The Subsistence Debate in Alaska: Who Will Control Navigable Waters

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"Experience shows that once the feds are entrenched and in control, they'll be harder to move out than the ice in the Nenana [River]."1

Senator Frank Murkowski, R-Alaska, on the threat of a federal takeover of Alaska's subsistence fisheries.2

I. Introduction

Senator Murkowski's fear is one shared by many Alaskans. In a state which prides itself on its independence, its spectacular scenery, and especially its natural resources, the idea of an outside entity administering fish and game regulation on public lands3 within the state is understandably disturbing. Many older Alaskans recall federal mismanagement of fisheries in the territorial days.4 In fact, the drive to control and properly manage the State's natural resources was one of the prime motivations for statehood.5 Although many Alaskans oppose federal administration of fish and game regulation on public lands in Alaska, some view federal management as a change for the better. Many Alaska Natives6 feel the State has mismanaged natural resources and look to the federal government to protect subsistence activities.7 Others see federal intervention as the beginning of the end, with all interests, including sport, commercial, and Native, suffering from inevitable federal bungling.8

It is the desire to preserve the subsistence lifestyle that lies at the heart of the controversy. Subsistence practices

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1. The Nenana River provides the focus for the Nenana Ice Classic, a yearly, statewide lottery where Alaska residents try to predict the exact date and time when the ice will break on the river.


5. GREINING, supra note 4.

6. For purposes of this Note:

"Native" means a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community) Eskimo, or Aleut blood, or combination thereof ... It also includes ... any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member .... 43 U.S.C § 1602(b) (1988).


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represent both economic and spiritual ties to the land for Alaska Natives and these practices are presently stirring up heated debates in the courts. Recent decisions from the Ninth Circuit Court of Appeals and the Alaska Supreme Court conflict on the problem of whether the federal government or the State should manage fishing activities in navigable waters on public lands in Alaska. This has left the residents of Alaska with no real answers to the problem. Conflicting results from the Ninth Circuit and the Alaska Supreme Court may lead to the eventual granting of certiorari by the United States Supreme Court to resolve this controversial issue. Ultimately, the interests of Alaskans would best be served through State management of navigable waters on public lands. In fact, the State should manage fishing activities in navigable waters on public lands in Alaska. The State must either comply with the terms of ANILCA, the federal statute that governs subsistence activities on public lands within Alaska, or ANILCA must be amended.

This Note discusses the evolution of regulation over hunting and fishing subsistence practices in Alaska and the struggle for State control, concluding with the current debate over who should manage navigable waters on public lands within the state. Section II traces the history of Alaska’s fisheries management and explores the two major federal statutes contributing to the present subsistence debate. Section III explains the different ways in which the term “subsistence” is defined by various groups. Section IV tracks the progression of the rural subsistence dispute through the courts, and Section V presents the most recent developments in the subsistence controversy concerning the management of navigable waters on public lands in Alaska. Section VI considers possible directions this problem may take in the courts along with potential legislative solutions that may allow the State to regain control and once again regulate both hunting and fishing on public lands within Alaska.

II. Background

A. Early History

The Territory of Alaska became part of the United States through the Treaty of March 13, 1867, executed by the United States and Russia. However, Alaska was not admitted as the forty-ninth state until 1958. The granting of statehood came after years of proposals and resolutions that were rejected by Congress. During the interim, Alaska was busy developing one of its most important assets, a booming commercial fishing industry.

During Alaska’s territorial days, the federal government controlled Alaskan fisheries. Because of an abundance of fish in Alaska, provisions for the conservation of fisheries were almost totally absent in the industry’s early years. The lucrative fisheries attracted canneries to the Alaskan territory. Years of over-fishing, mainly by the cannery industry, led to great declines in fish populations. The Territory of Alaska pleaded for control of its own fisheries, but the federal government was unwilling to relinquish control to the territory.

By 1948, Alaska’s fisheries had sunk to alarming lows and by 1953 they plummeted to their lowest numbers in thirty-two years. This decline was so severe that President Eisenhower declared Alaska a “disaster area” and sent federal relief funds. Much of the fishery problem was blamed on the use of the fish trap and poor management by the federal government. A fish trap consists mainly of a fence or netting stretched across an entire stream that steers the salmon into the “heart” or “pot” of the trap where they are captured. At one point, almost 700 of these fish traps were in operation in Alaskan waters. One major appeal of the fish trap, and also one of its devastating impacts, was that once erected, a fish trap could operate night and day, without...
interruption.24 This legacy of federal mismanagement has remained in the minds of older Alaska residents who do not want the fisheries disaster repeated.

Upon becoming a state, one of the first items on Alaska’s agenda was to ban the use of the fish trap within the State.25 However, Alaska was soon to be plagued with problems other than fisheries mismanagement. For example, one issue concerned what lands Congress would allow Alaska Natives to claim.26 Natives saw the land-claim issue “as the key to bringing an end to [the Natives’] disadvantaged status.”27 While the Organic Act of 188428 gave Natives and others the right to claim the land actually in their use and possession, the Act provided that the method for gaining title would come in future legislation.29 This “future legislation” never came.30 Alaska Native aboriginal land claims were further jeopardized by the State’s land selections granted by the federal government under the Alaska Statehood Act.31 The question of these aboriginal claims, combined with the possible obstacles that aboriginal claims posed for the extraction, transport and sale of Alaskan oil reserves, led to Congressional action in the form of the Alaska Native Claims Settlement Act.32

B. Statutory History

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA).33 ANCSA extinguished Alaska Native aboriginal claims to the land, including submerged land, and also extinguished aboriginal hunting and fishing rights.34 In return, ANCSA confirmed Native title to 44 million acres in Alaska, created thirteen Regional Native Corporations, formed over 200 Native Village Corporations, and provided for a monetary settlement to Natives of $962.5 million.35 The congressional rationale behind ANCSA was that, “Congress viewed previous federal conveyances of lands claimed by Alaska Natives as past takings of aboriginal title and that [ANCSA] was intended to compensate the Natives for these past appropriations as well as for the extinguishment of any remaining aboriginal land rights.”36 However, Natives received no riparian or offshore water rights.37

This lack of water rights had a drastic impact on those regions where Natives depended on fish and marine mammals for most of their diet. For example, at the time, the villages on Kodiak Island depended on fish and marine mammals for eighty-four percent of their subsistence diet.38 Despite this heavy reliance on fish and marine mammals to survive, the Natives on Kodiak Island were not given any control over these resources. The combination of federal rules and regulations made it harder to subsistence hunt.39 Initially, Alaska Natives had welcomed the idea of owning title to the land, as they believed owning the land would allow them to protect their traditional way of life.40 However, although ANCSA gave the Natives title to land, it gave no clearly defined tribal rights, and the extinguishment of aboriginal claims left Natives with no rights as Native peoples to fish or wildlife.41

At the same time ANCSA’s effects were beginning to be felt, Alaska’s urban areas experienced rapid population growth, increasing the competition for fish and game resources among Alaska Natives and other rural Alaskans.42 In addition, sport and commercial interests dominated the state boards of fish and game.43 Because the majority of the Alaska Department of Fish and Game’s funding derived from sport and commercial users’ license fees, these users, in turn, gained significant influence compared to subsistence users.44 Natives, the majority of subsistence users, were left in a sec-

24. GRUENING, supra note 4, at 170.
26. GRUENING, supra note 4, at 540.
27. Id. at 543.
29. GRUENING, supra note 4, at 540.
30. Id.
32. CASE, supra note 31.
38. Id.
39. Id.
40. Id. at 60.
41. Id.
42. H.R. REP. No. 1045, 95th Cong., 2nd Sess., pt. 1, at 184 (1978). “Between 1965 and 1975, Alaska’s population increased from 265,000 to 405,000 people and the number of resident hunting and fishing licenses almost doubled—from 93,000 to 170,500.” Id.
ory position with little economic or political influence over fish and game regulation in Alaska. 45

Feeling powerless, Natives sought federal statutory protection. At the first congressional hearings, in 1968, concerning ANCSA, the Alaska Federation of Natives expressed the need for subsistence protection. The President of the Alaska Federation of Natives testified:

Another facet of the native method for subsistence living has hit an all time low. That is the salmon fishing industry. The responsibility for the run of the fishing industry lies with the Federal Government. It took place under the control of the Bureau of Commercial Fisheries... The Alaska salmon industry was the world's greatest salmon industry, but it was ruined under Federal control and the industry that was a major employer of the Alaska native has been ruined to the point that the State is seriously considering closing the salmon season to commercial fishing... The running of the industry has put many natives out of work and has not been replaced by other means of making a living.

The decline in a subsistence way of life for the native people and the running of a basic industry that supported the natives leaves many people without means of making a living. In many areas of Alaska it costs $1 a gallon for fuel. It also costs $15 a case for milk. Without a means for making money and without a way of making a subsistence living. The native people are facing a daily crisis just to survive and the situation is getting worse as Alaska develops and grows in population. Unless relief is forthcoming it is not inconceivable that we may have starvation in the most affluent country in the history of the world.

We must do something now. 46

Although the joint Senate and House Conference Committee Report accompanying ANCSA expressed the clear intent that: the State of Alaska and the United States Secretary of the Interior “protect the subsistence needs of the Natives[,]” 47 no specific provisions were provided in ANCSA. This issue was finally addressed nine years later when Congress enacted Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). 48

ANILCA is a federal statute which provides measures for conservation of natural resources on public lands in Alaska. 49 The purposes of ANILCA include: (1) protecting and preserving Alaska's scenic, geological, wilderness and cultural values; (2) creating a balance between land protected for natural values and land used for commercial purposes; and (3) protecting the subsistence lifestyle in Alaska. 50

Congress recognized that "Alaska is unique in that, in most cases, no practical alternative means are available to replace the ... fish and wildlife which supply rural residents dependence on subsistence uses," 51 Title VIII of ANILCA attempts to deal with the subsistence issue. 52 It provides a priority for "the taking on public lands of fish and wildlife for nonwasteful subsistence uses ... over the taking on such lands of fish and wildlife for other purposes." 53 Concerning implementation of the subsistence priority, appropriate limitations are based on customary and direct dependence upon the fish and wildlife populations, local residency, and the availability of alternative resources. 54

Under ANILCA, the State is given the opportunity to administer subsistence laws. The State of Alaska retains control over regulation of hunting and fishing within the State as long as it enacts and implements laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA. 55 The State had one year, commencing on December 2, 1980, to set up a subsistence preference. 56 In order to enforce the subsistence priority, Congress authorized any aggrieved local resident or organization to file suit in federal district court to challenge the state or federal government's failure to provide a subsistence preference as required by ANILCA. 57

54. Id.
56. Id.
III. Subsistence Defined

People define subsistence in a myriad of ways. Subsistence comes from the Latin word meaning "to stand up."58 According to one dictionary, it is the means of subsisting; the irreducible minimum necessary to support life, such as food and shelter; or means of obtaining the necessities of life.59 Common usage of the word "subsistence" implies a low standard of living which is completely inconsistent with the Alaska Native view of subsistence.60 To Natives, "[s]ubsistence living [is] not only a way of life, but also a life-enriching process."61 It is a complicated economic system which requires the organization and effort of almost every man, woman, and child in a village.62 Subsistence activities form a complex network of rights, associations, and obligations between families and generations.63 It requires the knowledge of traditional customs of hunting and gathering and also knowledge of traditional distribution rules.64 The objective of a "subsistence system is to provide material and psychological security and self-sufficiency in the face of uncertainty in extraregional economic systems."65 Subsistence also has important religious significance.66 Subsistence is not only a tie to the past but a means by which to survive in the future. It clearly lies at the heart of the Native Alaskan culture.67 Congress has acknowledged the importance of the subsistence lifestyle in Alaska. In 1978, it reported that "[fifty] percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and [forty] percent of such families spend an average of [six] to [seven] months of the year in subsistence activities ..."68 Although Congress tried to acknowledge the importance of the subsistence way of life, ANILCA defines subsistence differently than Alaska Natives. ANILCA defines subsistence uses as follows:

"[S]ubsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.69

This mechanical definition does not encompass the dynamic meaning embraced by Alaska Natives. This definition is also not without ambiguity. For example, the phrase "customary and traditional" is not defined in ANILCA, and was not defined by statute in Alaska until 1992.20 Such ambiguity has plagued the development of the rural subsistence priority.

IV. History of the Rural Preference and Its Clash with the Alaska Constitution

In 1978, the Alaska Legislature adopted a statute providing for a subsistence priority.71 This statute was enacted in anticipation of ANILCA, because the State could retain control of hunting and fishing regulation if it set up regulations in compliance with ANILCA. However, this legislation did not restrict the subsistence priority to rural residents.72 So, in May of 1982, the Alaska Boards of Game and Fisheries adopted a regulation that tied subsistence hunting and fishing rights to rural residency.73 Between December 2, 1981, and April 29, 1982, the State made various submissions to the Secretary of the Interior demonstrating the compliance of Alaska's subsistence and management use program with the provisions of ANILCA.74 Finally, on

59. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2279 (unabr. 1966).
60. BERGER, supra note 37, at 54.
61. Id. (quoting Nelson Frank of Sitka).
62. Id. at 56.
63. Id. at 52.
64. Lee, supra note 58.
66. The Alaska Supreme Court recognized the religious importance of subsistence by determining the taking of moose out of season for funeral pot latches is constitutionally protected as an expression of freedom of religion. Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979).
May 14, 1982, the Secretary of the Interior determined that Alaska would be in compliance with ANILCA as of June 2, 1982, and thus would retain control of hunting and fishing regulation on public lands in Alaska. 75

Despite the Secretary of the Interior’s determination, Alaska’s first subsistence regulation was challenged in Madison v. Alaska Department of Fish and Game, by two groups of residents who were denied subsistence permits because their use of salmon did not meet the Board of Fishers’ definition of subsistence. 76 The residents denied permits had “fished with set nets for salmon for their personal and family use.” 77 The Alaska Supreme Court held the regulation “inconsistent with the legislative intent to provide guidelines for the protection of subsistence” and, in addition, the regulation exceeded “the authority delegated to the board because it operate(d) too restrictively in its initial differentiation between subsistence and non-subsistence uses.” 78 As a result of Madison, Alaska was no longer in compliance with ANILCA. Faced with the possibility of losing control of fishing and hunting regulation on public lands, the State amended the subsistence statute to restrict application to rural residents. 79

The new statute was challenged in 1988 by Natives on the Kenai Peninsula 80 because the statute defined “rural area” as “a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.” 81 This definition had the effect of classifying most of Alaska’s Kenai Peninsula as non-rural. 82 The Kenai Peninsula, located south of Alaska’s largest city, Anchorage, is known for its abundant fishing, and has become an important area in the fight over subsistence.

76. 696 F.2d 168, 170 (Alaska 1985).
77. Id.
78. Id. at 178. In its analysis the court observed:
    The legislative history indicates that the legislature intended to protect subsistence use, not limit it. The words “customary and traditional” serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities. For these reasons, the board’s interpretation of “customary and traditional” as a restrictive term conflicts squarely with the legislative intent. Id. at 176 (footnote omitted).
(a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence use in each rural area identified by the boards.
(b) The boards shall determine
(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with sustained yield; and
(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.
(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then non-wasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:
    (1) customary and direct dependence on the fish and stock or game population as the mainstay of livelihood;
    (2) local residency; and
    (3) availability of alternative resources.
(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.
(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not identified under (a) of this section may be taken only under nonsubsistence regulations.
(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and 16.30.
80. Kenaitze Indian Tribe v. Alaska, 860 F.2d 312 (9th Cir. 1988), cert. den., 491 U.S. 905.
81. ALASKA STAT. § 16.05.940(27) (1992).
82. As background information the court noted:
The Kenaitze [Indian Tribe], a tribe numbering approximately four hundred, [has] lived on the Kenai Peninsula, in southern Alaska, for hundreds of years. For most of their history, the Kenaitze have pursued a way of life dominated by subsistence fishing and hunting. In recent years, however, the area’s proximity to Anchorage has made the Kenai Peninsula a center of commercial and sport fishing, and has transformed the Peninsula’s economy to one based primarily on work for cash. Subsistence fishing has been crowded out by commercial harvesting and sport fishing, the latter pursued with all the zeal of a Crusade.
860 F.2d at 313 (citations omitted).
In considering the statute, the Ninth Circuit Court of Appeals concluded that the State was trying to "take away what Congress has given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests." The court also held that, although the Kenai Peninsula did not fall under the statute's definition of "rural area," it was nevertheless "rural" under the ordinary meaning of the term. Although this case challenged the coverage of the rural subsistence priority by questioning the meaning of "rural," the State's statutory rural preference remained in effect.

The State of Alaska remained in compliance with ANILCA, and therefore controlled subsistence hunting and fishing regulation on public lands. However, in 1989, in McDowell v. State, the Alaska Supreme Court struck down the rural resident subsistence priority for violating the Alaska Constitution. In McDowell, the rural subsistence preference was challenged by a number of Alaska residents under various provisions of the Alaska Constitution. These provisions included the common use clause, article VIII, section 3, the no exclusive right of fishery clause, article VIII, section 15, and the uniform application clause, article VIII, section 17. According to the Alaska Supreme Court, these three provisions all convey that "exclusive or special privileges to take fish and wildlife are prohibited." It is important to note though, that article VIII, section 15, does not bar differential treatment of commercial, sport, and subsistence fishermen. Further, concerning the common use clause of the Alaska Constitution, the framers of the constitution "in guaranteeing people 'common use' of fish, wildlife and water resources, ... clearly did not intend to prohibit all regulations of the use of these resources." In its opinion, the court wrote:

One purpose of the 1986 act is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so. This is an important interest. However, the means used to accomplish this purpose are extremely crude. There are ... substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated rural who have no legitimate claims. A classification scheme employing individual characteristics would be less invasive on the article VIII [Alaska State Constitution] open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion.

If the rural subsistence provisions violate the Alaska Constitution, what sort of subsistence provisions would be constitutional? The court left that question unanswered.

We are not called upon in this case to rule on what selection criteria might be constitutional. It seems appropriate, however, to note that any system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII. In such cases, assuming that the exclusionary criterion is not per se impermissible, our decisions suggest that demanding scrutiny is appropriate.

With the State's rural preference found to be unconstitutional, Alaska was again in non-compliance with the terms of ANILCA. In June 1990, Alaska's governor convened a special session of the
legislature to look at the subsistence problem. However, the special session failed to find a solution. In an attempt to salvage some sort of subsistence rule, the Alaska Superior Court found the rural limitation severable from the remaining portion of Alaska’s subsistence law. Therefore, a subsistence law still existed, but it applied to all Alaskans equally.

Since the State of Alaska was no longer in compliance with ANILCA, the Secretary of the Interior set up interim regulations effective July 1, 1990, the date of McDowell’s implementation. These interim regulations were supplanted by permanent regulations, effective July 1, 1992, and a Federal Subsistence Board was established to adopt regulations for the day-to-day management of subsistence hunting and fishing on public lands in Alaska. These new federal regulations were essentially identical to the State’s former subsistence hunting and fishing program that provided for a rural resident subsistence preference. This was done in order to avoid confusion and problems with a completely new set of regulations.

V. The Struggle for State Control

Alaska has struggled to solve its subsistence problem and return management to the State. In 1994, there was a failed attempt to get a Constitutional amendment measure on the November general election ballot. The primary reason for this failure is that Republicans in the Alaska Legislature, along with many sport and commercial hunters and fishermen, oppose any sort of special preference for subsistence users. Many Natives, on the other hand, favor federal control because they believe the State has mismanaged natural resources and see the federal government as the best protector of Native subsistence interests.

Despite the Natives’ belief in federal capabilities, federal regulation has failed to provide all the subsistence protection Natives expect. For although the federal government has taken over regulation on public lands in Alaska, it has excluded “navigable waters” situated on public lands in Alaska from its management. Management of these navigable waters has been left to the State because the Secretary of the Interior’s interpretation of ANILCA led to federal regulations which excluded navigable waters on public land in Alaska from the definition of “public lands.” Since most waterways on public lands fall under the category of “navigable waters,” essentially, the federal government does not regulate fishing on public lands. This interpretation of the definition of “public lands” in ANILCA has led to heated litigation.

A. The Debate Over Alaska’s Navigable Waters

In John v. United States, a group of consolidated cases under joint management, both Alaska Natives and the State of Alaska brought suit against the federal government. Despite their pursuit of a common defendant, these two plaintiffs sought opposing results. First, the State of Alaska sought to prevent the federal government from regulating fish and game on public lands. Second, Alaska Native Katie John and others sought enforcement of their subsistence rights and demanded federal control of navigable waters on public lands. The case raised

104. 50 C.F.R. § 100.3(b) (1994).
105. The regulations contained in subpart D apply on all public lands including all non-navigable waters located on these lands. 57 Fed. Reg. 22,951 (1992); see also 50 C.F.R. § 100.3(b) (1994).
109. The area in dispute is situated at the junction of Tanada Creek and the Copper River and is within the boundaries of Wrangell-St. Elias National Park and Preserve. There once existed a village known as “Batzulnetas” at this site. Although this area was closed to fishing in 1964, it was reopened to limited fishing in 1988. Katie John and others argue that these waters, determined to be “navigable waters,” are “public lands” as defined in Section 102 of ANILCA (16 U.S.C. § 3102) and should therefore be under federal management. 1994 WL 487830, at *10.
two issues: 1) for purposes of ANILCA, who is entitled to manage fish and game within Alaska, and 2) where does ANILCA apply? 110

1. Who is Entitled to Manage Fish and Game on "Public Lands"?

The State of Alaska questioned the Secretary of the Interior's authority, under Title VIII of ANILCA, to manage fish and game for subsistence purposes on "public lands." 111 The federal defendants, and plaintiffs Katie John and others, contended it was the duty of the federal government, and the Secretary of the Interior in particular, to implement the subsistence provisions of ANILCA. 112 The State disagreed, arguing that Congress enacted a law creating a right to manage subsistence hunting and fishing, but gave no authorization to the Executive Branch to implement the law. 113 Essentially, the State posited that the federal government had no right to manage federal land. Critical to the State's argument was ANILCA Section 805(c). 114 Although Section 805(c) speaks of the Secretary's monitoring and other administrative roles, it is silent as to implementation of the rural subsistence preference. 115 The court examined the legislative history of ANILCA to determine that Congress "unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804" 116 in the absence of a state program. 117 Thus, the court concluded that the Secretary of the Interior, not the State, "is entitled to manage fish and game on public (federal) lands in Alaska for purposes of Title VIII of ANILCA." 118

2. Where Does ANILCA Apply?

Concerning this question, the parties disagreed as to what lands were subject to federal regulation. 119 The State and the Secretary of the Interior, who were aligned on this issue, took the position that for purposes of ANILCA, navigable waters inside Alaska's borders are not "public lands." 120 On the other side, the plaintiffs believed the federal government should control navigable waters for purposes of ANILCA, and that the authority for this control comes from the reserved water rights doctrine and the federal navigational servitude. 121 In analyzing this issue, the court looked to the definitions set forth in ANILCA. 122 ANILCA Section 102 defines "public lands" in three parts as follows:

(1) The term "land" means lands, waters, and interests therein.
(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except-

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
(B) land selections of a Native Corporation made under [ANCSA] ... which have not been conveyed to a Native Corporation ...; and
(C) lands referred to in section 19(b) of [ANCSA] ... 123

In defining "public lands", Congress failed to define the terms "interests" or "title." 124 The Secretary of the Interior contended that the United States did not have "interests" in navigable waters, nor did it have "title," and therefore navigable waters were not within the federal government's area of control under ANILCA. 125 The court applied a rea

110. Id. at *1.
111. Id. at *5.
112. Id.
113. Id.
114. The provision provides:
The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.
118. Id. at *9.
119. Id.
120. Id.
121. Id. at *9-*11.
122. Id. at *12.
125. Id. at *13.
sonableness standard in reviewing the Secretary's interpretation.126 The plaintiffs relied on the reserved water rights doctrine127 and the federal navigational servitude128 to argue that the term "public lands" in Section 102 includes navigable waters.129 The court declined to use the reserved water rights doctrine130 but utilized the theory of the navigational servitude to find that "public lands" includes all navigable waters, and the Secretary of the Interior's position to the contrary was unreasonable.131

This ruling, the first since statehood denying Alaska the legal authority to manage any portion of its fisheries, came as quite a blow to the State.132 With the federal government responsible for the regulation of fishing in Alaska's navigable waters, federal regulations were proposed to cover fishing in the navigable waters for Alaska's 1995-96 season.133 In the meantime, both the State and the federal government appealed the John case to the Ninth Circuit Court of Appeals.134 Also during this interim, the federal government changed its position and conceded that its reserved water rights sufficed as "interests" in navigable waters for purposes of ANILCA.135

B. On Appeal to the Ninth Circuit

United States District Court Judge Russel Holland, who made the original ruling in John v. United States, stayed his decision pending the outcome of the appeal in the Ninth Circuit.136 The appeal was placed on the Ninth Circuit's "fast track" in the fall of 1994.137

In April of 1995, the Ninth Circuit handed down its decision in Alaska v. Babbitt.138 Before oral argument, the parties, including the State of Alaska, stipulated to the dismissal of the issue concerning whether the federal government was authorized to manage subsistence fishing and hunting on public lands according to Title VIII of ANILCA, in the absence of Alaska laws implementing the subsistence preference.139 Therefore, the district court's ruling that Title VIII authorized the federal government to manage hunting and fishing on public lands stood firm. The only issue on appeal concerned whether "navigable waters" were included in the definition of "public lands" for purposes of ANILCA.140

Ultimately, the Ninth Circuit held as reasonable the Secretary's later conclusion that those navigable waters in which the federal government had an interest by virtue of the reserved water rights doctrine were included in ANILCA's definition of public lands.141 The court also found that the federal agency administering the subsistence priority was responsible for determining which waters were held through the reserved water rights doctrine.142 In making its decision, the court had "no doubt that


1) "whether Congress has directly spoken to the precise question at issue' either in the statute itself or in the legislative history." Railway Labor Executives' Ass'n v. ICC, 784 F.2d 999, 963 (9th Cir. 1986) (quoting Chevron, 467 U.S. at 843).
2) if Congress has not directly spoken to that precise question, the court needs to consider "whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843.
127. "When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." 1994 WL 487830, at *13. Plaintiffs allege "that when the United States set aside land for plaintiffs under the Alaska Native Allotment Act of 1906, it also reserved sufficient water to fulfill the purposes of the allotments, and 'such reserved water rights are interests to which the United States holds title ...'" Id. at *11.
128. "The navigable servitude is described as a 'dominant servitude' and a 'superior navigation easement.' ... The purpose of the navigable servitude is to relieve the government of the obligation to compensate an owner of navigable, littoral, or submerged lands for acts which normally require compensation under the Fifth Amendment." Id. at *14; see Boone v. United States, 944 F.2d 1489, 1493-94 (9th Cir. 1991).
130. Id. at *14.
131. Id. at *17-18.
135. Native Village of Quinhagak v. United States, 35 F.3d 388, 393 (9th Cir. 1994).
137. Id.
138. 54 F.3d 549 (9th Cir. 1995), opinion withdrawn and superseded by Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995). The superseding opinion was identical to the original ruling except that the new opinion now has a one judge dissent. All cited hereinafter will be made to the superseding opinion.
139. 72 F.3d at 700 n.2. Not everyone was pleased with the stipulation for dismissal. The court noted:

The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. [The Ninth Circuit] denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal.

Id.
140. Id. at 700.
141. Id. at 703-04.
142. Id. at 704.
Congress intended that public lands include at least some navigable waters” by virtue of a clear reference to subsistence fishing in ANILCA and also because “subsistence fishing has traditionally taken place in navigable waters.” However, because ANILCA did not set forth which navigable waters were considered public lands, the court used a reasonableness standard to analyze the Secretary’s conclusion that some navigable waters are included in the definition of public lands under the reserved water rights doctrine.

In reaching its conclusion the court first looked to whether the navigational servitude gave the United States an “interest ... the title to which is in the United States,” according to the definition of “public lands” in ANILCA. According to the court, the navigational servitude is a “concept of power, not of property.” Previously, the Ninth Circuit had held that the navigational servitude was not “public land” under ANILCA because the United States did not hold title to it. On that basis, the Ninth Circuit rejected the federal navigational servitude argument. The court did find that the federal government had interests in some navigable waters because of federal reserved water rights. Therefore, the Secretary of the Interior’s interpretation of “public lands” for purposes of ANILCA was reasonable.

The court noted:

The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes. In doing so, it has also implicitly reserved appurtenant navigable waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservation. By virtue of its reserved water rights, the United States has interests in some navigable waters.

In its conclusion, the Ninth Circuit noted that the “issue raised by the parties cries out for a legislative, not a judicial, solution.” The court sent this message to both the Alaska and the United States Legislatures:

If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA’s rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. Neither the heavy administrative burden nor the complicated regulatory scheme that may result from our decision would be necessary. If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

Circuit judge Hall dissented in Alaska v. Babbitt, noting that the court was not empowered to resolve the question of whether navigable waters fall under the definition of “public lands” for purposes of ANILCA “without direction from Congress.” She recognized that this was “an incredibly complex issue whose resolution will impact all the navigable waters in Alaska.”

Judge Hall noted that because the “Submerged Lands Act of 1953 granted to the states all federal interests in the 'lands beneath navigable waters,'” Alaska held title “to the water within and the land beneath the river containing the fish camp” at issue. Therefore, since the federal government does not have “title” to the “land or water” within the area of the fish camp in question, they would need “title” to any “interest” in the navigable waters in order for the fish camp to be considered “public lands” for purposes of ANILCA. The judge found the doctrine of reserved water rights, the Commerce Power and the federal navigational servitude all inadequate to define “interest” in such a way as to allow Alaska’s navigable waters to fall under ANILCA. According to Judge Hall, even though it
“seems fairly clear that ANILCA’s objectives would be best achieved by bringing all Alaskan navigable waters under ANILCA’s reach.” the “United States seems fairly clear that ANILCA’s objectives would be best achieved by bringing all Alaskan navigable waters under ANILCA’s reach.” the “United States has had no ‘interest’ in Alaska’s navigable waters since it gave them away in 1959.” Therefore, the judge believed the decision should be made by Congress, not the court.161

This “issue” of how to classify navigable waters has yet to be fully resolved. Potential remedies include the federal government amending ANILCA to clarify the definition of public lands, or the State determining if and how to regain regulatory control under the current statute. In the meantime, the Alaska Supreme Court has added another twist to the problem.

C. Reaction of the Alaska Supreme Court

Recently, in a defiant move, the Alaska Supreme Court unanimously ruled that “navigable waters are generally not ‘public lands’ under ANILCA” and, therefore, “ANILCA does not curtail the State’s authority to regulate hunting and fishing in navigable waters …”162 In Totemoff, subsistence hunter Mike Totemoff was charged with violating the Alaska Administrative Code for shooting a deer with the aid of a spotlight.163 Mr. Totemoff was in navigable waters, situated on federal land, when he shot and killed the deer.164 The court’s initial inquiry was whether the State or the federal government had criminal jurisdiction over Totemoff.165

The Alaska Supreme Court determined that the State has jurisdiction to enforce Alaska’s spotlighting ban on federal land. The State did not consent to the exercise of exclusive federal control, nor did the State voluntarily cede exclusive jurisdiction to the federal government, and federal law does not preempt the State’s laws in this situation.166 Concerning jurisdiction over navigable waters, even if ANILCA preempts State enforcement of the anti-spotlighting regulation on public lands, the State would retain jurisdiction so long as the federal government did not have the authority under ANILCA to regulate hunting and fishing in navigable waters within Alaska.167 Looking at the definition of “public lands” under ANILCA, the court concluded that “public lands” did not encompass lands, waters, and interests therein transferred to Alaska under other federal laws.168

Although the Ninth Circuit held that the federal government had reserved water rights which constituted an interest in land to which it holds title under the definition of “public lands” in ANILCA, the Alaska Supreme Court noted, “[w]e are not obliged to follow [Alaska v. Babbitt], since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law.”169 In fact, the court found that the federal government has no authority under the federal “navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska’s navigable waters.”170

The court relied on six points to support its decision. Not only are each of these points convincing individually, but considered together they provide a persuasive rebuttal to the Ninth Circuit’s decision in Alaska v. Babbitt. First, Alaska’s interest in fish and wildlife located in navigable waters precluded federal regulation even if the navigational servitude, or reserved water rights of, the federal government can be shown.171 The court used the Submerged Lands Act of 1953172 to demonstrate Alaska’s relevant interest in lands and waters.173 Section 3(a) of the Submerged Lands Act states:

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States … and the respective grantees, lessees, or successors in interest thereof.174

160. Id. at 708.
161. Id.
164. 905 P.2d at 957.
165. Id. “Jurisdiction can be established either by finding that the State has the power to apply the spotlighting ban to subsistence hunters on federal land, or by determining that the State had exclusive jurisdiction over the navigable waters from which Totemoff fired his rifle.” Id. at 957-58
166. Id. at 958-61.
167. Id. at 962.
168. Id.
169. Id. at 963. (citing In re F.P., 843 P.2d 1214, 1215 n.1 (Alaska 1992), cert denied, 113 S. Ct. 2441 (1993)).
170. Id. at 964.
171. Id.
173. 905 P.2d at 964.
The court reasoned that navigable waters in Alaska were excluded from the definition of "public lands" in ANILCA because the Submerged Lands Act gave Alaska the ownership of, the title to, and the management power over, the land beneath the navigable waters, the navigable waters themselves, and the marine life, including fish, located in the navigable waters. In addition, the court went on to note that section 6(a) of the Submerged Lands Act specifically precludes the use of the navigational servitude to grant the federal government regulatory authority over fish and animals in Alaska's navigable waters, as this right is reserved to the State under section 3 of the Act.

The second rationale for the court's holding was that the federal navigational servitude and reserved water rights do not qualify as property interests to which title can be held. Some possessory interest is needed to hold "title" and any lesser interests will not qualify as holding "title." Because neither the navigational servitude nor reserved water rights represent a possessory interest, the federal government cannot hold title through them.

The third basis for the court's decision was the clear statement doctrine. Because hunting and fishing regulation in Alaska had been a "traditional state concern" and Congress had "not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power", ANILCA's definition of "public lands" could not be read to encompass navigable waters in Alaska. The court felt a broader reading of ANILCA would conflict with the clear statement doctrine.

Fourth, the limited management authority bestowed by any interests the federal government holds by virtue of the navigational servitude or reserved water rights was limited by the purposes of those interests. For example, the navigational servitude only covers the regulation of navigable waters for purposes of navigation, not to regulate hunting and fishing. Along the same lines, the reserved water rights doctrine "only grants to the government the right to either exclude others from appropriating water which needs a government reservation or to use a limited volume of water in order to serve the federal land reserved." Neither the navigable servitude nor the reserved water rights doctrine provided the federal government with complete power over a body of water.

Fifth, the federal navigational servitude and reserved water rights doctrine are powers over navigation and water, respectively, not powers over fish and game. Therefore, neither can be utilized to grant jurisdiction to the federal government to regulate hunting and fishing in Alaska's navigable waters.

The sixth and final reason for the court's holding concerned the reserved water rights doctrine. "Employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA would be highly impractical, perhaps even impossible." To go through the process of determining the purpose of each federal land reservation in Alaska, computing the amount of water needed to fulfill the purpose of the reservation, and convert this amount into a surface area representing "public lands" would be too complicated and burdensome for the federal agencies administering ANILCA.

175. 905 P.2d at 964.
176. Id. at 965.
177. Id. at 964.
178. Id. at 965.
179. Id. at 964.
180. Id. at 966. "The clear statement doctrine 'counsels that a ... court should not apply a federal statute to an area of tradi-
181. Id. at 966. "The clear statement doctrine 'counsels that a ... court should not apply a federal statute to an area of tradi-
182. Id. at 966.
183. Id.
184. Id. at 964.
185. Id. at 967.
186. Id. at 966-67.
187. Id. at 967.
188. Id.
189. Id.
190. Id.
191. Id.
In addition to the six reasons given to support its ruling that the federal government has no authority over navigable waters in Alaska, the Alaska Supreme Court criticized the Ninth Circuit's rationale. The Ninth Circuit had found that "the position taken by the federal agencies that reserved water rights do define the scope of ANILCA was a reasonable agency interpretation owed deference." The Alaska Supreme Court concluded that it should defer to the interpretation of the federal agency, not the new position the government set forth during the litigation. The court decided that a litigation position was not an agency determination entitled to judicial deference. Furthermore, where there exists a pure question of statutory construction no deference is due.

The final point of disagreement was that the Ninth Circuit believed its findings as to the scope of ANILCA were necessary to fulfill Congress' intent to protect subsistence fishing in Alaska. In reply, the Alaska Supreme Court pointed out that Congress' intent to protect subsistence fishing could be fulfilled through regulation of the navigable waters over submerged land owned by the United States in addition to non-navigable waters covered by ANILCA. Therefore, there is no need to resort to either the federal navigational servitude or a reserved water right to accomplish Congress' goal of protecting subsistence uses in Alaska.

VI. The Next Step

As a result of the many judicial decisions concerning subsistence activities in Alaska, we are left with no clear answers, and the search for a solution to the subsistence debate continues. Two unanswered questions that emerge from the material discussed thus far are, who actually has the authority to regulate fishing activities in navigable waters on public lands in the state, and concerning subsistence practices, what type of preference will satisfy both the Alaska Constitution and ANILCA?

A. Management of Navigable Waters

A ruling from the United States Supreme Court would resolve the conflict between the Ninth Circuit and the Alaska Supreme Court. A Supreme Court ruling allowing Alaska to regain control of fish and game regulation on public lands within the State would be ideal. To date, the Supreme Court has not granted certiorari on the issue of subsistence regulation on navigable waters. Alternatively, Congress could amend ANILCA. As the Ninth Circuit stressed in Alaska v. Babbitt, this situation calls for a legislative solution. The statute could be clarified to either specifically include or exclude navigable waters from the definition of public lands. Alaska would prefer to have navigable waters excluded from the federal statute; the State would not have to alter its present regulation system in order to keep control of navigable waters.

However, regardless of whether navigable waters are included or excluded under the terms of ANILCA, Alaska can still regain control of hunting and fishing regulation if the State brings its subsistence policy in line with ANILCA by implementing a rural subsistence priority. Apparently Congress also wants the State to administer fish and game regulation within Alaska, as evidenced by the provision in ANILCA that provides for such control. Since the mutual goal of both the federal government and the State of Alaska is to return management control to the State, the two should work together to reshape the subsistence priority. This re-tooling will require considering options such as changing the priority itself, altering the federal statute, or amending the state constitution.

B. Reshaping the Subsistence Priority

A determination as to who controls regulation of navigable waters on public lands does not resolve the problem of what type of subsistence priority will be enforced pursuant to ANILCA. One option would be to amend the Alaska Constitution to allow for a rural subsistence preference in fish and game management. However, all attempts to amend the constitution have been unsuccessful so far; no amendment has ever gotten on the Alaska ballot. Such an amendment requires two-thirds approval from the Alaska Legislature before voters can consider the measure. A two-thirds approval has been unreachable because Republicans believe rural residents should not receive preferential treatment. In addition, Alaska Natives and other rural residents have traditionally voted Democratic and Republicans are fearful of an issue that would bring out the rural vote. Sport hunters and fishermen

192. Id. (citing Alaska v. Babbitt, 54 F.3d 549, 552-54).
193. Id. Initially in Ijikas the federal government claimed it did not have sufficient "interests" in navigable waters for purposes of ANILCA, but later conceded this point in Alaska v. Babbitt.
194. Id.
195. Id. at 968.
196. Id.
198. 905 P.2d at 968.
199. Ralph Thomas, Legislators Try CPR on Dropped Suit, ANCHORAGE DAILY NEWS, Jan. 27, 1995, at Cl.
200. Id.
do not want a rural subsistence preference either. To them, a rural preference means further limits on licenses, bag limits, and hunting and fishing seasons. Yet another group, commercial fishermen, do not want their catch limits lowered to accommodate subsistence activity, and therefore oppose a constitutional amendment as well.

Another possibility would be a Native preference as opposed to a rural preference. However, this is a very controversial option. On the one hand, Natives believe subsistence is part of their culture and, therefore, should be reserved for Natives regardless of where they live.202 Favoring a Native preference is the Congressional enactment of Title VIII of ANILCA to protect Native uses of fish and game resulting from loss of aboriginal rights under ANCSA.203 "It is a reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of [ANILCA] to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary."204 The other side of the argument is that many non-Natives live in rural areas where they survive on subsistence hunting and fishing and therefore want and need the rural preference. A possible solution to this is to provide a Native preference, but also provide a secondary preference which would protect non-Native rural residents after the Native preference was fulfilled.205

A third solution, and an alternative to amending the Alaska Constitution, is to amend ANILCA to either preempt state law and grant a rural or Native preference across Alaska, or to eliminate the federal rural preference entirely. Congress could clarify not only its intent behind ANILCA, but the definition of "public lands" as well. It remains to be seen whether this type of amendment is feasible or whether State action is required to resolve the subsistence problem. Waiting for Congress to amend the statute may prove frustrating if Congress drags its feet on the issue and fails to address the problem from the perspective of Alaskans. The dynamic that exists between Native, sport and commercial interests is unique and requires special knowledge of the circumstances. A decision made by a distant body, such as Congress, may fail to adequately address any of the interests involved.

Alaska Governor Tony Knowles has suggested a proposal that attempts to strike a balance among the competing interests in the area of subsistence.206 The proposal, made up of three elements, would not only amend the state constitution but amend the federal statute as well. The amendment to the state constitution would allow for a rural subsistence preference.207 Knowles also proposes a change in state law that would give a subsistence preference to some urban residents who came from rural areas.208 The third portion of the Knowles proposal calls for an amendment to ANILCA to match the language of his proposed new state law.209 The advantage of such a plan would be to address the interests of most Alaskans. The disadvantage being that such a compromise may be unacceptable to some groups and cause further divisiveness. It is difficult to see how this proposal addresses sport and commercial interests.

One major fear about State management is the possible sacrifice of the subsistence lifestyle in favor of commercial and sport interests. Upon regaining control of fish and game regulation the State would need to regain the confidence of Alaska Natives who feel the State has mismanaged public lands. The State must strike a balance that will protect the subsistence lifestyle of Natives along with providing for the interests of sport and commercial hunters and fishermen. Alaska's government should form a partnership with Native communities in order to guarantee subsistence protection and ensure Natives an effective voice in fish and game regulation. Only through this type of collaboration can Natives receive a meaningful say in the future of subsistence protection without fear of total domination by sport and commercial interests. The Native lifestyle should not suffer at the hands of increased sport and commercial activity. Although subsistence lies at the heart of Native culture, Alaskans, including non-Natives, who live in rural areas and depend on subsistence for their survival should also be protected. A state managed rural preference that also provides subsistence protection for those Natives who live in urban areas but who customarily hunt and fish in rural areas would protect both the subsistence lifestyle of Natives and the livelihood of non-Natives dependent on subsistence hunting and fishing. While sport and commercial interests need to be considered as they represent major sources of revenue for the State, maintaining the subsistence way of life for Alaska

202. See Kancewick & Smith, supra note 43, at 647.
204. Village of Gambell v. Clark, 746 F.2d 572, 580 (9th Cir. 1984).
207. Id.
208. Id.
209. Id.
Natives should remain the most important goal.

Deciding which is the best way to regain State control of hunting and fishing regulation will be a difficult task. There are many different interests at stake, including commercial, sport, and Native. The State of Alaska needs to take the next step in order to regain control of regulation on public lands. Whether this is to amend the state constitution or to push for the amending of ANILCA, the State needs to make the next move, as Congress will not move on its own and it is uncertain when or if the subsistence issue will be addressed by the United States Supreme Court. In the long run, Native, along with commercial and sport interests would be best served by State regulation of public lands. Who better to understand the intricacies of hunting and fishing regulation in Alaska than Alaskans themselves. Although the State needs to strike a better balance between the needs of all interested groups, having control close to home allows for the development of an effective, cost efficient and beneficial regulatory regime that works for the benefit of all Alaskans.

VII. Conclusion

Prior to statehood, Alaska suffered under federal mismanagement of the territory’s fisheries. Years of over-fishing and the use of the fish trap had a devastating impact on fish populations. Many Alaskans suffered at the hands of State mismanagement as well. The primary complaint from some Alaska residents was the fishery exploitation by commercial and sport hunters and fishermen at the expense of Native subsistence activities. This dual mismanagement has resulted in a long-lived debate and legal battle for the control over fishing and hunting within the State of Alaska. Managerial duties have shifted between the federal and Alaskan governments, and today the federal government is exercising regulatory control on public lands within the State. However, this is an extremely unsatisfactory situation, especially from the State of Alaska’s point of view.

Understandably, Alaska wants control over its own natural resources and would like current federal involvement to cease. To that end, Alaska has made several unsuccessful attempts to comply with the federal statute, ANILCA, which mandates a rural subsistence preference. In 1978, the State promulgated a subsistence provision covering hunting and fishing on public lands. However, the provision was successfully challenged in court and consequently amended to apply to rural residents. Then in 1989, the Alaska Supreme Court ruled this amended subsistence priority violated the Alaska Constitution.

The federal government responded to the court’s action by promulgating its own hunting and fishing regulations for public lands within Alaska. Subsequent federal control, though extensive, did not extend to regulation of fishing in navigable waters located on public lands in Alaska. The federal government initially felt that those waters remained under Alaska’s control. Several conflicting court opinions have continued the uncertainty over who should manage Alaska’s hunting and fishing in navigable waters as well as what kind of subsistence preference should be implemented that would satisfy ANILCA. The primary victims of this lack of stability in subsistence management are Native Alaskans who depend on a subsistence lifestyle for survival.

There are two possible options concerning whether the State or the federal government control navigable waters under ANILCA. One option would be a decision from the United States Supreme Court that would solve the dispute between the Ninth Circuit and the Alaska Supreme Court. In the alternative, Congress could clarify the language of ANILCA to either specifically include or exclude navigable waters from the definition of public lands.

Once the issue of navigable waters is resolved there still remains the question of what type of subsistence priority, if any, should be promulgated. The reason to have some type of subsistence preference is to protect the subsistence lifestyle of Alaska Natives. On the other hand, a subsistence priority gives Alaska Natives preferential treatment over commercial and sport hunters and other non-Native fishery users.

A state administered rural preference that also qualifies urban Natives for subsistence use is a compromise that would successfully protect the subsistence way of life in Alaska. However, such a plan would require the State to regain the Alaska Natives’ confidence in the State’s ability to manage public lands. In addition to protecting rural subsistence activities, the state government needs to guarantee a strong Native voice in further management of fish and game. The State needs to strike a balance between Native, sport and commercial interests in order to have effective management. This type of compromise plan is the most promising and feasible solution that will unify Alaskans and minimize divisiveness.