did not deal with our hunting and fishing rights. The substitute for Native hunting and fishing rights, Title VIII of ANILCA, has proved inadequate and does not ensure food security for our people. Justice and fairness require that these rights be restored in consultation with Alaska's tribes and corporations.

Rather than simply defending and repairing a broken system that no longer serves its intended purpose, it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Congress should introduce and pass legislation that will restore and protect Native hunting and fishing rights in Alaska, and provide a co-equal role for Alaska Natives in the management of fish, wildlife and other renewable resources that Alaska Natives rely upon for their economic and cultural existence. Congress has the authority to enact legislation that ensures a "Native" or "tribal" subsistence preference on all lands and waters in Alaska, and to provide a co-management role for Alaska Natives. It has done so in the enactment of numerous other federal laws that provide explicit protection for Native hunting and fishing rights in Alaska.

Federal legislation would fulfill the federal government's trust responsibility to protect Alaska Native subsistence culture and economy. It would end "dual management" and fulfill Congress' original intent to protect the Alaska Native subsistence way of life on all lands and waters in Alaska. By embracing co-management with Alaska Natives, the federal government could administer a much more responsive and cost-efficient management program. It would reduce the litigation that has plagued the implementation of Title VIII since its passage and would be consistent with the United States' obligations under the UN Declaration on the Rights of Indigenous Peoples.

I am attaching AFN's extensive comments to the Secretary of the Interior in 2010 during his review of Federal Subsistence Management in Alaska, as well as a briefing paper on administrative actions the Secretary can take immediately that would improve protections for our customary and traditional hunting and fishing rights. As we make clear in our comments, without fundamental structural changes to the law, more of our people will lose the right to live a subsistence way of life -- especially those whose traditional hunting and fishing grounds are on state and Native owned lands. Dual management will continue, as will the litigation, and our way of life will continue to be ensnared in a web of inconsistent state and federal laws and court decisions.

The competing federal and state administration of subsistence significantly impairs the food security of people who need it the most, and denies us our basic human rights to food security and self-determination and the right to maintain our own unique culture – rights that are recognized under International law and due protection by the United States.

**Written Comments on behalf of the Alaska Federation of Natives
Before the
Senate Committee on Indian Affairs**

**Oversight Hearing on Fulfilling the Federal Trust Responsibility:
The Foundation of the Government-to-Government Relationship**

May 17, 2011

The Alaska Federation of Natives, Inc. (AFN), hereby submits the following comments on the federal government's trust responsibility to Alaska Natives.

AFN was formed in 1966, to address Alaska Native aboriginal land claims. From 1966 to 1971, AFN devoted most of its efforts to passage of a just land settlement in the U.S Congress. On December 17, 1971, those efforts were rewarded with the passage of the Alaska Native Claims Settlement Act (ANCSA). Today, AFN is the largest Native organization in Alaska. Its membership includes the vast majority of Alaska's 244 Native villages, 13 regional for-profit corporations (established pursuant to ANCSA), and 11 of the 12 regional Native nonprofit tribal consortia that contract for and run a broad range of state and federal programs for their member villages. The overall mission of AFN is to enhance and promote the cultural, economic and political voice of the Alaska Native community.

Federal officials, often drawing from their experience of the "Indians" on reservations in the lower 48 states, sometimes have assumed the same legal principles applicable there do not apply in Alaska. This is perhaps due to the perception that Alaska's history is "different," and that ANCSA untethered the Alaska Natives and the federal government from the normal legal principles applicable to their relationship. Neither perception is accurate.

The fundamental "difference" in Alaska's American history is that it began with the Alaska Treaty of Cession in 1867¹ rather than with the adoption of the United States Constitution in 1789. This meant that Alaska Natives were not part of the first nearly 80-year history of federal Indian policy under the Commerce Clause of the United States Constitution, which grants Congress the power: "To regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."² Article III of the 1867 Treaty of Cession divided all the inhabitants of Alaska into two broad categories: (1) the "uncivilized native tribes" and (2) "all the other inhabitants." The inhabitants "with the exception of the uncivilized native tribes" were to be admitted as citizens of the United States. As for the tribes, the last sentence of Article III provides that:

The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time, adopt with regard to the aboriginal tribes of that country.

¹ Treaty Considering the Cession of Russian Possessions in North America, U.S.-Rus., 15 Stat-539, TS No. 301 (1867).

² U.S. Const., Art. I, §8, cl. 3.

As early as 1904 the federal courts held that this sentence applied the whole body of federal Indian law to the tribes of Alaska.³ Nonetheless, until perhaps the end of the 20th century, there was general judicial and policy confusion about the status of the Alaska Natives and their relationship to the federal government. It was often assumed that they did not have the same “trust” relationship with the United States and that, notwithstanding the 1867 treaty, federal Indian law did not apply in Alaska.⁴ Beginning with the enactments of ANCSA in 1971 and the Indian Self-Determination and Education Assistance Act in 1975, and continuing with a host of statutes enacted to the end of the 20th century, it is now well established that:

Alaska natives, including Indians, Eskimos and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution.⁵

II. ORIGINS OF THE TRUST RESPONSIBILITY

The federal government’s trust responsibility to Native Americans finds its origins in the federal government’s assumption of power and responsibility over Indian lands and tribal governments. The power, exercised by Congress under the Commerce Clause, is characterized as “plenary” or complete.⁶ The executive branch is often delegated authority over Indian affairs, including the authority to “recognize” tribal governments.⁷ Both Congress and the executive are characterized as the “political” branches of the government whose determinations as to the existence of Indian tribes and the extent to which they are recognized as tribes are judicially unreviewable.⁸ The United States Supreme Court recently characterized the origins of the federal authority over Indian affairs as being “preconstitutional,” because it incorporates elements of military and foreign policy that are “necessary concomitants of nationality” which do not necessarily require the affirmative grant of federal power.⁹

The federal trust responsibility is founded on the inherently unequal relationship between the Native Americans and the federal government – an inequality largely of the government’s own making.¹⁰ The nature of that relationship was defined in the early years of the republic by congressional enactments and the decisions of the United States Supreme Court - the so-called

³ *In re Minook*, 2 Alaska Repts. 200, 220-221 (D. Alaska 1904) (so holding in determining a question of Alaska Native citizenship). See generally David S. Case and David A. Voluck, *Alaska Natives and American Laws*, 44-46 (2d ed., Univ. Alaska Press 2002) (discussing the application of the 1867 treaty to Alaska Natives).

⁴ Case and Voluck, *supra* at 6-8.

⁵ Cohen, *Handbook of Federal Indian Law* (2007 ed. LexisNexis Mathew Bender) at 336, n. 1068, citing among other authorities, AMERICAN INDIAN POLICY REVIEW COMMISSION, Final report, 95th Cong., 1st Sess. 489 (Comm. Print 1977) (“Alaska Natives did not differ markedly from other American native peoples. They organized themselves into social and political units (groups or tribes) as various and multiform, but of the same general nature, as those evolved by the Indians in the lower 48.”); David S. Case & David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 428-431 (2d ed. Univ. Alaska Press 2002).

See authorities cited there.

⁶ See, e.g. *United States v. Lara*, 541 U.S. 193, 201-202 (2004).

⁷ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913). See also, Federally Recognized Tribe List Act of 1994 (25 U.S.C. §479a, note and §479a-1).

⁸ *U.S. v. Holliday*, 70 U.S. 407, 419 (1865).

⁹ *U.S. v. Lara*, 541 U.S. *supra* at 200. (Citation omitted.)

¹⁰ E.g. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

Marshall Trilogy. The Trade and Intercourse Acts of 1790 imposed a statutory restraint on the alienation on all tribal lands, preventing their disposition by the tribes except by a federal treaty.¹¹ The statute ensured a federal monopoly over the disposition of Indian lands, but it was the Supreme Court that defined the nature of Indian title.

In *Johnson v. M'Intosh*, John Marshall employed the fiction of the “rule of discovery” to find that the United States held a superior title to the lands (variously characterized as “fee,” “absolute title” or “absolute ultimate title”).¹² The Indians, on the other hand, were considered to have an exclusive right of use and occupancy (which later came to be described as “aboriginal title” or “Indian title”) that can only be defeated by the exercise of congressional authority. Because the United States gained the preemptive right to purchase the title, the result was that the Indian title was significantly diminished at common law in a way that paralleled the Trade and Intercourse Act’s restraint on alienation.¹³

In the Cherokee cases (*Cherokee Nation v. Georgia* and *Worchester v. Georgia*), Marshall extended the analysis of the federal-tribal relationship to describe the political status of the Indian tribes as “domestic dependant nations” whose relationship to the federal government was something like that of a “ward to his guardian.”¹⁴ As a result of the Marshall decisions, and as a matter of federal common law, the Indians lost control of the disposition of their lands, and their governments were deemed placed under the protection of the federal government, subject to further limitations of their powers by Congress.¹⁵

Supreme Court decisions in the late 19th to early 20th centuries expanded upon the Marshall Trilogy, to evolve a virtually unchallengeable interpretation of the scope of congressional authority to legislate in the field of Indian affairs.¹⁶ Congressional power to legislate seems to be limited only by other provisions of the Constitution, which, for example, require compensation for the taking of treaty lands and rights.¹⁷ Similarly:

[I]n respect distinctly Indian communities the question is whether, to what extent to and for what time they shall be recognized and dealt with as dependant tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.¹⁸

The trust responsibility, as exercised by Congress, is almost unfettered power without responsibility. Thus, Congress can extinguish Native land claims, settle them without

¹¹ Act of July 22, 1790, 1 Stat. 137 (25 U.S.C. §177).

¹² *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).

¹³ See generally, *Cohen*, supra, section 5.04 [4][a], describing the development of the trust responsibility.

¹⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1871).

¹⁵ *Cohen*, supra. at page 420. See also, *U.S. v. Lara*, 541 U.S. supra. at 205 (Inherent tribal power subject to divestiture by Congress.)

¹⁶ See e.g. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (tribal status determined exclusively by the political branches of government) and *U.S. v. Kagama*, 118 U.S. 375 supra at 384 (although not within the scope of the Commerce Clause, Congress had power to regulate and prescribe penalties for crimes by Indians in Indian country because from the federal relationship to the tribes “there arises the duty of protection, and with it the power.”

¹⁷ *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Congress can not exercise plenty of power to deprive a tribe of its treaty lands without just compensation).

¹⁸ *U.S. v. Sandoval*, 231 U.S. 28, 46 (1913).

compensation to or the consent of the Natives, and terminate federal recognition of tribal status.¹⁹ However, once Congress delegates the power to manage tribal assets to the executive branch and prescribes the standards for doing so, the executive branch can be held to principles applicable to a private trustee.²⁰

To summarize, the federal trust responsibility is considered to arise out of the inherently unequal relationship between the federal government and the “distinctly” Native communities that are federally recognized as tribes. Whether, to what extent and for what time those tribes are to be recognized by the federal government is exclusively a matter left to Congress and the executive (“the political branches of government”). The power of the United States asserted in the field of Indian affairs, under both the Commerce Clause and federal common law, has been held to impose upon the United States a responsibility of trust when dealing with Indian tribes. Congressional exercise of the power is unreviewable so long as it is not inconsistent with other provisions of the United States Constitution. But once Congress has delegated power to the federal executive to administer Indian resources and has sufficiently described the standards by which those resources are to be managed, then the United States executive can be held accountable as would a private trustee.

The general trust responsibility is manifested primarily in the “government-to-government” relationship between the United States and the federally recognized tribes and the plenary authority of Congress to legislate on their behalf. The executive branch has also long been understood to have the authority to recognize the tribes, much as it has the authority to recognize foreign nations. In 1994 Congress confirmed this authority with the enactment of the Federally Recognized Indian Tribe List Act that required the Secretary of the Interior to publish an annual list of federally recognized tribes, and prohibited tribes from being removed from the list except by an act of Congress.²¹ Congress has gone even further in Alaska, where it has frequently defined the Alaska Native corporations established under ANCSA as “tribes” for particular purposes.

III. THE GOVERNMENT’S TRUST RESPONSIBILITY TO ALASKA NATIVES

The great confusion about the history of the relationship between the Alaska Natives and the federal government is that it is often characterized as being “unique.” In truth it is no more unique than the history of any other Native American community within the United States. Like all Native American communities, that history begins with a treaty between the United States and a European power ceding the European power’s authority over Native American territory to the United States. These cessions are understood to convey to the United States the exclusive right

¹⁹ See, e. g. *Tee-Hit-Ton Band of Indians v. U.S.*, 348 U.S. 272, at 283, n. 17 (1955) (Holding that Native land claims in Alaska are on the same footing as in the lower 48 states and congressional extinguishment of aboriginal title is not compensable under the Fifth Amendment.) See also, *U.S. v. Lara*, 541 U.S. 193 *supra*, at 202 (Congress can enact laws both restricting, then relaxing restrictions on tribal sovereignty).

²⁰ Compare *U.S. Mitchell I*, 445 U.S. 535 (1980) (Remanded to determine if federal government had defined statutory responsibilities in the management of allotment timber) with *U.S. v. Mitchell II*, 463 U.S. 206 (1983) (Upholding a statutory responsibility to manage Indian timber). See also, *Seminole Nation v. U.S.*, 316 U.S. 286, 297, n.12 (1942). (Holding the United States to “the most exacting judiciary standards” when it erroneously paid money to the agents of the Indian tribe knowing them to be dishonest).

²¹ Act of Nov. 2, 1994, 108 stat. 4791 (25 U.S.C. §479a, note and §479a-1).

recognized under *Johnson v. M'Intosh* to acquire the aboriginal title of the Native Americans.²² As in the contiguous United States, Native people living primarily in village communities historically denominated as "tribes" also populate Alaska.

As noted earlier, what *was* different about Alaska was that the year was 1867, not 1789. By that time, following the end of the Civil War, America was on the march west and the Indians were in the way. In the latter half of the 19th century the United States adopted policies calculated to assimilate Native Americans and break up their tribal governments and tribal lands. These policies found their expression in late 19th century Alaska judicial decisions and federal Alaska policies. Until 1884 Alaska was governed as a military district, but when the army attempted to use the Trade and Intercourse Act to stop the introduction of liquor, the courts held that Alaska was not "Indian country" subject to the Act.²³ The next year, Congress applied the liquor control sections of the Intercourse Act to Alaska, after which the courts upheld prosecutions for supplying liquor to the Indians.²⁴

Similarly, the BIA was held to have no authority to implement programs or spend money in Alaska.²⁵ The 1884 Organic Act also required education in the territory to be "without regard to race."²⁶ In 1886 the Alaska courts held that the Tlingit Indians did not have sovereign authority.²⁷ Much as was then the policy in the lower 48 states, these cases, statutes, and policies in Alaska were designed to assimilate the Natives into American society and generally avoided treating Alaska Natives as being subject to federal Indian law. At the end of the 19th century, the Department of the Interior Solicitor held that Alaska Natives did not have the same relationship to the federal government as other Native Americans.²⁸

In spite of these policies, other forces were at work to protect Alaska Native lands under the doctrines of aboriginal title and to deal with the Alaska Native villages as tribal governments. Two cases, in 1904 and 1914, upheld the authority of the United States to prevent trespass to aboriginal lands in Alaska.²⁹ Additionally, although education was to be "without regard to race", in fact, it was very much with regard to race.

A noted missionary, Dr. Sheldon Jackson, was appointed General Agent for Education in Alaska to implement the educational policies of the 1884 Organic Act. In that capacity he established numerous schools in remote Native villages, which became the focus of health care, reindeer herding, and other programs administered by the Department of Interior's Bureau of Education exclusively for Natives. In 1905 the Nelson Act specifically required the separation of white and Native children in the schools and increased the appropriations for Native services in Alaska.³⁰

²² *Fletcher v. Peck*, 10 U.S. 87, 142-143 (1810). ("[T]he Indian title. . . to be respected by all courts, until it be legitimately extinguished," continues with the land when it is acquired by a new sovereign.)

²³ See *U. S. v. Seveloff*, 1 Alaska Rpts. 64 (1872).

²⁴ *In re Carr*, 1 Alaska Rpts. 75 (1875).

²⁵ *Case and Voluck* supra at 187, n. 2.

²⁶ Act of May 17, 1884 §13, 23 stat 24.

²⁷ *In re Sah Quah*, 1 Alaska Fed. Rpts. 136 (1886).

²⁸ *Alaska-Legal Status of Native*, 19 L. D. 323 (1894).

²⁹ *U.S. v. Berrigan*, 2 Alaska Rpts. 442 (D. Alaska 1904) and *U.S. v. Cadzow*, 5 Alaska Rpts. 125 (D. Alaska 1914).

³⁰ Act of January 27, 1905, 33 stat 616, 619. See also *Case and Voluck* supra at 8.

In 1932, responsibility for Alaska Native programs was transferred to the BIA. Shortly thereafter the Interior Department Solicitor issued a new opinion, concluding after an exhaustive analyses of applicable cases, statutes and policies:

From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos or other natives are natives or of Indian origin or not as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska referred to in the [1867 Treaty of Cession], are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States.³¹

Four years later the Indian Reorganization Act was amended to specifically apply to the Alaska Natives.³² Nonetheless, the confusion about the status of the Alaska Natives continued to the end of the 20th century.

Alaska was admitted as a state on January 3, 1959. As was typical of most western states, a provision in the Alaska Statehood Act and an identical provision in the Alaska Constitution disclaimed “all right or title ... to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives)” and retained these lands “under the absolute jurisdiction and control of the United States until disposed of under its authority.”³³ Six months later, in a long pending case, the United States Court of Claims affirmed the aboriginal title of the Tlingit and Haida Indians to virtually all of southeast Alaska.³⁴ This decision set the stage for the settlement of the broader Alaska Native claims to aboriginal title throughout the new state and implicitly rejected the notion that the Alaska Natives were “unique” and not entitled to such claims.

Responding to these claims, then Secretary of the Interior Udall imposed a land freeze on state selections under the Statehood Act. The state challenged the land freeze, but the Ninth Circuit Court of Appeals affirmed that the Native claim to exclusive use and occupancy was sufficient to prevent the state from making its selections under the statehood act until the claims were resolved.³⁵ Two years later, Congress, exercising its plenary power, enacted ANCSA, extinguishing aboriginal title throughout Alaska and confirming what would amount to 45 million acres of surface and subsurface estate to 12 regional and more than 200 village corporations.

The only mention of “tribes” in ANCSA is in the definition of “Native village,” which includes “any tribe, band, clan, group, village, community, or association in Alaska” that

³¹ *Status of Alaska Natives*, 53 I. D. 593, I Ops. Sol. 303, 310. (1932).

³² Act of May 1, 1936, §1, 41 stat 1250 (25 U.S.C. §473a).

³³ Act of July 7, 1958, §4, 72 stat. 339. See also Art. XII, §12 of the Alaska Constitution.

³⁴ *Tlingit and Haida v. U.S.*, 147 Ct. Cls. 315, 177 F. Supp. 452 (1959).

³⁵ *Alaska v. Udall*, 420 F. 2nd 938 (9th Cir. 1969).

qualified for ANCSA benefits.³⁶ The residents of each Native village were authorized to organize a “Village Corporation”³⁷ which is defined in ANCSA as:

an Alaska Native Village Corporation organized under the law of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and behalf of a Native village in accordance with the terms of [ANCSA].³⁸

The village corporations were to receive the surface lands under ANCSA and the regional corporations were to receive the subsurface of those lands as well as, in some cases, additional surface and subsurface lands.³⁹ Although the “Native villages” clearly included “tribes,” the corporations were not initially considered to be tribes. That soon changed.

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDEA”). The ISDEA expressed a firm congressional commitment to:

the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.⁴⁰

The ISDEA required the contracting of federal programs to an “Indian tribe” or the tribe’s designated “tribal organization.” The definition of these terms was crucial. “Indian tribe” under the ISDEA means:

Any Indian tribe, band, nation, or other organized group or community including any Alaska Native *village or regional or village corporation* as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (Emphasis added.)⁴¹

A “tribal organization” is defined in important part as “any legally established organization of Indians which is controlled, sanctioned, or chartered by [the governing body of an Indian tribe].”⁴²

³⁶ Act of December 18, 1971, §3(c), 85 stat. 689 (43 U.S.C. §1602(c)).

³⁷ 43 U.S.C. §1607(a).

³⁸ 25 U.S.C. §1602 (j).

³⁹ Regional corporations were organized within each of the 12 ethnic regions of Alaska under 43 U.S.C. §1606.

⁴⁰ Act of January 4, 1975, §3 (b), 88 stat. 2203 (25 U.S.C. §450a(b)).

⁴¹ 25 U.S.C. §450 b(e).

⁴² *Id.* at 25 U.S.C. §450b(l).

Thus, four years following the enactment of ANCSA, Congress identified three separate Alaska Native institutions as “tribes.” At that time and up to the present most Alaskan Native villages are also organized as consortia of regional nonprofit corporations, which were ideally suited to act as a “tribal organization” for purposes of ISDEA contracting. This resulted in the rapid contracting of BIA and IHS services to those organizations, as well as in many cases, to individual villages.⁴³ Moreover, the inclusion of the village and regional corporations as “tribes” enabled the corporations to obtain contracts under the ISDEA when Native villages were not available for contracting.⁴⁴

A year earlier, Congress had enacted the Indian Financing Act.⁴⁵ The Indian Financing Act also defined “tribe” to include “Native villages and Native groups ... as defined in [ANCSA].”⁴⁶ Moreover, the Indian Financing Act defined “reservation” to include “land held by incorporated Native groups, regional corporations, and village corporations under the provisions of [ANCSA].”⁴⁷ The treatment of all of Alaska as being “on or near the reservation” is also a longstanding federal policy. The United States Supreme Court has described this policy in great detail as being the geographic area in which BIA social service programs are implemented in Alaska.⁴⁸ Current social service regulations also define “reservation” as “including Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act.”⁴⁹ Moreover, the Indian Financing Act definitions of reservation and the ISDEA definition of tribe are commonly repeated in more than two-dozen federal statutes enacted over the last twenty years.⁵⁰ These statutes include the Indian Health Care Improvement Act of 1976, under which hundreds of millions of dollars in health care programs are now provided annually through the Alaska Native Tribal Health Consortium.⁵¹

Likewise, federal courts have upheld preferential economic treatment for Alaska Native corporations and Native-owned enterprises. For example, under Section 7(b) of the ISDEA, preferences in subcontracts and contracts are to be given to Indian organizations and Indian economic enterprises in implementing housing and any other programs under the ISDEA.⁵² The Alaska Chapter of the Associated General Contractors challenged these regulations when applied to Department of Housing and Urban Development programs. In upholding the preferences the Ninth Circuit concluded that:

⁴³ See *Case and Voluck* at 221-224 describing the effect of the ISDEA in Alaska.

⁴⁴ *Cook Inlet Native Assn. v. Bowen*, 810 F. 2^d 1471-1476 (9th Cir. 1987) (ANCSA regional corporation held to be a tribe for purposes of ISDEA contracting for health and other federal services.)

⁴⁵ Act of April 12, 1974, 88 stat. 77 (25 U.S.C. §1451 et seq).

⁴⁶ *Id.* 25 U.S.C. §4539(c).

⁴⁷ *Id.* 25 U.S.C. §452(d).

⁴⁸ *Morton v. Ruiz*, 415 U.S. 199, 212-213 (1974). Oklahoma Natives have historically been afforded a similar special treatment.

⁴⁹ 25 C.F.R. §20.100 “Reservation.”

⁵⁰ See e.g. Indian Child Protection and Family Violence Act of November 28, 1990 (25 U.S.C. §3202(9) defining “Indian reservation” to include land held by Alaska Native groups on regional or village corporations under ANCSA and (10) defining “Indian tribe” to be the same as the definition under the ISDEA; See also American Indian Agriculture Resource Management Act of December 3, 1993, 25 U.S.C. §3703(10) defining “Indian tribe” to include Alaska Native village or regional corporations.

⁵¹ 25 U.S.C. §1601 et seq. The Act defines “Indian Tribes” as including ANCSA corporations. 25 U.S.C. §1603(d). See also, *Case & Voluck*, supra., note 2 at 220 -221. (Describing the scope of these programs.)

⁵² 25 U.S.C. §450e(b).

Congress has utilized methods other than tribal rolls or proximity to reservations, which have generally been used as eligibility criteria in statutory programs for the benefit of Indians. The Supreme Court has already noted and approved one such different treatment of Alaska Natives.⁵³

More broadly the Ninth Circuit noted that:

It is now established that through [the 1867 Treaty of Cession] the Alaska Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.⁵⁴

More recently, the District of Columbia Circuit Court of Appeals has similarly upheld a preference in defense contracting specifically benefiting the Alaska Native corporations. The legislation enabled an Alaska Native corporation joint venture to obtain a preferential contract for the management of a federal military base. Unlike the other statutes discussed above, the Defense Appropriation Acts adopted between fiscal years 1999 and 2000 allowed a preference in federal contracting for firms of at least 51 percent "Native American ownership." The joint venture applied for and received a preferential contract to manage Kirtland Air Force Base.⁵⁵

The D.C. Circuit Court rejected the argument that the preference was racially based because: "When Congress exercises this constitutional power [under the Commerce Clause] it necessarily must engage in classifications that deal with Indian tribes."⁵⁶ The court noted that Congress has the exclusive authority to "determine which 'distinctly Indian communities' should be recognized as Indian Tribes."⁵⁷ The court therefore upheld the contracting preference as applied to the Alaska Native corporations even though they were not specifically defined as "tribes" in the Defense Appropriation Acts.⁵⁸ This decision implicitly confirms the constitutionality of an earlier amendment to ANCSA that statutorily qualifies Alaska Native Corporations as "disadvantaged businesses" for purposes of the federal 8(a) contract set-aside program.⁵⁹

Beyond the congressional treatment of the Alaska Native corporations as tribes for certain purposes, it is also now well established in the general sense that the Alaska Native villages (also defined as "tribes" in ANCSA) are federally recognized tribal governments. Owing perhaps to ANCSA's omission of tribes in the settlement, it took more than twenty years of litigation to confirm their status. At the end of the first Bush administration, Thomas L. Sansonetti, the Solicitor for the Department of Interior, issued a comprehensive 133-page

⁵³ *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F. 2d 1162, 1169 n. 10 (9th Cir. 1982) citing *Morton v. Ruiz*, supra. at note 49.

⁵⁴ Id. at 1169, n. 10 (citation omitted).

⁵⁵ *American Federation of Government Employees v. U.S.*, 330 F. 3d 513 (D. C. Cir. 2003).

⁵⁶ Id. At 521.

⁵⁷ Id at 520, citing *U.S. v. Sandoval*, 231 U.S. 29, supra note 8.

⁵⁸ Id. at 522-523. ("[P]romoting the economic development of federally recognized Indian tribes (and their members) is rationally related to a legitimate legislative purpose and thus constitutional").

⁵⁹ 43 U.S.C. § 1626(e).

opinion examining the historical status of the Alaska Natives and their continued entitlement to federal services and programs. Although the opinion stopped short of deciding that all the Alaska villages were federally recognized tribes, it noted in conclusion that:

In our view, Congress and the Executive Branch have been clear and consistent in the inclusion of Alaska Natives as eligible for benefits provided under a number of statutes passed to benefit Indian tribes and their members. Thus we have stated that it would be improper to conclude that no Native village in Alaska could qualify as a federally recognized tribe.⁶⁰

Nine months later the new Clinton administration published a comprehensive "Notice" in the federal register listing more than 200 of the Alaska Native villages and two regional tribes as federally recognized Indian tribes. The Notice states specifically that:

This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather they have the same *governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.*⁶¹

The very next year, Congress passed the Federally Recognized Indian Tribe List Act that required the annual publication of a list of all federally recognized Indian tribes.⁶² In 1998, after many years of litigation, the United States Supreme Court denied territorial jurisdiction to Alaska Native tribes to impose a tax on non-Natives on ANCSA land now held by the tribe.⁶³ In reaching its decision, the Supreme Court noted with apparent approval that the effect of ANCSA was to leave the Alaska Native villages as "sovereigns, without territorial reach."⁶⁴ The next year the Alaska Supreme Court concluded, in a ground-breaking decision, that even without territory Alaska Native villages, as federally recognized tribal governments, retained inherent jurisdiction over their members even outside of Indian country, sufficient to determine a child custody and probably other "internal" matters significant to the exercise of inherent tribal sovereignty.⁶⁵

IV. CONCLUSION

It is now beyond doubt that Alaska Native villages, as well as ANCSA regional and village corporations, are federally recognized "tribes." The "Native villages" defined in ANCSA, the ISDEA and other statutes and listed under the requirements of the Federally Recognized Tribe List Act are tribal governments with political jurisdiction over their members

⁶⁰ "Governmental Jurisdiction of Alaska Native Villages Over Land and Non-Members" (M-36975, January 11, 1993).

⁶¹ 58 F. Reg. 54365, 54366 (October 21, 1993).

⁶² See 25 U.S.C. §479a note, and 479a-1 at note 22, *supra*.

⁶³ *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

⁶⁴ *Id.* at 526.

⁶⁵ *John v. Baker I*, 982 P. 2nd 738 (Alaska 1999).

and perhaps others. Alaska Native regional and village corporations, as defined in or established under ANCSA, are also tribes for purposes of particular statutory programs and services, including preferences in government contracting as authorized under federal law. As the United States Supreme Court decided nearly a century ago in the case of “distinctly Indian communities ... whether to what extent and for what time they shall be recognized ... is to determined by Congress.”⁶⁶ In this respect, Alaska Native villages and ANCSA regional and village corporations are squarely within the scope of Congress’s plenary authority and trust responsibility over Native American policy under the commerce clause of the United States Constitution. Congress therefore has the same authority to legislate on behalf of all the “distinctly Indian communities” of Alaska as it does throughout the United States.

Finally, AFN agrees with the recommendations of many of the witnesses at the hearing who urged Congress to reverse some of the US Supreme Court ‘s holdings that have been adverse to tribal rights, and reassert itself as the primary policymaking entity for the federal government. A clear statement of the general trust responsibility of the federal government to Indian tribes would be helpful in ensuring that all federal agencies and the federal courts acknowledge Congress’s primacy as the lead policy maker in Indian Affairs. In doing so, Congress should link its restatement of the federal government’s general trust responsibility to the provisions of the UN Declaration on the Rights of Indigenous Peoples.

Congress settled our land claims but did not deal with tribal sovereignty at the time. The Supreme Court’s decision in *Venette* terminated tribal powers over ANCSA lands. Congress also did not deal with our hunting and fishing rights. The substitute for Native hunting and fishing rights, Title VIII of ANILCA, has proved inadequate and does ensure food security for our people. Justice and fairness require that rights in these two areas be restored in consultation with Alaska’s tribes.

⁶⁶ *U.S. v. Sandoval*, 23 U.S. note 8 supra at 46.

Legal Empowerment & Indigenous Peoples Conference

Developing a US Agenda for Change – May 9, 2011 Washington, D.C.
A draft working document to inform discussions during this conference and beyond.
Prepared for the Alaska Federation of Natives.

Restoration of Aboriginal Rights

Introduction

Alaska Native aboriginal rights to land and associated resources were not dealt with until Congress enacted the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971. Like many indigenous land claims, the discovery of exploitable resources prompted the settlement of aboriginal rights in Alaska. Alaska's movement toward statehood was typical of United States' expansion, in that the aboriginal occupants of the Alaska Territory had their rights to property and sovereignty determined by the newcomers. While the Statehood Act disclaimed any effect on the aboriginal title claims of Alaska Natives, it, along with the discovery of oil on the North Slope, was the driving force for placing aboriginal claims on the table for settlement on terms set by Congress in ANCSA.

The Act extinguished aboriginal title, but left unresolved important questions regarding tribal sovereignty and Native hunting, fishing and gathering rights. It did not allow for the collective rights of Alaska Native peoples to consent to the terms of the act, an essential element of self-determination under international law. ANCSA was a property rights settlement, which did not speak explicitly to governance questions at all. Glaring deficiencies in the settlement include the failures to provide a self-governance option, or to protect Native hunting, fishing and gathering rights.

A whole host of other issues that should have been included in the settlement were inadvertently left on the table in the haste to settle aboriginal land claims. The bundle of tribal rights that were not addressed in ANCSA, which are taken for granted by tribes in the lower-48, include those that generally apply within "Indian country." They include the favorable treatment given to tribal enterprises for ANCSA corporations, such as exemption from taxation (i.e., treatment equal to that given tribal enterprises organized under the IRA); adequate, long-term funding for Alaska's Native peoples from federal off-shore oil and gas development in areas traditionally used and occupied by them; co-management of federal public lands in Alaska with Native land owners; federal investment in education of Alaska Natives instead of turning it over to the State of Alaska and requiring Native students to excel under a system in which they have limited or no control.

The failure to address these tribal rights has resulted in years of litigation over tribal sovereignty and tribal jurisdiction. Though the fundamental rights to participation in decision making, consent, intergenerational rights, development, and a wide range of other rights were not

contemplated within the terms of ANCSA, Alaska Native tribes have remained intact and active. They and the ANCSA corporations have struggled to make ANCSA work. The corporations were foreign to Alaska Natives, but through hard work and perseverance they have succeeded. The regional and a few of the village corporations have since become some of the most important business enterprises in Alaska, employing thousands of people and generating billions of dollars in annual revenue from business activities around the world. At the same time, the basic structure of tribal governance in Alaska today remains legally recognized.¹

Congress and the Administration need to address the rights of indigenous peoples in Alaska in a comprehensive way and in a manner consistent with existing and emerging international human rights law. Congress has broad authority to restore these rights. This paper addresses one aspect of the problem – ANCSA’s extinguishment of aboriginal hunting, fishing and gathering rights. There are many other unfinished issues that need to be addressed.

Background

The Secretary of the Interior, Ken Salazar, announced a comprehensive review of the federal subsistence management program contained in Title VIII of ANILCA in 2009. AFN devoted substantial resources to the review and submitted the following recommendation at the close of the process.

ANILCA’s scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA’s compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress’s original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We have reviewed many of them and held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska. Congress has the authority to enact legislation, based on the supremacy clause and on its

¹ *John v. Baker*, 982 P.2d 738 (Alaska 1999)(Alaska tribes continue to have power over their members and others who consent to their jurisdiction notwithstanding the U.S. Supreme Court’s decision in *Native Village of Venetie*, 522 U.S. 520 (1998), finding that ANCSA lands were not “Indian country” and thus not territory subject to tribal jurisdiction under general principles of federal Indian law).

plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska.

Unfortunately, the Secretarial review resulted in few meaningful changes, and failed to prompt any attention from Congress. It is thus time to explore some legislative options for advancement by the Native community. Otherwise, the existing subsistence regulatory scheme will remain and the status quo will become the future.

This memorandum addresses issues raised by proposals to: 1) repeal the provision of the Alaska Native Claims Settlement Act (ANCSA) that extinguished aboriginal hunting and fishing rights (§ 4(b));² 2) replace the extinguishment clause with improved protection and recognition of Native hunting and fishing rights, possibly through amendments to ANILCA. Before delving into these issues, however, the basic attributes of aboriginal title are addressed, along with a brief discussion of federal power in this area.

I. Aboriginal Title in General

Under principles of international law, discovering European nations asserted the exclusive right to deal with indigenous peoples with respect to matters of land ownership and intergovernmental relations.³ The property rights of Alaska Natives and Indian tribes in the lower 48 states to use and occupy their lands were labeled aboriginal title, or original Indian title.⁴ In *Johnson v. McIntosh*, Chief Justice Marshall declared that “The absolute ultimate title [of the United States] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”⁵ In the subsequent case of *Cherokee Nation v. Georgia*, Marshall stated that “the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government[.]”⁶ The rights asserted by the “discovering” nation, thus consisted of a technical legal title, plus the “right of preemption,” which is the right to acquire the full beneficial title to land used and occupied by the indigenous occupants.⁷ Of course, Alaska Natives had no such understanding,

² 43 U.S.C. § 1603(b) (“All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.”).

³ See generally, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at 10-22 (2005) (FEDERAL INDIAN LAW).

⁴ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁵ *Id.* at 582.

⁶ 30 U.S. 1, 17 (1830).

⁷ The discovery doctrine is often also described as one which vested legal title to aboriginal lands

much less agreement, with the proposition that Russia, the United States, or any other country could divest the Native peoples of their rights to soil and their way of life without their voluntary consent. Chief Justice Marshall was aware of the arrogance of the colonial legal proposition: “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”⁸ Thus, the United States’ legal claim to title was buttressed by Supreme Court decision and the framework for the eventual extinguishment of aboriginal land ownership in the lower 48 states, Alaska and Hawaii was in place.⁹ However, until Congress extinguishes aboriginal title, Native tribes hold a legal right to exclusive use and occupancy of aboriginal lands and waters. That exclusive right includes rights to hunt, fish and gather and make use of other natural resources in aboriginal areas. As the leading treatise notes:

Aboriginal title, along with its component hunting, fishing, and gathering rights, remains in the tribe that possessed it unless it has been granted to the United States by treaty, abandoned, or extinguished by statute. A claim based on aboriginal title is good against all but the United States. The power to extinguish aboriginal title or aboriginal use rights rests exclusively with the federal government. If aboriginal title to land is extinguished, the hunting, fishing, and gathering rights on the land are extinguished as well, unless those rights are expressly or impliedly reserved by treaty, statute, or executive order.

FEDERAL INDIAN LAW at 1121 (footnotes omitted).

Courts have generally required that tribes show actual use and/or occupation of an area on a continuous basis, except for periods of involuntary dispossession, in order to establish aboriginal title. This long-standing use and occupation of territory is sufficient and need not be “based on treaty, statute, or other governmental action.” *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1942).

II. The Scope of Federal Power over Native Affairs

Congress has full authority over Indian and Alaska Native affairs, and although that power is much criticized and has often been asserted to the detriment of Native peoples, it also may be utilized to provide federal law protection for Native rights, often by preempting state law. *See* FEDERAL INDIAN LAW at 390-99. Recent examples of favorable treatment of tribal

in the discovering nations, with the indigenous inhabitants retaining the “only” right of use and occupancy – analogous in some ways to landlord-tenant relationship. *See generally*, FEDERAL INDIAN LAW at 969-974.

⁸ *Johnson v. McIntosh*, 21 U.S. at 591.

⁹ *See* Stuart Banner, *HOW THE INDIANS LOST THEIR LAND* (2005)(surveying federal-Indian land transactions and underlying policies).

rights include enactment of the Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, which (among other things) provides for the repatriation of cultural patrimony held by federally funded museums, and the Tribal Law and Order Act of 2010, which increased tribal powers in the criminal law area. *See* 25 U.S.C. § 1302 (b). Other examples include the various statutes that restored tribal status to those subject to “termination” statutes in the 1950s. *See* FEDERAL INDIAN LAW at 400-01.

Since federal power under the Constitution provided authority to extinguish aboriginal land claims and hunting and fishing rights in ANCSA, it also can provide power to restore aboriginal rights. *Cf. United States v. Lara*, 541 U.S. 193 (2004) (upholding act of Congress restoring tribal criminal jurisdiction over Indians who are not members of the governing tribe). Indeed, shortly after ANCSA was passed, Congress provided an Alaska Native exemption from the Endangered Species Act. 16 U.S.C. § 1539(e)(1). The question is not so much whether Congress *could* recognize aboriginal rights in Alaska, but what exactly that would mean, and whether it is politically possible.

III. Aboriginal Title Prior to ANCSA & Repeal of the Extinguishment Clause

A. Aboriginal Title in Alaska

The extinguishment clause of ANCSA has its roots in many years of debate prior to Alaska’s statehood.¹⁰ Hearings on statehood took place at several locations around Alaska in 1945. Secretary of the Interior Harold Ickes spoke in favor of statehood, but also declared that “the ancestral claims of Alaska Natives should be affirmed, delineated, or extinguished with compensation.”¹¹ The first bill introduced in the post-war period provided for statehood, but did not include any reference to Native aboriginal rights, causing Secretary of the Interior Julius Krug to propose amendments requiring the state to disclaim any interest in land owned or held by any Native.¹² For the most part, however, non-Native Alaskans were not prepared or willing to deal with Native claims to aboriginal title during the post-war economic expansion.¹³ One historian described the situation.

During this period of economic growth, the Natives were growing increasingly aware of their rights and asked repeatedly for the protections of reservations. Their petitions were ignored. * * * The Natives’ growing uneasiness coincided with the white man’s push for statehood for Alaska. While most proponents of

¹⁰ See Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* 17 (2007).

¹¹ Richard H. Bloedel, *The Alaska Statehood Movement* at 124 (Unpublished Ph.D. dissertation, U. of Wash. 1974) (on file with U. of Wash. Lib., Seattle).

¹² *Id.* at 193-194.

¹³ *Id.* at 220-21.

statehood were aware of the Native land claims, few seem to have understood them and most thought that any attempt to settle them at the time of statehood would merely postpone everything. So, almost to a man, they disclaimed any responsibility for them. As one witness told a Congressional committee considering statehood, "The Indians with their aboriginal rights are a federal problem. We have no control over it and we cannot dispose of it and we have nothing to say about it. Whatever happens to Alaska it will still be a federal problem." No one wanted to talk about the claims. This issue was a highly emotional Pandora's box: to open it would let out bigotry and greed and fears that were inappropriate in a group of people petitioning for admission to the democratic United States of America.

Mary C. Berry, *THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS* 25 (1975).

It was in this context that Congress considered a number of approaches to the extinguishment of Alaska Native land claims. Some of these would have simply provided Alaska Natives with the right to sue the United States for compensation for the loss of aboriginal lands, while others provided for the confirmation of title to relatively small amounts of land in and around the Native villages.¹⁴ The effort to extinguish Alaska Native claims to aboriginal title subsided to some degree when the Supreme Court decided *Tee-Hit-Ton Indians v. United States*, which was incorrectly interpreted by some as clearing the way for non-Native development and presumably, acquisition of Native lands. In fact, the Supreme Court in *Tee-Hit-Ton* simply ruled that aboriginal title, unrecognized by Congress, was not subject to the just compensation clause of the Fifth Amendment. The Court did not hold that aboriginal title did not exist and appeared to assume just the opposite.¹⁵ *Id.* at 275 ("The Court of Claims . . . held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was 'original Indian title' or 'Indian right of occupancy'.").

Shortly thereafter, in *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452, 461-63 (Ct. Cl. 1959) the court of claims affirmed the existence of aboriginal title among the Tlingit and Haida Indians of Alaska.

The land and water owned and claimed by each local clan division in a village was usually well-defined as to area and use. Clan property included fishing streams, coastal waters and shores, hunting grounds, berrying areas, sealing rocks, house sites in the villages, and the rights to passes into the interior. Tracts of local

¹⁴ For a discussion of these efforts, see *Alaska Native Rights, Statehood, and Unfinished Business*, 43 *Tulsa L. Rev.* at 26-28.

¹⁵ The Court concluded that there was no formal congressional guarantee of permanent Native ownership, but implicit in its ruling was acknowledgement that Alaska Natives did have aboriginal title claims.

clan territory were parceled out or assigned to the individual house groups for use and exploitation and the chief of the local clan, assisted by other house chief elders of the clan, formed a sort of council which controlled the clan's affairs. Smaller areas belonging to a house within a clan remained clan property whenever a house ceased to exist. The modes of living and of dealing with property among these Indians were regulated by rigidly enforced tradition and custom, and, except under special circumstances, there was no authority in a clan or clan division to sell, transfer or otherwise dispose of, in whole or in part, any claimed area of land or water. Land was transferred from one clan to another only as compensation for damages, as gifts in connection with marriages and the like, and such transfers were infrequent. In addition to the areas which were claimed and used exclusively by individual houses, there were certain common areas which could be used by all the clans comprising a particular group of clans residing in a single geographical area. Certain designated offshore fishing and sea mammal hunting areas in larger bodies of water, channels and bays and stretches of open sea could also be used in common by all members of the various clans residing in a particular geographical area, but Indians residing in other geographical areas had no right to such use.

177 F.Supp. at 456.

The court's ruling was consistent with an earlier opinion from the Department of the Interior considering aboriginal fishing rights of Alaska Natives.

The Indian who has been forbidden [through government callousness or indifference] from fishing in his back yard has not thereby lost his aboriginal title thereto"; "aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and . . . such rights have not been extinguished by any treaty, statute, or administrative action."¹⁶

After a thorough discussion of the history of Alaska Native claims to aboriginal title, the leading treatise on Alaska Native legal issues concludes: "the most tenable legal conclusion is that prior to ANCSA, Alaska Native title had the same legal status as original Indian title [aboriginal title] elsewhere in the United States." David S. Case and David A. Voluck, *ALASKA NATIVES AND AMERICAN LAWS* 62 (2d Ed. 2002).

B. A Simple Repeal of the Extinguishment Clause Would Only Result in More Litigation.

Even if ANCSA's aboriginal title extinguishment clause were repealed, the State of Alaska could be expected to vigorously dispute the factual basis for claims to aboriginal hunting and fishing right claims. Litigation to establish the geographic scope of such aboriginal rights would certainly be lengthy and expensive. In fact, litigation underway in federal court to do just that was commenced in the mid-1990s in *Native Village of Eyak v. Locke*, No. 3:98 cv-0365-

¹⁶ *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 474, 476 (Feb. 13, 1942).

HRH. Judge Holland concluded that none of the villages had established aboriginal title to portions of the Outer Continental Shelf:

None of the ancestral villages was in a position to occupy or exercise exclusive control over any part of the OCS on a sustained basis. Such use and occupancy as probably existed was temporary and seasonal, and more likely than not was carried out by the residents of individual ancient villages as distinguished from any kind of joint effort by multiple villages.

Id. at 21. The case is now on appeal to the Ninth Circuit for the second time and will likely be argued this summer.

In addition to contesting the existence of aboriginal rights as a factual and legal matter, the state would almost certainly assert regulatory authority over the exercise of aboriginal rights based on the Supreme Court decision in *Organized Village of Kake v Egan*, 369 U.S. 60, 61-62 (1962). In that case, the state sought to regulate the use of fish traps by two Native villages pursuant to federal permits issued by the Secretary of the Interior. In the course of upholding state authority over off-reservation fishing, the United States Supreme Court noted that:

The [Alaska] Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right, or simply occupancy, against the Government. * * *

Because § 4 of the Statehood Act provides that Indian ‘property (including fishing rights)’ shall not only be disclaimed by the State as a proprietary matter but also ‘shall be and remain under the absolute jurisdiction and control of the United States,’ the parties have proceeded on the assumption that if Kake and Angoon are found to possess ‘fishing rights’ within the meaning of this section the State cannot apply her law.

Id. at 67.

Contrary to the parties’ assumption, the Court held that the State of Alaska possessed regulatory authority over the exercise of aboriginal fishing rights – at least for conservation purposes, stating: “This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy.” *Id.* at 76. The disclaimer was said to relate only to interference with aboriginal *property* rights. The exercise of state regulatory jurisdiction over aboriginal fishing rights – at least with respect to the fish trap prohibition – was said to be consistent with aboriginal property rights. While a good argument can be made that the language in *Kake v. Egan* was overbroad and should not be followed, the question of state regulatory power over aboriginal hunting and fishing rights would present a difficult and complicated matter to litigate.

In light of the likelihood of: 1) lengthy and difficult litigation to establish the geographic scope aboriginal title for each federally recognized tribe; and 2) litigation over state regulatory authority over aboriginal hunting and fishing rights, it would be best to consider more than a simple repeal of the extinguishment clause and to provide for preemption of state law. The next section briefly addresses these issues.

IV. Protecting Hunting and Fishing Rights in an ANILCA Amendment.

One possibility would be to provide for an actual Native preference much like the hunting and fishing rights of most Northwest tribes. This would require the determination of where aboriginal rights to hunt, fish and gather exist and who would have authority to exercise such rights. In other words, repeal of ANCSA's extinguishment clause would be followed by clarification under federal law of the nature of aboriginal rights to hunt, fish and gather. For example a model based on Pacific Northwest treaties could provide:

The right of taking fish, hunting, and gathering for subsistence purposes, at all traditional areas, is hereby secured to all Alaska Natives.

There would need to be definitions for "Alaska Native" and "subsistence purposes." In addition, it would be necessary to include some method to determine where and who would exercise such hunting and fishing rights. Also, it would not be realistic to think that Congress would ever pass such a vague provision without some sort of federal-tribal-state cooperative management scheme.

A more politically feasible option that has been discussed in the past would be to amend Title VIII of ANILCA to provide for an Alaska Native priority for subsistence on all lands and waters in Alaska. This could be limited to Alaska Natives who are rural residents, or expanded to all Alaska Natives. It is likely that the priority for non-Native rural residents would be continued, although its precise relationship to a Native preference would need to be determined. A rough draft to accomplish this has been developed for discussion purposes.

Conclusion

1. AFN's letter to Secretary Salazar in January of 2010 stated:

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. See attached letter of June 1, 2009. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

Unfortunately, Secretarial Salazar's review only provided a few band-aids. In light of that reality, it is time to revisit congressional alternatives to avoid remaining mired in the status quo.

2. Given the political divide in the federal government, there is no chance that any major substantive changes could be advanced in this Congress, and the start of the Presidential

campaign will only slow things down more.

3. The Native Community could get oversight hearings on new solutions to the impasse in the House Resources Committee and the Senate Indian Affairs Committee, in this Congress. This is an important first step to provide focus and allow input which is critical.

4. It would be important to remind all that Congress has the power to amend ANCSA by repealing § 4(b), which extinguished aboriginal rights.

5. Such a repeal by itself would only prompt more litigation to determine whether and where such rights exist in Alaska for each Alaska Native village, or tribe, and the state could be expected to assert continued regulatory authority over aboriginal rights.

6. A simple treaty-like provision to protect subsistence uses could also be explored, but would have no realistic chance of passage by Congress.

7. Another option would be to amend Title VIII of ANILCA to provide an Alaska Native preference for subsistence uses on all lands and waters in Alaska, and completely preempt state law with regard to the preference.

8. It seems that the option that would have the greatest chance of success would be the amendment of Title VIII to provide an Alaska Native priority for subsistence uses applicable to all lands and waters in Alaska. Even this sort of a change would require a monumental effort. It could be accompanied by a repeal of § 4(b), but a repeal would not be necessary since the amended Title VIII would provide the Native priority and preempt state law.

9. Finally, all of the options noted above should be evaluated in light of the United Nations Declaration on the Rights of Indigenous Peoples, article 38, which provides that States shall take appropriate measures, including legislation, to achieve the ends of the Declaration. Since the United States signed on to the Declaration last year, it can be used with lawmakers and the Administration to argue for explicit protections for Native hunting and fishing. Article 20(1) provides that "Indigenous peoples have the right, ...to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." The Declaration should be used to evaluate ANCSA and ANILCA and provide guidance for amendments.



**ALASKA FEDERATION
OF NATIVES**

January 7, 2010

Honorable Kenneth Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Alaska Subsistence Review

Dear Secretary Salazar:

The Alaska Native community greatly appreciates your review of the subsistence management program in Alaska. We have been working with the Department for many years to implement the program, but it is apparent that there are fundamental flaws in the existing program and that it needs to be reformed. Changes are needed both in the governing federal statute and in the program itself.

We are mindful of, and support, the remarks of Special Assistant to the Secretary, Kim Elton, to the 2009 annual convention of the Alaska Federation of Natives including, specifically, the recognition that, under federal law, subsistence management is a Secretarial responsibility. We also agree with the commitments to implement the federal subsistence mandate of the Alaska National Interest Lands Conservation Act (ANILCA) and promptly put in place a system that does not anticipate a return to State management, to recognize and respect (1) the voice of subsistence users in subsistence management, (2) traditional knowledge and (3) the overriding importance of subsistence to the lives of Alaska Natives. We also welcome the pledge that this issue "will not be compromised or relegated to a low-priority status in this administration."

Title VIII, with its priority for subsistence is, of course, a federal law, which has a clear purpose to protect the subsistence uses of Alaska Natives, along with those of other rural residents. It must be administered as a federal law, under federal standards, without improper deference to state law or state management issues and objectives, which are inconsistent with federal requirements. While we will submit a separate response to the comments of the State of Alaska, through the Commissioner of Fish and Game, calling for widespread and specific deference to the State of Alaska's subsistence determinations, practices and policies, we note here our specific objection to deferring key subsistence policies and practices away from the federal government, where they belong, to the State. Our concern over deference on such a fundamental matter as our food supply is particularly meaningful in Alaska, which is one of only a handful of states where special protections are still in place to protect the civil rights of a minority population under the Voting Rights Act.

As noted in the attached history of litigation involving subsistence, and in its own comments calling for deference, the State of Alaska has a long history of opposition to a Native or rural subsistence priority in favor of one for all residents of Alaska, which of course, amounts to no preference at all. This approach is fundamentally inconsistent with ANCSA and ANILCA, and cannot properly be deferred to in administering a federal program of fundamental importance to Native people. After falling out of compliance with Title VIII in 1989, and thus losing authority to manage subsistence uses on federal lands, the State has steadfastly refused to amend its constitution to allow its laws to conform to the compromise reached in ANILCA in 1980, despite the best efforts by the Native community, our Congressional delegation and many Alaskans.

Summarized below are our primary policy suggestions for the Department. Attached is a more detailed memorandum in support of our request that the Obama Administration advance action by Congress to secure Native hunting, fishing and gathering rights. In addition, we recommend administrative changes in the federal subsistence program as currently structured under Title VIII of ANILCA.

The issue is whether our country can learn from its own past - and whether it will finally deal honorably with Alaska's indigenous peoples by giving them meaningful protections for their way of life. What we now call subsistence is not a relic from the past - a holdover from previous times that will inevitably disappear as market conditions take over - it continues to be the foundation of Alaska Native society and culture. A vast majority of Alaska's 120,000 Native people (nearly 20% of the total population of Alaska) still participate in hunting, fishing and gathering for food during the year. The subsistence harvests remain central to the nutrition, economies and traditions of Alaska's Native villages.

Protection of Native hunting, fishing and gathering rights is a part of federal law throughout the United States. The right to food security for oneself and one's family is a human right enumerated in the Universal Declaration of Human Rights of the United Nations Charter. The only reason that there is a priority for subsistence uses in Alaska is because of Alaska Native ownership of the territory transferred from Russia to the United States in 1867. The Treaty with Russia recognized that as the original occupants, Alaska Native peoples had continuing rights to use and occupy all of Alaska. Art. III, Treaty of March 30, 1867, 15 Stat. 539. Those rights were largely ignored until the Statehood Act of 1959, 72 Stat. 339, and the discovery of vast oil reserves at Prudhoe Bay in the 1960s ran up against Alaska Native aboriginal rights. In response to the conflict, Congress in 1971 passed the Alaska Native Claims Settlement Act (ANCSA), Act of December 18, 1971, Pub. L. NO. 92-203, 85 Stat. 689, 43 U.S.C. §§1601 et seq. Although Congress did not expressly protect Native hunting and fishing rights in ANCSA, that Congress expected both the Secretary of the Interior and the State of Alaska to "take any action necessary to protect the subsistence needs of the Natives." S. Rep. No. 581, 92nd Cong., 1st Sess, 37 (1971). Their expectation was not fulfilled and the current program was established in Title VIII of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §§ 3111 et seq. (ANILCA), a cornerstone title of that major federal conservation and land management law.

ANILCA's scheme envisioned state implementation of the federal priority on all lands and waters in Alaska through a state law implementing the rural priority. That system operated for a

mere seven years before the Alaska Supreme Court ruled that the State Constitution precluded State participation in the cooperative federalism program. After initial efforts to amend the State Constitution to comply with the ANILCA's compromise and thus have a unified management regime, the State has undermined the system through litigation and by gutting its own subsistence law applicable to state and private lands.

Rather than simply defending a system that no longer serves its intended function, we believe it is time to consider options that reach back to Congress's original expectation that Alaska Native hunting, fishing and gathering rights be protected. Alaska Native peoples have submitted many wise and informative suggestions to you as part of this review process. We held numerous meetings with our constituents in our process of developing these recommendations.

We recommend that the Obama Administration ask Congress to replace the present rural preference with a priority for all Alaska Natives to engage in subsistence uses in Alaska, in addition to maintaining the current rural priority, *i.e.*, a "Native plus rural" or a "tribal plus rural" priority. Congress has the authority to enact legislation, based on the supremacy clause and on its plenary authority to regulate Indian affairs, to provide a Native or tribal subsistence preference on all lands and waters of Alaska. There are already variations of a Native priority in Alaska with respect to marine mammals, halibut and migratory birds. A Native plus rural preference would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law followed elsewhere in the United States. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.¹

The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly cases, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. We continue to this day to participate in the litigation to defend the federal regulations put in place to implement that decision.

Congress should extend the geographical scope of ANILCA's jurisdiction to include all marine and navigable waters in Alaska, and all lands conveyed to and owned by Native corporations pursuant to ANCSA as well as the thousands of Native allotments in Alaska.

Cooperative management of fish and game populations with tribal governments has been successful in the implementation of Indian treaty rights in other states and should be replicated in ANILCA as amended.

The Regional Advisory Councils are in need of reform. At a minimum, they should be exempted from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of

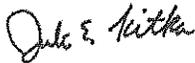
¹ See attached summary of litigation involving the interpretation and implementation of Title VIII of ANILCA.

ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of FACA, the RACs are required to be composed on at least 30% sport and commercial users. While not a majority, the sport and commercial interests do their best to water down the subsistence priority rather than implementing it.

While our primary focus is on achieving fundamental structural changes to the law, administrative and regulatory changes in the current management system are needed. We stress, however, that a band-aid approach to a system that is broken and that has never worked is not acceptable to the Native community.

We look forward to working with you, the Department of Agriculture, the Congress and the White House to make the changes needed to provide lasting protections for our way of life. We are confident that with your help meaningful changes can be made that will ensure the promises of ANCSA and ANILCA are finally fulfilled.

Sincerely,



Julie Kitka, President
Alaska Federation of Natives

cc:

The Honorable Tom Vilsack, Secretary, U.S. Department of Agriculture
The Honorable David Hayes, Deputy Secretary, U.S. Department of the Interior
The Honorable Larry Echohawk, Assistant Secretary for Indian Affairs, U.S. Department of the Interior
The Honorable Kim Elton, Director, Alaska Affairs, U.S. Department of Interior
The Honorable Pat Pourchot, Special Assistant to the Secretary for Alaska
The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Mark Begich, U.S. Senator, Alaska
The Honorable Lisa Murkowski, U.S. Senator, Alaska
The Honorable Don Young, U.S. Congressman, Alaska
The Honorable Byron Dorgan, Chair, U.S. Senate Indian Affairs Committee, U.S. Senate

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RECOMMENDATIONS
SECRETARIAL REVIEW OF FEDERAL SUBSISTENCE MANAGEMENT PROGRAM

General Recommendations concerning the review itself: The Review should be thorough and not constrained by an arbitrarily short deadline. It should integrate the Regional Advisory Councils into the review and recommendation process. Special standing should not be given to comments from the Territorial Sportsmen, the Alaska Outdoor Council and other anti-subsistence groups or to the State of Alaska. An Alaska Native advisor should be hired to assist in the review of the comments and to assist in making the recommendations to the Secretary.

The Secretary and Deputy Secretary of the Department should meet with key Native leadership after all comments are submitted. There should be at least two such meetings to discuss the views of the Department as it develops its position, and there should be full consultation with the Native community on legal and policy issues.

In addition, the Secretary should convene a meeting with key White House officials, including the Domestic Policy Council, and the Department of Agriculture to participate in the Review and in the crafting of a legislative proposal to provide meaningful protections for Native hunting, fishing and gathering rights.

AFN's recommendations and comments are set out below. While many represent views on how to reform the existing system, it is critical to note that fundamental change in the priority from one based on rural residence to a Native priority is essential. The comments are based on the following principles, which are foundational to a successful subsistence program:

1. The subsistence management system must recognize the overriding importance of meeting the needs of subsistence users, over other management issues and objectives.
2. Subsistence is a Native issue - a critical part of the larger historical question about the status, rights and future survival of Alaska's aboriginal peoples. The economic and cultural survival of Native communities is the principal reason why Congress enacted its rural subsistence preference in 1980. By articulating the federal government's traditional obligation to protect indigenous citizens from the political and economic power of the non-Native majority, Title VIII of ANILCA constitutes a landmark of Indian law, but one that has failed to deliver the protection promised.
3. The Obama Administration (the Secretaries of Interior and Agriculture, along with senior White House officials) should press Congress to introduce a legislative package that includes a Native plus "rural", or "tribal plus rural" priority for Alaska Native subsistence uses.
4. The federal system must not defer to the State government on management policies. This is a federal system, to implement established federal priorities in support of Native hunting, fishing and gathering rights.

5. The heart of Title VIII is the local and regional participation system, the mechanism by which Congress ensured local subsistence users would be given a “meaningful role” in subsistence management. The federal system must recognize the fundamental importance of the input from the Regional advisory Councils, separate from any other “stakeholder” input.
6. The Secretary should undertake a survey of the amount of money spent on litigation involving the interpretation and implementation of Title VIII since 1980, by both the federal government and Alaska Natives that can be used to demonstrate to Congress the need for fundamental statutory changes.

TITLE VIII OF ANILCA IS INDIAN LEGISLATION: The Secretary should encourage President Obama to issue an Executive Order that advises the Federal Subsistence Board and the Office of Subsistence Management that Title VIII is Indian legislation, enacted under the plenary authority of Congress over Indian Affairs, and directs OSM and the FSB to implement a subsistence management program in accordance with the Executive Order. Title VIII was enacted to protect the subsistence way of life of rural Alaska residents, including residents of Native villages. It implements Congress’ long-standing concern for, and obligation to protect subsistence uses of Alaska Natives, and serves to fulfill the purpose of the Alaska Native Claims Settlement Act (ANCSA). 16 U.S.C. § 3111(4). Although the statute provides for a “rural” preference, it is important to remember that the subsistence title would never have been added to ANILCA had it not been for the efforts of Alaska Natives. The Justice Department and the Interior Solicitor’s office should also be directed to take this position in all litigation surrounding Title VIII.

Title VIII expresses an overriding congressional policy of protecting the subsistence rights of Alaska Natives. Congress found that because “continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska . . . [and] by increased accessibility of remote areas containing subsistence resources,” 16 U.S.C. §3111(3) it was necessary and in the national interest “to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.” 16 U.S.C. § 3111(4) (5). Title VIII reflects recognition of the ongoing responsibility of Congress to protect the opportunity for continued subsistence uses in Alaska by Native people, a responsibility consistent with the federal government’s well-recognized constitutional authority to manage Indian Affairs. For that reason, the FSB should construe Title VIII and the regulations implementing it broadly to accomplish Congress’ purposes, which were, *inter alia*, to ensure that the subsistence way of life would be protected for generations to come.

While the FSB takes the position that ANILCA is not Indian legislation,¹ there is no question but that Title VIII is “remedial” legislation. It was intended to remedy the failure of the State and Federal

¹ See, e.g., 72 Fed. Reg. 25688, 25691 (May 7, 2007). The FSB takes the position that Title VIII of ANILCA is not Indian legislation for the purpose of statutory construction based on *dicta* in *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999). However, that *dicta* is in direct conflict with *Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984), *rev’d on other grounds sub. nom. Amoco Production Co. v. Village of Gambell*, 107 S.Ct. 1396 (1987). The Supreme Court in *Amoco* implicitly accepted the Ninth Circuit’s holding in *Gambell* that Title VIII is Indian legislation; it simply

governments to protect the subsistence rights of Alaska Natives and other rural residents who live off the natural resources. And because it is “remedial” legislation, the rules of statutory construction require that Title VIII be broadly construed to accomplish its purposes, *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 504 (1999), which were to ensure that the subsistence way of life would be protected for generations to come.

AMEND TITLE VIII of ANILCA as follows:

- Replace the “rural” priority with a “Native,” or “Native plus rural” or “tribal plus rural” subsistence priority. ANILCA’s rural preference does not protect legitimate subsistence needs of many Native people who still occupy their ancestral homelands, but whose communities are now designated nonrural due to the influx of people into the surrounding areas. Congress has the authority, based on the supremacy clause and on its plenary authority to regulate Indian affairs rooted in the Indian commerce clause of the United States Constitution, to enact legislation that imposes a Native or tribal subsistence preference on all lands and waters of Alaska. This could be in addition to protecting the legitimate needs of non-Natives who live in rural Alaska who also dependent upon subsistence. Protection for Native hunting and fishing rights in Alaska are already contained in numerous other federal laws, including the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Fur Seal Treaty, the Endangered Species Act, and the International Whaling Convention. In 2000, the North Pacific Fishery Management Council (NPFMC) authorized a subsistence fishery for halibut in Alaska for rural residents and members of Alaska’s federally recognized tribes. A Native subsistence preference for hunting, fishing and gathering would fulfill the promises of ANCSA and ANILCA, and would be consistent with settled principles of federal Indian law. It would also put an end to the otherwise endless litigation concerning the implementation of the current rural priority.
- Mandate tribal compacting and contracting of subsistence programs in order to give Alaska Natives a more meaningful role in the management of subsistence uses on federal and Native lands. Here again, examples abound. The Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. §§703 et seq., and the treaties with Canada and Mexico provide for subsistence uses of migratory birds by the indigenous inhabitants of Alaska and provide for a federal-state-tribal co-management regime to manage the subsistence harvest. The Marine Mammal Protection Act, as amended, 16 U.S.C. §§1361 et seq., governs the management of marine mammals in Alaska and authorizes the Secretaries of Interior and Commerce to enter into cooperative agreements with Alaska Native Organizations to conserve marine mammals and provide co-management of subsistence use of marine mammals by Alaska Natives. One of the earliest examples of co-

found that there were no ambiguities to interpret with respect to whether Title VIII applied to waters beyond Alaska’s territorial sea. The case was reversed on other grounds, so the Ninth Circuit’s conclusion in *Gambell v. Clark* on this issue remains good law. Moreover, prior to *Hoonah*, the Court had consistently held that Title VIII of ANILCA is legislation intended to benefit Indians through preservation of Alaska Native hunting and fishing rights and the cultural aspects of the subsistence way of life. See, e.g., *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997), citing *Gambell v. Clark*; *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994); *United States v. Alexander*, 938 F.2nd 942, 945 (9th Cir. 1991). The *dicta* in *Hoonah* does not overrule this prior precedent.

management in Alaska involves the Alaska Eskimo Whaling Commission, which under the authority of a cooperative agreement between AEWC and the National Oceanic and Atmospheric Administration (NOAA), has taken responsibility for conducting its own research, developing whaling regulations, allocating the national whale quota among participating villages, and enforcing both the quota and the regulations. The North Pacific Fishery Management Council has also authorized agreements with tribal governments for harvest monitoring, local area planning and other issues affecting subsistence uses of halibut.

- Exempt the Regional Advisory Councils from the requirements of the Federal Administrative Committees Act (FACA). Section 805 of ANILCA mandates that the secretaries establish regional advisory councils, composed of local subsistence users, with the authority to devise and submit to the Federal Subsistence Board recommendations on proposed regulations. Today, because of the requirements of FACA, the RACs are required to be composed on at least 30% sport and commercial users. Congress never intended the RACs to be composed of anyone other than local subsistence users. Application of FACA's membership requirements contradicts and frustrates the purposes of §805 of ANILCA. Congress should amend FACA (or Title VIII of ANILCA) to exempt the RACs from the requirements of FACA, and the Secretaries should advance such an amendment.

AMEND THE DEFINITION OF PUBLIC LANDS: Extend the geographical scope of ANILCA jurisdiction to include all marine and navigable waters in Alaska, and Native allotments. Provide Alaska Native Corporations the authority to opt into a provision ensuring a federally protected customary and traditional hunting and fishing right on ANCSA fee lands and associated waters for Alaska Natives. ANCSA lands and Native allotments were often selected for their value to the subsistence economy and culture, yet jurisdiction to regulate hunting and fishing on these lands presently lies with the State. Congress obviously intended to provide protection to subsistence uses of fish, which for the most part occurs in navigable waters. Indian treaty rights in the lower 48 states often extend to state and private lands. The Administration should consider this possibility in the review.

ALASKA NATIVE FUND: The Secretary should create an Alaska Native Fund, as part of the BIA Rights Protection Program, to reimburse the Native community for the millions of dollars we have had to spend defending our aboriginal and human rights. As demonstrated in the attached addendum, many of the subsistence court cases were brought by Alaska Natives and were directly related to forcing the federal agencies to take their responsibilities under Title VIII seriously. One of our most costly, the Katie John litigation, was necessitated by the federal government's initial refusal to assert management authority over fishing. Congress very clearly intended our subsistence fishing in Alaska to be protected by Title VIII, and the agencies knew that fishing is the very lifeblood of our traditional way of life. That case took years to litigate and involved several appeals, not to mention the time that was spent in the regulatory processes. We continue to this day to participate in litigation to defend the federal regulations put in place to implement the *Katie John* decision.

COMPREHENSIVE REVIEW OF ALL SUBSISTENCE REGULATIONS. When the federal subsistence program was adopted, the federal managers blindly incorporated into federal law all existing

State license, permit, harvest-ticket and tag requirements – without any assessment of the propriety of imposing these requirements on subsistence users. These types of restrictions should not be imposed upon subsistence users unless necessary under §804 to protect the viability of a species and/or the continuation of subsistence uses.

The Federal Subsistence Management system was also put into place before the Secretaries established the local and regional participation scheme mandated by §805(a)-(c). We believe Congress intended that the development of a “permanent” subsistence management program would derive from the local and regional participation system, and would be based on the recommendations flowing through that system. Congress gave the Councils the explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish and wildlife” in each region of the State. Yet, the regional councils had no input (since they were not formed at the time) in important questions like (1) whether the program should be implemented by a federal subsistence board, and if so what its composition should be; (2) the critical “rural” eligibility determinations; (3) the proper approach for determining C&T uses of resources; (4) the content of the initial hunting and fishing regulations that govern the day-to-day resource harvest activities of subsistence users, and many other vital questions important to the management of subsistence. All of these important questions need to be revisited with input from the RACs.

As noted by the Northwest Arctic Borough, by the wholesale incorporation of the State’s regulations, the federal system also incorporated the State’s long history of commercial hunting/fishing biases. The FSB needs to start fresh with the idea of fulfilling the full intent of ANILCA, which was allow Native communities to be able to retain the opportunity to maintain local subsistence practices and customs.

During the last Administration, in particular, the FSB more often than not aligned its hunting seasons and bag limits with the State’s rather than based on subsistence users needs and customary practices. As a result, in many cases the regulations do not reflect the customary and traditional values of subsistence users. Every regulation should be necessary, consistent with Title VIII, and cause the least adverse impact possible on subsistence uses. Finally, in adopting regulations, local traditional knowledge should be incorporated into the analysis.

COMPOSITION OF THE FEDERAL SUBSISTENCE BOARD: The Federal Subsistence Board should be replaced with a federally-chartered or authorized entity composed of twelve (12) subsistence users from the 12 ANCSA regions or the chairs of each of the Regional Advisory Councils. There is nothing in Title VIII of ANILCA that prohibits the federal government from creating a Federal Subsistence Board structure composed of non-federal members – in fact there is nothing in the statute that mandates the establishment of a Federal Subsistence Board at all. At the very least the Secretaries should increase the size of the Board and make at least 50% of the membership rural residents. The North Pacific Fisheries Management Council is composed of a mix of federal, state and public members.

RURAL/NON-RURAL DETERMINATIONS:

- Amend the regulatory definition of “rural”. As noted earlier, we believe the rural preference should be amended to expressly protect Native subsistence use. But until that happens, the

current definition of rural should be amended and defined as broadly as possible so as to benefit the greatest number of Alaska Natives who wish to continue to pursue a subsistence way of life. The only court decision addressing the question did so in the context of the State of Alaska's definition of rural, which excluded the entire Kenai Peninsula. *Kenaitze Indian Tribe v. Alaska*, 860 F.3d 312 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3187 (1989). In rejecting the State's definition, the court of appeals cited a number of definitions of rural, ranging from the one used by the census bureau (places with a population of less than 2,500) to one used by Congress in the National Housing Act of 1949, 42 U.S.C. 1490, as amended November 28, 1990 (rural defined to include communities with a population of up to 25,000). Residents of communities on the Kenai Peninsula were thus entitled to financial assistance for a number of rural housing programs but not to the subsistence priority. In light of the federal government's trust responsibility to Alaska Natives, ANILCA's rural definition should surely be construed at least as broadly as the National Housing Act.

- Revise the FSB criteria for assessing rural characteristics in making its decennial reviews of communities' rural status. The FSB needs to identify fair and workable criteria for making rural determinations. Following the first decennial review the USFWS contracted with the University of Alaska Anchorage's Institute of Social and Economic Research (ISER) to develop methodologies for identifying rural and non-rural areas, but the FSB arbitrarily rejected the scientific method recommended by ISER which would have used clear, effective and defensible criteria to distinguish between rural and non-rural populations. The FSB's rejection was due to political pressure from the State to avoid the potential impact the methodology would have on the Kenai Peninsula. The regulations need to be amended to ensure that future rural status reviews do not result in the elimination of rural, subsistence-dependent communities.
- Military bases should not be considered "rural" but rather separate communities, so that sparsely populated areas such as Delta Junction are not bumped out of the rural priority due to the presence of self-contained military installations like Fort Greely;
- The FSB should reconsider its decision finding the Organized Village of Saxman to be socially and communally integrated with Ketchikan, and reinstate Saxman's rural status; alternatively, the Secretary should direct the FSB to reconsider its decision to classify Saxman as nonrural. Saxman has little economic development and few cash jobs – its economic and cultural characteristics are more akin to those of other small rural communities across Alaska.

CUSTOMARY AND TRADITIONAL USE DETERMINATIONS: The federal subsistence regulations adopted the State's eight criteria for determining customary and traditional uses (C & T) on a species-by-species basis. See 50 C.F.R. § 101.16(b). This means that a community may have C&T use of moose but not sheep, for example, even though sheep are located within that community's traditional uses areas.

We believe a species-by-species approach to C&T determinations is inconsistent with Title VIII of ANILCA. The policy goal of ANILCA is to preserve cultural systems and activities which underlie subsistence uses. A primary component of subsistence use patterns involves opportunistic taking of fish or game *as needed and as available*. Congress fully expected Native communities to be able to retain the opportunity to maintain local subsistence practices and customs and understood that subsistence use activities were grounded in and by local self-regulating forces:

[T]he phrase “customary and traditional” is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation. H.R. No. 96-97, 96th Cong., 1st Sess. Part I at 279 (1979).

Subsistence uses historically took place within particular areas customarily used by the Villages. In other words, Alaska Natives used all the resources available to them within their community’s traditional use area. Rather than focusing on whether particular species are the subject of C&T use, the regulations should focus on C&T use areas, and provide that all species found within those areas are subject to the subsistence priority, including indigenous, reintroduced and introduced species. Federal district court Judge H. Russel Holland employed the proper methodology in striking down restrictive state regulations in the landmark case of *Bobby v. Alaska*.

Because many Villages are now surrounded by state and private lands, the FSB should implement its C&T regulations and determinations in such a way that ensures communities surrounded by State and private lands will have reasonable access to federal “public lands” in order to harvest all subsistence resources that were customarily and traditionally used by the Native Villages.

TRIBAL COMPACTING AND CONTRACTING: As noted earlier, we believe this should be included in a legislative package in order to ensure meaningful participation in management of subsistence in Alaska. Significant aspects of the federal subsistence program in Alaska could be compacted to tribal organization in Alaska. Meanwhile, Section 809 of ANILCA provides some authority for contracting OSM and FSB functions. It has not been fully utilized and needs to be expanded.

OFFICE OF SUBSISTENCE MANAGEMENT:

- Remove OSM from USF&WS to the Secretary’s office, and consider contracting with a Native organization pursuant to ANILCA §809 to perform the functions the OSM currently operates. Under the current system, the USFWS is designated as the lead agency and as such has too much control over the federal subsistence program. The federal subsistence management program is supposed to be a multi-agency effort, yet USF&WS has garnered almost total control over subsistence management because it receives the funding and hires the personnel to run the OSM. The subsistence management program could be operated out

of the Secretary's office in a way similar to the Indian water rights settlement program. In both cases multiple agencies are involved and central coordination is essential.

- OSM Director. Since the OSM is included in the budget of the USFWS, the Director is hired and answers to the Regional Director of USFWS. In the past, there has been no consultation with the Native community and apparently none or very little with the other federal partners or the Regional Advisory Committees in the recruitment and hiring of key positions within the OSM. In the future, USFWS should consult with the Native community, the RACs and the other federal partners in the hiring of the Director and Deputy Director. Those positions should be filled with individuals who are highly qualified, and who have an understanding and appreciation of the importance of subsistence to the economy and way of life of our people. They should also be committed to meaningful participation and consultation with Alaska Native Tribes and organizations on all issues that impact them. Finally, we recommend consideration of Native candidates for these positions.
- Native Hire: Increase the number of Alaska Natives in management positions in OSM and the federal agencies. Under the previous administration, the number and authority of Alaska Native OSM employees steadily decreased, reaching a point in June, 2009, where only six Natives, of more than 45 OSM employees remained, and none have an effective role in policymaking decisions. The Secretaries of Interior and Agriculture should conduct an analysis of federal hiring practices in Alaska at USFWS, OSM, NPS, BLM, BIA the Forest Service to determine whether there are inherent barriers to the hiring of Alaska Natives, and address the cause of underrepresentation of Alaska Natives within the agencies.

FEDERAL SUBSISTENCE BOARD

- **Appoint a new FSB Chair**, after consultation with tribes & Native organizations and include the RAC's in the nomination and selection process.
- **Revoke the 2008 MOA between the FSB and the State of Alaska** and renegotiate it with input from RACs and Alaska's tribes. The agreement was signed in the final days of the Bush Administration and purports to establish guidelines to coordinate the management of subsistence uses on federal public lands. It imports state law requirements into the federal management program. For example, under subparagraph IV(3) of the MOU, the FSB and the State agree to "provide a priority for subsistence uses of fish and wildlife resources and to allow for other uses of fish and wildlife resources when surpluses are sufficient, consistent with ANILCA and AS 16.05.258 (emphasis added). Alaska's statute only requires the State to "provide a reasonable opportunity for subsistence uses," while §802(1) of ANILCA requires that "[t]he use of the public lands in Alaska is to cause the least adverse impact possible on residents who depend upon subsistence uses of the resources of such lands." This is but one example of the problem. It is simply impossible for the FSB to provide a subsistence priority consistent with *both* federal and state law. It is notable that Alaska law provides for the creation of "non-subsistence use areas," which is nothing more than a

vehicle for excluding subsistence uses when politically powerful sport or commercial interests feel the priority interferes unduly with their activities.

- **Revoke Secretary Kempthorne's Letter of June 28, 2007**, requiring Regional Directors to be present at key meetings and allow them to decide if they want to serve on the Board or delegate that responsibility to staff who can devote more time to the Federal Subsistence Management System.
- **The FSB should hold some of its meetings in regional locations.** Given the importance of subsistence to Alaska Natives living closest to the land and subsistence resources, and the fundamental significance of input of real-life subsistence users, FSB meetings should be held in regional locations to maximize the opportunity for input from subsistence users and real-time, experiential resource evaluations.
- **Make FSB deliberations transparent and eliminate excessive use of Executive Sessions.** Executive sessions should be limited to issues involving personnel, litigation and other issues that require confidentiality as a legal matter; deliberations on regulatory matters -- no matter how contentious -- should never take place in executive session. In the past, the Board has held regulatory discussions in executive session simply because the issue was "controversial." What made the issue controversial were objections and pressures coming from non-subsistence users and the State of Alaska. The FSB was created to implement Title VIII of ANILCA and to protect subsistence users -- not to cater to or negotiate with competing users of fish and game or the State of Alaska.
- **The Federal Subsistence Board Regulatory Cycle:** Until 2007, the FSB regulatory cycle was conducted yearly, with annual deadlines for recommendations from RACs and the public. Citing budgetary constraints, the FSB switched to 2-year cycles. This change has meant more "out-of-cycle" and emergency Openings/Closures, which means there is no time to seek RAC recommendations or pay them any deference. Decisions on these actions are made at FSB work sessions or by email, with no or minimum input from the RACs or the public. The RACs should not be limited to participation in the federal regulatory process to only one time every two years. Excluding their input on out-of-cycle and emergency proposals abrogates the role of the RACs and is arguably a violation of Title VIII of ANILCA. The Secretary should direct the FSB to return to an annual cycle, and to seek RAC recommendations on all proposals, including out-of-cycle and emergency openings and closures.
- **Non-voting Seats on the FSB.** The State of Alaska has a non-voting seat on the FSB, and its representative has been allowed to sit at the table with the FSB and participate in Board discussions and deliberations. While not entitled to vote, the State is being given too much influence over the decision-making process. We believe the position should be eliminated.

- **Deference to Regional Advisory Council Recommendations:** Section 805 is the heart of the reform program designed by Congress to protect subsistence uses of Alaska Natives and other rural Alaskans. It mandates a viable regional participation scheme and requires that deference be given to Regional Advisory Council (RAC) recommendations. The Secretary must follow these recommendations unless he determines a recommendation is “not supported by substantial evidence, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of subsistence needs.” The FSB has interpreted §805(c) as only requiring deference on regulatory proposals involving the “taking” of fish and wildlife and not on important policy decisions.

The Secretaries should direct the FSB to give deference to the recommendations of the RACs on (1) rural determinations; (2) customary and traditional use determinations; (3) out-of-cycle; and (4) special actions and emergency regulations, as well as any other matter that impacts rural subsistence users’ ability to subsistence hunt and fish on federal public lands and waters. Examples of where the RACs were not given deference include the proposal to close Mahknati Island to commercial herring harvest & the decision to reclassify Saxman as non-rural.

- **Discontinue the use of RAC subcommittees and/or Working Groups** unless called for by the RACs themselves. These work groups tend to circumvent the RACs and are usually formed at the request of the State. The FSB has allowed Workgroup reports to become part of its record and deliberation regardless of the RAC response to the Workgroup’s recommendations.
- **Petitions for Reconsideration:** Reinstate the Board’s policy of allowing RACs to submit requests for reconsideration of FSB decisions. The SE RAC denied right to request reconsideration of the Saxman nonrural determination. RFRs should be posted on the OSM website prior to the meeting where the issue will be decided.

The FSB should adopt a policy that prevents opponents of subsistence from filing repeated requests for reconsideration of the FSB’s positive C&T determinations. The Policy should state that the Board will only consider a proposal to modify or rescind a positive C&T determination if the proponent of the proposal has demonstrated substantial new information supporting the claim.

REGIONAL ADVISORY COMMITTEES:

- **The Regional Advisory Committees (RACs) need more support and funding.** Congress gave the regional councils explicit authority to engage in “the review and evaluation of proposals for regulations, policies, management plans and other matters relating to subsistence uses of fish

and wildlife.” §805(a)(3)(A). The full advisory role of the RACs set forth in §805 needs to be recognized in the public hearing, consultation and regulatory process. Instead, the RACs are largely on their own, with little or no professional expertise or sources of information necessary to carry out their role of making recommendations to the FSB and reporting to the Secretaries. This has weakened the grassroots input to the federal system. Despite today’s obvious constraints on the federal budget, the Secretaries should review the budgetary needs of an adequate federal system, which includes a well-funded RAC system, and restore as much of the recent reductions as is fiscally possible. The Councils, to be effective, need to have a separate pool of funding to hire their own staff and participate as full and independent partners with the agencies and their staff.

- Currently, the RACs can no longer hold meetings in rural communities so that affected subsistence users can provide input on issues that will come before the FSB. This policy should be rescinded.
- Contract management of the RACs to an Alaska Native tribally authorized entity.
- Members of the RACs should be appointed by their tribal governments & should be subsistence users.

SCIENTIFIC RESEARCH AND DATA COLLECTION: Additional funding is needed for scientific research and data collection, including for the partnership program and fisheries information service projects. Currently, too much of the federal research funding is going to the State of Alaska. That funding could go to a statewide Native organization. The Secretary should direct OSM and the various agencies to contract and/or compact with Alaska’s Tribes and their organizations to conduct more of this research and data collection. Alaska Natives and their organizations need to be able to participate as full partners. More involvement by Alaska Natives can only improve the overall research.

In fact, given the complexity of dual management now in place in Alaska, depressed stocks and the need to scrutinize diverse fishing pressures on a large number of different stocks and species, there is a need for a statewide Alaska Native umbrella organization that can monitor and coordinate activities statewide, and provide technical assistance to regions and localities that have not yet developed their own resource management capacity. There are numerous working groups, task forces and committees that the State and the Federal Government have established to address natural resource issues that do not have meaningful Native participation because no one is paying attention or has the time or staff to offer the follow-through needed. A well-staffed statewide Native Subsistence Commission could monitor efforts to undermine federal protections for subsistence, act as a clearinghouse on subsistence-related information, and provide administrative and professional help to Alaska tribal governments and their organizations on fish and wildlife issues. While some regions and tribes have begun to develop modern resource management capacity, there is no statewide coordination and no uniform approach on many fish and wildlife issues. Such a Commission would serve to clearly demonstrate the capacity within the Alaska Native community to manage resources using appropriate science and management regimes, including traditional knowledge, so as to disprove the prevailing belief among policy makers and resource managers that there can be no meaningful role for Alaska Natives.

OSM also needs to obtain RAC, tribal and local input into research priorities so they reflect issues of importance at the local level, and then avail themselves of local, traditional knowledge and expertise in conducting subsistence research.

TRIBAL CONSULTATION: FWS and the OSM has given a very narrow interpretation to EO 13175 in Alaska. They limit consultation to only those issues that affect tribal trust lands or resources that impact tribal self-governance or treaty rights, and see no need to consult on regulations that impact subsistence users and uses. Each of the federal agencies, including the OSM, need to create a meaningful public consultation process which honors the federal government's trust responsibility to Alaska's tribes and that includes consultation on all subsistence policies and regulations.

ANILCA SECTION 810 REVIEWS: Section 810 requires federal agencies to analyze the effect of non-subsistence uses allowed by federal decisions that "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" if those uses would "significantly restrict subsistence uses." Both the National Park Service ("NPS") and Bureau of Land Management ("BLM") have permitted a rapidly increasing number of transporters and outfitters and their growing numbers of sport hunting clients to have almost unregulated access to the federal public lands and waters in the northwest arctic that are under NPS and BLM management. The NPS last performed an 810 analysis in 1986 when it found that the northwest arctic region was too remote for sport hunting to have any adverse effects on subsistence uses. The BLM recently completed an Environmental Impact Statement and a massive Resource Management Plan reaching from the Kobuk Valley north of Kotzebue to the Seward Peninsula south of Nome where it took the position that since the Resource Management Plan did not specifically "withdraw, reserve, lease, or otherwise permit the use, occupancy or disposition of public lands" it did not "significantly restrict" subsistence. It is now preparing a more localized Resource Management Plan for the Squirrel River drainage, which reportedly will include an 810 analysis on the effect of permitted sport hunting on subsistence. The NPS is also reportedly completing a long delayed concession permitting plan for the Noatak Preserve, but has previously taken the position that in part as long as "some" species were available for subsistence uses (such as rabbits or ptarmigan) sport hunting could not be said to "significantly restrict" subsistence uses of caribou. It is probable that these are not isolated lapses.

The Secretary should direct all federal land management agencies to review, the agencies' process for the implementation of Title VIII, Section 810. The review should be conducted with the full participation and consultation of the RACs and subsistence users. The review should lead to the adoption of regulations that meaningfully protect the opportunity for customary and traditional subsistence patterns and practices of taking and use, and the opportunity to harvest subsistence resources, as well as the availability of subsistence resources and the maintenance of healthy fish and wildlife populations. The regulations should require an 810 process and analysis that is designed to protect the opportunity to continue the subsistence way of life rather than the narrow and cramped interpretation the agencies currently subscribe to section 810. The regulations and policy should be consistent among all the federal agencies.

ENFORCEMENT: Citations should be given for wanton waste, illegal methods and means and commercial sale of subsistence taken fish, but not for subsistence users who responsibly follow their customary and traditional practices. The federal subsistence regulations establishing seasons, methods & means and bag limits need to legalize customary and traditional practices and set realistic harvest quotas.

All enforcement actions on federal lands and waters should be suspended pending a complete regulatory review, and violations that were issued pursuant to erroneous policies prior to the review should be dismissed, and law enforcement agents directed to return individual's nets, small fishing gear and other essential equipment needed to feed their families.

We also recommend the Department undertake an investigation and report on Federal and State law enforcement aimed at subsistence activities undertaken in 2008 and 2009. We have seen a significant increase in enforcement actions against Alaska Natives. Finally, we recommend that the MOU between the State of Alaska and the FSB that allows the State to carry out enforcement actions on federal lands be reviewed and possibly suspended.

INTENSIVE MANAGEMENT OF PREDATORS ON FEDERAL LANDS: The FSB has refused to adopt regulations that would allow for predator control. It adopted a policy in 2004 that states that it has no authority to adopt such measures. The policy states that the FSB is authorized only to administer the subsistence taking and uses of fish and wildlife on federal public lands for rural residents and that the authority over predatory control and habitat management rests with the various land managers (FWS, NPS, BLM, BIA and the Forest Service). The Secretaries of Interior and Agriculture should direct the various agencies to incorporate predator control measures into their wildlife management plans, and to ensure that decisions are based on local and traditional knowledge as well as the more general biological and social impact data. Section 815(1) of Title VIII of ANILCA infers that the "conservation of healthy populations" is not the same as the "conservation of natural and healthy populations," which is the standard required for the national parks and monuments. ANILCA §801(4) provides that Congress invoked its constitutional authorities to protect and provide the opportunity for continued subsistence uses on the public lands by rural residents. ANILCA refers to using sound management principles, in accordance with recognized scientific principles and the purposes of each conservation unit. Predator control is a legitimate wildlife management tool and in situations where it does not conflict with the stated purposes of the federal land unit, could be used to manage ungulate populations at a healthy level to "provide the opportunity for continued subsistence uses on the public lands by rural residents."

Subsistence in the Courts

****Madison v. Alaska Department of Fish and Game*, 696 P.2d 168 (1985):** The Alaska Supreme Court overturned the state regulations that limited subsistence uses to rural residents on the grounds that the Alaska subsistence statute did not limit eligibility to rural residents. The decision placed the State out of compliance with Title VIII of ANILCA.

***Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989):** The State amended its subsistence statute in 1986 to limit the state subsistence priority to “residents of a rural area,” and defined “rural area” to mean “a community or area of the state in which 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.” The definition had the effect of excluding Native communities located on the Kenai Peninsula. The Kenaitze Indian Tribe sued. The Court of Appeals rejected the State’s definition of rural, concluding that the State was simply trying to find a way to “take away what Congress had given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests.

***Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989):** This case helped define and clarify the requirements of Title VIII by establishing that the state subsistence regulations (seasons, bag limits, means and methods of harvest) had to be consistent with local, customary and traditional subsistence uses and that regulatory restrictions had to result in the minimum adverse impact possible upon rural residents’ customary and traditional uses. The court also held that neither state law nor ANILCA precludes a defendant from challenging the validity of a state hunting regulation as a defense to a criminal prosecution.

****McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989):** The Alaska Supreme Court invalidated the state subsistence statute’s rural residency preference as unconstitutional under several clauses in article VIII of the Alaska Constitution. The decision meant that the State could not comply with the basic requirement in Title VIII that it provide a priority for subsistence uses of Alaska’s rural residents. In response to the McDowell ruling and Alaska’s inability to comply with the requirements of Title VIII, the federal agencies took over management of subsistence uses on federal lands in 1990. 55 Fed. Reg., 27,114 (1990).

****McDowell v. United States*, A92-0531-CV, (D. Alaska, filed June 22, 1990):** The same plaintiffs in the earlier State court McDowell case brought a facial challenge to ANILCA in federal court challenging the constitutionality of Title VIII’s rural preference. The district court upheld the constitutionality of Title VIII, and rejected equal protection and 11th amendment challenges, but on reconsideration determined that the plaintiffs’ original complaint had been filed prior to the effective takeover of management of the subsistence program and dismissed the case on procedural grounds. The plaintiffs appealed, but voluntarily dismissed their appeal in early 1998.

***Kwethluk IRA Council v. Alaska*, 740 F. Supp. 765 (D. Alaska 1990):** The court struck down state regulations governing subsistence hunting of caribou in western Alaska as inconsistent with customary and traditional harvest patterns of Yupik natives.

*Denotes those cases in which AFN has intervened to defend the federal priority.

***John v. Alaska*, Civ. No. A85-698 (D. Alaska Jan. 19, 1990)(Order on cross motions for summary judgment):** The court struck down state regulations that restricted subsistence fishing at historic native fish camp on a Native allotment on the Copper River.

***U.S. v. Alexander*, 938 F.2d 942 (9th Cir. 1991):** The court set aside a federal Lacey Act prosecution on the ground that the state subsistence law prohibiting cash sales from being considered subsistence uses was in conflict with ANILCA's protection of customary trade as a subsistence use.

***Peratrovich v United States*, No. 92-0734-CV (D. Alaska):** At issue in this case, which is still being litigated, is whether the definition of public lands in Alaska should include the waters within the Tongass National Forest. The plaintiffs claim that the US owns the submerged lands within the Forest as a result of a pre-statehood withdrawal. The case was stayed for years pending a decision in *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128 Original), and was jointly managed with the *Katie John* case. The court in *Alaska v. US* approved the federal government's disclaimer of interest in the Tongass submerged lands, but the plaintiffs argue that the submerged lands within the exterior boundaries of the Forest are either subject to the exceptions in the disclaimer or that the US did not disclaim title to those waters.

***State of Alaska v. Morry*, 836 P.2d 358 (Alaska 1992):** The Alaska Supreme Court held that "all Alaskans," regardless of where they live or what their circumstances, are eligible to travel anywhere in the State and participate in subsistence hunting and fishing on equal terms with local subsistence users. It also held that the "customary and traditional uses" standard does not provide any basis for distinguishing among users, nor does it protect "traditional patterns and methods of taking fish and game for subsistence purposes," or "traditional and customary methods of subsistence takings."

***Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994):** Several Alaska Native villages were granted preliminary injunctive relief from state regulations that prevented them from fishing for rainbow trout in the navigable portions of rivers in the Togiak National Wildlife Refuge. At the time, the federal government took the position that it did not have jurisdiction over navigable waters. In reversing the lower court's refusal to grant a preliminary injunction, the Court of Appeals found that the district court erred in focusing on whether people were going hungry in weighing the harm to the villages, and held that "the court should have focused on the evidence of the threatened loss of an important food source and destruction of their culture and way of life."

****Olsen v. United States*, A97-0031CV (D. Alaska, filed January 30, 1997):** This case alleged the same issues that were plead in *McDowell v. United States* and involved largely the same group of plaintiffs. The case was voluntarily dismissed without prejudice on March 13, 1998, in order to allow the Alaska Legislative Council's case to proceed in the DC Circuit. The DC Circuit had issued an order stating that it would transfer that case to Alaska unless the Olsen case was dismissed.

****Katie John v. United States*, A90-0484-CV (HRH), 1994 WL 487830 (D. Alaska March 30, 1994), consolidated with *Alaska v. Babbitt*, Nos A92-0264-CV, 94-35480 (D. Alaska, April 20, 1995):** In response to the federal agencies decision not to assume management over most navigable waters (only those overlying submerged lands withdrawn before Statehood), Alaska Native elders fishing near the Copper River from a Native allotment

*Denotes those cases in which AFN has intervened to defend the federal priority.

near Batzulnetas challenged the Secretary's position. They sought to extend federal subsistence management to all navigable waters in Alaska. The State sued, alleging that the federal regulations impermissibly diminished the State's authority to manage fish and game. The two cases were consolidated. Before oral argument on cross-motions for summary judgment, the federal government changed its position and conceded that the priority should extend to waters in which the US has a reserved water right. The district court concluded, based on the federal navigational servitude that federal management should extend to all navigable waters in Alaska in order to fulfill Congress' intent to provide for subsistence needs of rural Alaska residents. Both the State and the plaintiffs appealed.

The court also rejected Alaska's claim that the federal government lacked authority to manage subsistence uses on federal public lands. The State did not appeal this ruling and stipulated to a dismissal with prejudice. The State legislature, along with a group of anti-subsistence advocates attempted to intervene in the Ninth Circuit in order to appeal this ruling, but the Court denied their motion.

***Alaska Legislative Council v. Babbitt, 181 F.3d 1333 (DC Cir. 1999):** A group of Alaska legislators, having failed in their attempt to intervene in the appeal of the Katie John decision, attempted to challenge the federal exercise of management authority in a separate lawsuit. The case was dismissed on the ground that the Legislature lacked standing to vindicate an alleged injury to the State's sovereignty interests, and the individual plaintiffs had not established their standing to bring their claims.

***Alaska v. Babbitt (Katie John II), 72 F.3d 698 (9TH Cir. 1995):** The Ninth Circuit reversed as to the navigational servitude and agreed with the plaintiffs' alternative theory that the federal public lands include all federally reserved waters in the State.

Totemoff v. State of Alaska, 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244 (1996): The Alaska Supreme Court, in *dicta*, expressed disagreement with the *John* ruling, creating a conflict between state and federal law on the issue of whether the reserved rights doctrine applies to the state's navigable waters. The court also rejected the argument that *Alexander* and *Bobby* should be read to invalidate the State law that purports to strip subsistence users of "a defense [to a prosecution for a taking violation] that the taking was done for subsistence uses." AS 16.05.259. The court held that only the US Supreme Court can control the decisions of state courts, even on questions of federal law.

State of Alaska v. Kenaitze Indian Tribe, 894 P.2d 632 (1995): Since Alaska fell out of compliance with Title VIII of ANILCA in 1989, its statutory scheme maintains a subsistence priority in name only, as demonstrated by a series of State court decisions. In this case, the Supreme Court upheld the constitutionality of the state's creation of vast non-subsistence areas (Alaska Sta. 16.05.258(c). The court also unanimously invoked *McDowell's* construction of the "equal access" clauses of the State Constitution to prohibit the Legislature from using "local residency" for any subsistence-priority purpose, even as one of the three "Tier II" criteria of dependence and need to determine which subsistence users should be preferred when a particular fish or wildlife resource is not sufficiently abundant to satisfy all subsistence uses. Section 804 of ANILCA imposes local residency in its scheme to differentiate between subsistence users in times of shortages.

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***Native Village of Elim v. State of Alaska*, 990 P.2d 1 (Alaska 1999):** This case interpreted the state-law subsistence priority as not applying to subsistence fish and wildlife resources throughout their migratory range. The ANILCA priority, by contrast, clearly attaches to such resources throughout their migratory travels. That is, the ANILCA priority prevents resources from being taken for non-subsistence uses in one part of their range if that would deprive rural residents in another part of the range of sufficient resources to satisfy subsistence uses. See, e.g., 50 C.F.R. §§100.10(a) (the Secretary retains “existing authority to restrict or eliminate hunting, fishing, or trapping activities [outside of the] public lands when such activities interfere with subsistence fishing, hunting or trapping on the public lands to such an extent as to result in a failure to provide the subsistence priority.”)

***Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000):** The Court deferred to the Federal Subsistence Board’s application of restrictions on subsistence users—ostensibly for conservation purposes, but without first eliminating non-subsistence users. The court found it permissible for the FSB to balance competing aims of subsistence use, recreation, and conservation, but noted that the Board must provide subsistence users with a meaningful use preference, and found the two-day opening for subsistence hunters insufficient.

****John v. US*, 247 F.3d 1032 (9th Cir. 2001) (en banc):** Following publication of the agencies final determination of which waters are subject to the federal reserved water rights doctrine, 64 Fed. Reg. 1276 (January 8, 1999), the State appealed the Secretaries’ action to federal district Judge Holland, who affirmed the Secretarial action as consistent with the Ninth Circuit’s 1995 decision. On appeal, an *en banc* panel of the court upheld the federal regulations, holding that “the judgment rendered by the prior panel, and adopted by the district court should not be disturbed or altered by the en banc court.” Governor Knowles decided against petitioning for certiorari to the US Supreme Court.

***State v. Kenaitze Indian Tribe*, 83 P.3d 1060 (Alaska 2004):** The Supreme Court rejected a challenge to the implementation of the State’s non-subsistence areas (Alaska Sta. 16.05.258(c), and found that the Joint Boards of Fisheries and Game did not act arbitrarily or capriciously in including Native, subsistence-dependent communities within a large non-subsistence area encompassing almost half the state (Anchorage, the Kenai Peninsula and the Mat-Su Borough).

****Alaska Constitutional Legal Defense Conservation Fund v. Kempthorne*, 2006 US App. LEXIS 21570 (9th Cir. 2006), cert. denied, January 22, 2007:** In an unpublished decision, the Ninth Circuit affirmed the district court’s dismissal of plaintiffs’ challenge to the federal regulations implementing Title VIII’s rural priority. The court held that the Federal Subsistence Board acted within its statutory authority under ANILCA by enacting regulations that grant a preference for subsistence hunting to rural Alaskans, and that the preference does not violate the federal Equal Protection guarantee.

***Safari Club International v. Dementieff*, 227 F.R.D. 300 (D. Alaska 2005):** The court ruled that the exclusion of non-subsistence users from regional advisory councils violated the requirement of the Federal Advisory Committees Act (FACA) that committees subject to FACA be “fairly balanced.” The Secretary in October, 2004 adopted a rule that required the RACs to be composed of 30% sport and commercial users. Native tribes and individuals intervened to challenge the rule on the grounds that it violated ANILCA. The Court ultimately ruled that the RACs are subject to FACA, and after additional rulemaking, the FSB adopted a final rule that asks the Board to achieve 30% sport and/or commercial users on each of the RACs.

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***Ninilchik Traditional Council v. Fleagle*, No. 3:06 CV 213 JWS, 2006 U.S. District LEXIS 67753 (D. Alaska 2006):** This lawsuit challenged the failure of the Federal Subsistence Board to provide for a subsistence fishery on federal waters on the Kenai Peninsula. The federal district court denied the tribe's request for a preliminary injunction to set aside the FSB's decision not to approve the Southcentral Regional Advisory Council's recommendation to create the temporary subsistence fishery requested by the Tribe. The Court held that the regulations do not clearly require the FSB to give deference to RAC recommendations when considering a request for special action for a temporary change under 50 C.F.R. 100.19(e), i.e., concluding that 805(C) Of ANILCA only applies to recommendations on actions taken during the annual regulatory cycle.

***Alaska v. Federal Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008):** The Ninth Circuit affirmed the district court's summary judgment dismissal of the State of Alaska's challenge to the FSB's customary and traditional use determination for moose hunting for the relevant game management unit near Chistochina. The State had alleged that because harvest data indicated that customary and traditional use occurred in only a very small portion of the unit, the Board's decision to extend the C&T finding to the whole unit was made without substantial evidence. The Cheesh-na Tribal Council in Chistochina intervened in the case to defend the FSB's C&T determination.

****Katie John v. U.S.*, NO. 3:05-cv-0006-HRH, consolidated with *State of Alaska v. Salazar*, NO. 3:05-cv-0158-HRH) (Order on Cross Motions for Summary Judgment, September 29, 2009):** The State filed suit in federal court in 2005 to challenge regulations adopted by the federal agencies in 1999 to implement the Ninth Circuit Court of Appeals decision (in the original Katie John case), holding that the definition of "public lands" for purposes of Title VIII of ANILCA includes navigable waters in which the US has reserved water rights. AFN intervened on the side of the federal government to support the existing regulations. Katie John filed a separate lawsuit arguing that the federal regulations should have defined water upstream and downstream from Conservation System Units (CSUs) and waters adjacent to Native allotments as public lands for purposes of ANILCA. The cases were consolidated and jointly managed with *Peratrovich v. US*, which asserted that certain marine waters within the boundaries of the Tongass National Forest should have been included within the definition of "public lands."

In May 2007, Judge Holland upheld the federal rulemaking process for determining which waters in Alaska are subject to federal jurisdiction, and on September 29, 2009, issued an order deciding all of the remaining issues in these cases regarding which waters have federal reserved water rights and are thus subject to federal jurisdiction. The court upheld the agencies' regulations which define "public lands" to include (1) waters bordering CSUs, even if they are outside the CSU; and (2) waters adjacent to in-holdings within CSUs. The court also held that selected but not conveyed lands within CSUs are properly treated as public lands until conveyed; and that the method for determining where a river ends and marine waters begin (headland to headland) was reasonable. Unfortunately, the court rejected the claims raised in both *Katie John* and *Peratrovich*, and held that federal reserved water rights do not exist, as a matter of law, in marine waters. In addition, the court upheld as "reasonable" the Secretaries' decision to exclude waters upstream and downstream of CSUs, and waters adjacent to Native allotments that are outside of CSUs from the definition of public lands. The State has appealed the decision to the Ninth Circuit.

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Administrative Actions Needed to Ensure Food Security for Alaska Natives

Statement of the Issue:

Alaska Natives remain dependent on subsistence hunting and fishing for their economic and cultural survival. The ability of Alaska Natives to pursue their subsistence activities is closely linked to the economics of their food security and requires federal protection. The right to food security for oneself and one's family is a human right enumerated in the Universal Declaration of Human Rights of the United Nations Charter. Article 20(1) of the United Nations Declaration on the Rights of Indigenous Peoples also provides that "Indigenous peoples have the right . . . to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in their traditional and other economic activities." Although the umbrella of federal protection provided by Title VIII of ANILCA shelters both Natives and non-Native rural residents, competing federal and state administration of different "preferences" significantly impairs the ability of our people to continue to access their traditional foods. There is an urgent need for stronger federal protections.

The erosion of federal protections after more than twenty years of dual management and widespread dissatisfaction among subsistence users prompted the Secretary of the Interior in 2009, to initiate a Review of the Federal Subsistence Management Program. In doing so, he called for a "new approach" – one that would recognize and respect the voice of subsistence users in subsistence management. The Native community participated in the review, and submitted extensive comments and recommendations. Attached is a copy of the comments submitted by AFN. The Secretary completed his review in October 5, 2010. All of the changes outlined in the final report were ones that could be implemented by the Secretary of the Interior with the concurrence of the Secretary of Agriculture, or by the Federal Subsistence Board (FSB) – most by Secretarial directive or policy changes. We believe the actions taken to date as a result of the review are inadequate.

Solution: Recognizing that only Congress can address the necessary changes to the underlying federal law protecting our way of life, and the reality that those changes are not likely to be addressed in the current political climate, we focus here on steps the Administration can take immediately that would help provide better food security for our people without significant impacts on the federal budget.

The President should convene a high-level interagency workgroup consisting of key White House officials, including the Domestic Policy Council and departments with jurisdiction over subsistence similar to the White House Council on Native Affairs, but focused specifically on Alaska Natives and their relationship to the land and the continuation of their way of life, the impacts of climate change and federal responsibilities as a result of court decisions. Subsistence management and the legal rights of Alaska Natives cut across a number of departments, including Interior, Agriculture, Justice, State and Commerce. If meaningful protections are to be provided for subsistence hunting and fishing in Alaska, there must be an ongoing dialogue between Alaska Native leaders and the agencies with jurisdiction over the various aspects of subsistence. Presidential involvement has been a hallmark of all of the major federal laws affecting Alaska, including the Alaska Statehood Act; the Alaska Native Claims Settlement Act (ANCSA); and the Alaska National Interest Lands and Conservation Act (ANILCA), including Title VIII of that Act, which was intended to provide protection for subsistence hunting and fishing rights and to fulfill the promises of the ANCSA. The same level of White House commitment and involvement is needed today.

The President and his Administration should take the following administrative and policy measures to ensure Alaska Natives are able to pursue their subsistence activities, which are central to the economies, food security, and cultures in villages across Alaska:

1. **Tribal compacting and contracting of subsistence programs:** Expand contracting with Alaska's tribes and Alaska Native corporations for operation of significant aspects of the federal subsistence program, including the staffing and administration of the RACs. Section 809 of ANILCA provides authority for contracting Office of Subsistence Management and Federal Subsistence Board functions. Not only would this improve federal interactions within the Native community, it would engage more Alaska Natives in management and research, integrate traditional ecological knowledge gained over thousands of years, foster new Alaska Native scientists, and create real jobs for Alaska Natives.
2. **Executive Order:** The President should issue an Executive Order to advise federal agencies and the Federal Subsistence Board (FSB) that Title VIII of ANILCA is "Indian Legislation," enacted under the plenary authority of Congress over Indian Affairs, and direct that the subsistence management program be implemented in accordance with the Executive Order. Title VIII was enacted to protect the subsistence way of life of rural Alaska residents, including residents of Native villages. In implementing the statute, Congress expressed its long-standing concern for, and obligation in, protecting subsistence uses of Alaska Natives and fulfilling the purposes of ANCSA. Any ambiguities in the statute should be resolved in favor of protecting the subsistence way of life.
3. **Expand the federal government's jurisdiction under Title VIII of ANILCA:** The Secretary should voluntarily review and through rulemaking, extend federal jurisdiction to Alaska Native allotments and reserved waters upstream and downstream from federal conservation system units (CSUs). The federal district court in Alaska has acknowledged that the Federal Subsistence Board possesses the authority to determine that federal waters associated with federal lands extend to waters upstream and downstream from federal lands. *Katie John et al. v. United States*, No. 3:050-cv-00006-HRH (Sept. 29, 2009), at 65, affirmed, *State of Alaska v. Jewell and Katie John v. United States*, ___ F.3d ___ (2013).
4. **Regional Advisory Councils:** Section 805 of ANILCA mandates that the FSB follow the recommendations of the RACs unless the recommendation is "not supported by substantial evidence, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of subsistence needs." The Federal Subsistence Board (FSB) takes the position that it need only give deference to recommendations that involve the "taking" of fish or wildlife, and not on whether a community is "rural" or has customary and traditional use of fish or wildlife within their respective regions. The FSB should be directed to give deference to RAC recommendations on all matters relating to subsistence uses, including, among other things (1) rural determinations, (2) customary and traditional use determinations, (3) issues that arise out-of the normal regulatory cycle; and (4) special actions and emergency regulations.
5. **Comprehensive review of all subsistence regulations:** The Secretary should direct a comprehensive review of all federal subsistence regulations to ensure that no unnecessary restrictions are being imposed upon subsistence users unless necessary under Section 804 of ANILCA to protect the viability of the species and/or the continuance of subsistence uses.
6. **Composition of the Federal Subsistence Board:** During the Secretarial review, AFN recommended that the Federal Subsistence Board be replaced with a federally-chartered or authorized body composed of twelve (12) subsistence users from the twelve ANCSA regions, or the chairs of each of the Regional Advisory Councils. There is nothing in Title VIII of ANILCA that prohibits the Administration from creating a FSB structure composed of non-federal members. While the Secretary has recently added two public members to the FSB, the majority of the members are still federal employees.

Appendix E. Public Comments Submitted to Commission

Trust Land: We see this issue as a very important issue for all the federally recognized sovereign Tribal governments in Alaska, especially in terms of economic development projects. We know that there has been a lot of conversation about putting land into trust. We have also heard that some have said, that Alaska Tribes do not want and/or need to have that ability. As a federally recognized sovereign Tribal government we would like to say, for the record, that we agree that any Tribal corporation that is legally considered a Tribe, in order to be eligible for some funding opportunities, should not be eligible to put land into trust. It is also our feeling that Alaska Tribes that have federally recognized sovereign Tribal governments should have the option to put land into trust, instead of a blanket restriction against all Alaska Tribes. We respect that other Alaska Tribes may not want this option at this time, but we do want this option. We also feel that it would be very beneficial to "real" federally recognized sovereign Tribal governments to have the ability to put land into trust. Right now, it is very hard for federally recognized sovereign Tribal governments in Alaska that do not have large funding streams of discretionary funding to start economic development projects on any of their lands, because the land will quickly get taxed right out from under them. Also, by not allowing Tribal corporations to put land into trust and allowing federally recognized sovereign Tribal governments to have the ability to put land into trust, maybe the Tribal corporations would be more compelled to work with the federally recognized sovereign Tribal governments, that they were supposedly formed to support. This would be our vision. The way that current legislation has been implemented, Tribal corporations are basically autonomous from their federally recognized sovereign Tribal governments and their federally recognized sovereign Tribal government's wants, wishes, and concerns are an afterthought, if thought of or considered at all.

Chickaloon Village Traditional Council
Rick Harrison
Vice-Chairman