



Spring 1993

## U.S. v. Alexander: Defining and Regulating Subsistence Use of Resources among Alaska Natives

M. Lynne Bruzzese

### Recommended Citation

M. L. Bruzzese, *U.S. v. Alexander: Defining and Regulating Subsistence Use of Resources among Alaska Natives*, 33 NAT. RES. J. 461 (1993).

Available at: <https://digitalrepository.unm.edu/nrj/vol33/iss2/19>

This Student Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [disc@unm.edu](mailto:disc@unm.edu).

## COMMENT

### *U.S. v. Alexander:* Defining and Regulating "Subsistence Use" of Resources Among Alaska Natives

In *United States v. Alexander*,<sup>1</sup> the Ninth Circuit considered whether cash sales of fish by Alaska Natives are a protected "subsistence use" under the federal Alaska National Interest Lands Conservation Act (ANILCA).<sup>2</sup> *Alexander* specifically decides whether the subsistence use priority detailed in ANILCA provides a defense for Alaska Natives<sup>3</sup> charged with violations of federal law and underlying state fish and wildlife regulations.

Defendants in *Alexander*, two Natives of southeast Alaska, appealed convictions for transporting herring eggs (also known as roe or spawn) on kelp (seaweed) in violation of the federal Lacey Act.<sup>4</sup> The Ninth Circuit found that limited transport and sale of roe on seaweed may constitute "customary trade," a legally recognized subsistence use of fish.<sup>5</sup> Under ANILCA, subsistence uses of fish by Alaska Natives must be given priority over other uses.<sup>6</sup> The court determined, therefore, that the state regulation prohibiting the sale of subsistence-caught herring spawn-on-kelp,<sup>7</sup> on which the Lacey Act convictions were based, conflicts with ANILCA.<sup>8</sup> Rather than striking down the Alaska regulation, the *Alexander* court held that ANILCA may be employed by Alaska Natives as a defense against criminal prosecution for violations of the Lacey Act.<sup>9</sup>

---

1. 938 F.2d 942 (9th Cir. 1991).

2. Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 and 43 of U.S.C. (1980)) [hereinafter ANILCA].

3. For purposes of this Comment, "Native" means members of the aboriginal groups that inhabited Alaska at the time it became a United States territory, which groups include the Aleuts; Eskimos; and Athapaskan, Tlingit, and Haida Indians. See F. Cohen, *Handbook of Federal Indian Law* 401 (U.N.M. Press 1971) (1948).

4. 938 F.2d at 945. The Lacey Act provides in pertinent part that: "It is unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A) (1988).

5. 938 F.2d at 946.

6. 16 U.S.C. § 3114 (1988).

7. See Alaska Admin. Code tit. 5, § 01.010(d) (Jan. 1990). See *infra* notes 43-57 and accompanying text for a discussion of the regulation.

8. 938 F.2d at 946.

9. *Id.* at 948.

An ongoing dispute between the State of Alaska and the federal government contributed to the conflict in *Alexander* and a number of similar cases. For more than a decade, this battle has generated confusion among the legislative, administrative, and judicial branches of Alaska's government. The controversy concerns the extent to which Alaska should be permitted to enforce, without federal interference, state fish and wildlife laws that affect Alaska Natives. Adding another dimension to the fray, the Alaska Native population is struggling to protect its traditional subsistence way of life and to achieve greater control over subsistence resources.

This Comment first discusses the facts leading to the convictions of the defendants in *Alexander*. Second, the activities of these defendants are set within the broader context of the culture and traditional practices of rural residents of southeast Alaska. Third, the Comment explores state and federal law regulating subsistence use of fish and wildlife in Alaska and places the *Alexander* decision within this legal framework. Fourth, the comment discusses the impact of regulation on the subsistence way of life in Alaska and highlights chronic problems in the state and federal schemes currently regulating subsistence use of Alaska's fish and wildlife. Finally, the Comment recommends that a practical, unified policy be formulated to overcome the present system's inadequacies. To ensure effective implementation of the chosen policy, Alaska Natives, as well as federal and state representatives, must be given a meaningful voice in the decisionmaking process and the greatest possible opportunity to participate in implementation of the regulatory scheme.

## FACTUAL BACKGROUND

### Alexander and Peele: A Tale of Two Travelers

A delicacy in some parts of the world, herring roe on kelp earns sellers up to \$60 per pound on the international market. The Japanese particularly covet this item, known in common parlance as fish eggs on seaweed. Demand for roe and other herring products has led to depletion of the herring population and consequently poses a threat to Alaska's fisheries. The state now regulates all taking of roe on kelp for subsistence<sup>10</sup> and commercial<sup>11</sup> purposes. Judge Kozinski, author of the *Alexander* opinion, ichthyologically unravels the role of roe in the present case:

---

10. Alaska Admin. Code tit. 5, § 01.715, 01.730(a) (Oct. 1991).

11. See *id.* § 27.055, 27.185. The *Alexander* court noted that the endangerment of the herring fishery led Alaska to prohibit all harvesting of roe on kelp except for subsistence use. 938 F.2d at 944. Regulations in effect at the time of the *Alexander* decision, however, indicate that commercial harvesting of roe on kelp could have been conducted, albeit only under the authority of a valid permit issued by the fishery commissioner. See Alaska Admin. Code tit. 5, §§ 27.055, 27.180 (Oct. 1991). These regulations may change in the wake of legislation newly promulgated by the Alaska legislature. See *infra* note 120 and accompanying text.

The facts that spawned this controversy are relatively straightforward. Defendants Alexander and Peele are Haida Indians. Peele harvested over half a ton of herring roe on kelp in Southeastern Alaska and enlisted Alexander's help in selling it. However, they had permits for only 444 pounds. Undeterred, they loaded an old Dodge station wagon to the gills with the contraband and trawled Canada for a buyer. Their plan began to flounder when they were unable to hook a buyer and the herring roe began to rot. They then attempted to enter the United States, hoping to unload their now malodorous cargo in the state of Washington. Alerted by Canadian officials, United States Customs agents snared the purloiners of prenatal Pisces.<sup>12</sup>

Peele collected the roe-laden kelp in April of 1987 and preserved it in brine-filled plastic buckets. Peele and Alexander transferred the goods into wax-lined boxes, without brine or refrigeration of any sort, immediately prior to their departure for Canada in December of 1987. The nearly rancid fish eggs and kelp, dry weighed at 1,060 pounds by United States National Maritime Fisheries Service officials in the State of Washington, fetched a mere \$7.25 per pound at a government auction the day following its seizure.<sup>13</sup>

Alexander and Peele planned to sell most of their goods in Canada and distribute some to relatives in Washington. After subtraction of costs, the cash proceeds were to be divided among Alexander, Peele, and three relatives in Hydaburg, Alaska, the defendants' home village. Each of the five parties expected to collect payment on about 200 pounds of the total harvest.<sup>14</sup>

### Customary Practices of Southeast Alaska Natives

Alexander's and Peele's activities parallel the traditional uses of the roe on kelp resource by southeast Alaska Natives. Alaska Natives living in Sitka Sound, a coastal area encompassing the village of Hydaburg, have engaged in the harvest of herring spawn, or *k'aaw* in Haida, since at least the 1790s.<sup>15</sup> Native elders refer to pre-colonial Sitka as 'the herring

---

12. 938 F.2d at 944-45.

13. Brief of Defendant-Appellant Henry W. Peele at 5, 8, *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1990) (No. A89-019CR) [hereinafter Brief of Defendant Peele].

14. *Id.* at 6.

15. R. Schroeder & M. Kookesh, *The Subsistence Harvest of Herring Eggs in Sitka Sound 1989*, at 4 (Div. of Subsistence, Alaska Dep't of Fish & Game Technical Report No. 173, Jan. 1990). This information applies generally to both the Tlingit Indians and the Haida Indians who reside in southeast Alaska. Letter from J. Rashleger, Member of the Haida Nation, to M. L. Bruzzese (Mar. 13, 1992) (on file with author). Note that the Sitka area harvest has been larger than that of the Hydaburg or Prince of Wales Island areas. *Id.*

egg capital' of northern southeast Alaska.<sup>16</sup> Elders recall spawn occurring in such abundance during their childhoods that the entire Sound turned white. Tidal deposits of unattached eggs reportedly reached depths of two or more feet on beaches.<sup>17</sup> Contemporary observers still speak of seeing at least that quantity of spawn on shore after storms.<sup>18</sup>

Alaska Natives collect herring eggs, which adhere together in clusters, by one of three traditional means: placing weighted western hemlock branches in spawning areas and gathering the wood on which roe settles; raking or hand-gathering hair seaweed<sup>19</sup> to which roe attaches; and cutting macrocystis kelp<sup>20</sup> covered with roe and transporting it to shore in small boats.<sup>21</sup> Researchers report that 'Japanese sets,' which consist of blueberry rather than hemlock branches, have been used in some parts of Alaska as well.<sup>22</sup> Japan apparently purchased the harvest collected from such sets at one time.<sup>23</sup> Current regulations ban the use of blueberry bushes for commercial harvesting purposes in Alaska.<sup>24</sup>

Historically, southeast Alaska Natives ate the harvested herring spawn fresh, or preserved and stored it for later consumption and trade.<sup>25</sup> Prior to the mid-1700s, Native people sent the preserved herring eggs along trade networks that criss-crossed the area now known as southeast Alaska and extended into Canada.<sup>26</sup> The tribes of southeast Alaska traded herring roe in a system of direct barter for goods such as berries, hooligan oil, craft products, and mountain goat meat. During the 1800s, currency systems developed, involving exchange of cross-valued items.<sup>27</sup> Currency items included, among other things, furs, buttons for ceremonial button blankets, bullets, and wool cloth.<sup>28</sup> By the late 1800s, "[t]raditional trade

---

16. Schroeder & Kookesh, *supra* note 15, at 3.

17. *Id.*

18. *Id.* at 3 n.2.

19. *Desmarestia viridis* sp.

20. *Macrocystis integrifolia*.

21. Schroeder & Kookesh, *supra* note 15, at 8-9.

22. *Id.* at 9.

23. *Id.* at 9 n.11. Tlingit Indians provided this information. Haida elders claim that residents of Hydaburg began to sell roe on kelp directly to the Japanese only recently. Brief of Defendant Peele, *supra* note 13, at 11.

24. Pursuant to Alaska law, "[h]erring spawn may not be taken on . . . any . . . substrate, except for kelp in its natural occurring state. Kelp plants used to take herring spawn may not be suspended from lines, frames, or other man-made devices." See Alaska Admin. Code tit. 5, § 27.833(a) (Cum. Supp. July 1992). Chapter 27 of the Alaska Administrative Code applies "to commercial herring fishing only, unless otherwise specified." See *id.* § 27.001 (Oct. 1991).

25. Schroeder & Kookesh, *supra* note 15, at 10; Brief of Defendant Peele, *supra* note 13, at 12.

26. Schroeder & Kookesh, *supra* note 15, at 12. Haida and Tlingit Indians made extensive use of many sea resources of their area. They traded extensively with each other, neighboring tribes, Russians, and Americans. *United States v. Tadamiitsu Sakurai*, No. A88-026 CR, 1988 WL 142332, at \*10 (D. Alaska Nov. 8, 1988), (quoting Tlingit and Haida Indians of Alaska v. *United States*, 177 F.Supp. 452, 456 (Ct.Cl. 1959)).

27. Schroeder & Kookesh, *supra* note 15, at 12. In other words, the value of one item was expressed in terms of a quantity of another item.

28. *Id.*; Interview with J. Rashleger, Member of the Haida Nation, in Albuquerque, N.M. (Jan. 28, 1993).

and exchange of subsistence herring eggs included these currencies *and cash*."<sup>29</sup>

Haida elders report that roe on kelp was traded for cash as early as 1914. It sold for anywhere from 25 cents to one dollar per pound at villages in the Hydaburg region.<sup>30</sup> This sale and barter of herring roe played an important part in the Haidas' subsistence existence. Historically, the cash sales earned individuals supplemental incomes of \$500 to \$1,500 on an average harvest of 1,000 pounds of herring spawn per year.<sup>31</sup>

Permits<sup>32</sup> have been required since 1979 for the harvest of herring spawn on kelp.<sup>33</sup> The most recent data available from the Alaska Department of Fish and Game (ADF & G) indicates that approximately 27 percent of Hydaburg's households harvested herring roe in 1987; each household took an average of 105 pounds of eggs.<sup>34</sup> The ADF & G collected this information by survey,<sup>35</sup> as subsistence permit data do not reflect accurately the amount of roe on kelp taken by subsistence users: "[s]ubsistence harvesters gathering eggs on kelp for themselves and for barter and trade [do] not always observe the permit limits."<sup>36</sup>

Disregard for permit limits may be attributable in large measure to the fact that traditional, community-based subsistence needs tend to exceed the limits of permits, which are geared toward the needs of individual harvesters. For example, among southeast Alaska Natives in general, customary harvests of herring spawn historically were 'substantial' among household units, which consisted of 50 people or more.<sup>37</sup> Households took eggs in sufficient quantities to exchange with other villages, and also to use at traditional gatherings. To host a potlatch,<sup>38</sup> for instance,

29. Schroeder & Kookesh, *supra* note 15, at 12-13 (emphasis added).

30. Appellant's Opening Brief at 10, *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991) (No. 89-30253); Brief of Defendant Peele, *supra* note 13, at 12.

31. Brief of Defendant Peele, *supra* note 13, at 11.

32. See discussion of Alaska's regulatory scheme, *infra* notes 44-57 and accompanying text.

33. Schroeder & Kookesh, *supra* note 15, at 23. See also *infra* text accompanying note 78.

34. Schroeder & Kookesh, *supra* note 15, at 44, 46.

35. *Id.* at 43.

36. *Id.* at 23. Cf. *Bobby v. State of Alaska*, 718 F.Supp. 764, 781 (D. Alaska 1989) (admonishing the Alaska Department of Fish & Game to adjust its data on subsistence hunting of moose and caribou to reflect "under-reporting which almost surely occurred as a result of fear of criminal sanctions which could follow accurate reporting of the taking of game for community use in excess of bag limits or out of season" (emphasis added)). See *infra* note 197 and accompanying text for further discussion of this situation.

37. Schroeder & Kookesh, *supra* note 15, at 9. Members of Haida Indian households lived in longhouses consisting of a central gathering place for meals and meetings, and connected living areas for smaller family groups. Interview with J. Rashleger, *supra* note 28.

38. Traditional potlatch or payoff parties serve as wealth distribution mechanisms and as a means of transferring honorific names and crests between generations. M. Halpin, *Foreword* to U. Steltzer, *A Haida Potlatch* at viii (1984). A potlatch may be given for a number of reasons, including commemorating a relative's death, celebrating a plentiful harvest, and increasing a family's status. J. Boardman, Note, *McDowell v. State of Alaska: Is a Limited Entry Subsistence System on the Horizon?*, 26 Willamette L. Rev. 999, 1001 n.16 (1990); Interview with J. Rashleger, *supra* note 28. A family may save and plan for years to give a potlatch. Interview with J. Rashleger, *supra* note 28.

a household needed enough roe to feed hundreds of guests for several days. The total quantity required by a household for these uses might reach 10,000 pounds.<sup>39</sup>

A relatively small number of contemporary Alaska Native households account for a substantial portion of the total subsistence harvest of herring spawn along the southeast Alaska coast today.<sup>40</sup> These 'high harvesters' distribute the spawn to many households in their communities.<sup>41</sup> The high harvesters expect everyone except close family members to reciprocate for the eggs by offering the harvesters different, similarly valued subsistence food or cash.<sup>42</sup> Permit limits based on an individual's needs thus can subvert the traditional practice among Alaska Natives of designating to certain persons the role of harvester for an entire household.

### Present Subsistence Fishing Regulations and the Alexander Defendants

Under regulations promulgated by the Alaska Board of Fisheries,<sup>43</sup> "[a]quatic plants and finfish . . . may be taken for subsistence purposes at any time in any area of the state by any method unless restricted by the subsistence fishing regulations . . ."<sup>44</sup> Herring spawn on kelp may be taken only under authority of a subsistence fishing permit.<sup>45</sup> Permits must be procured from the ADF & G.<sup>46</sup> The annual possession limit for

39. Schroeder & Kookesh, *supra* note 15, at 9.

40. *Id.* at 26 (footnote omitted).

41. *Id.* Non-natives participate in the same fishery, yet do not harvest large quantities or supply herring spawn to non-harvesting households. *Id.*

42. *Id.* at 27. One high harvester, for example, told researchers that he and his family harvest herring spawn and, "have friends that come and help themselves to hundreds of pounds of eggs. . . . A lot of people get herring eggs from us . . . Cockles, clams, fresh salmon, and fresh and dried halibut from families in Angoon, fresh sockeye from families in Klukwan, seaweed and seal oil from families in Sitka, strawberries from families in Portland, and raspberries from families in Seattle are some of the things we receive in return for herring eggs." *Id.* at 28-30. Researchers note that this specialization of role tasks occurs commonly in Alaskan communities that have subsistence-based economic systems. R. Wolfe, *Understanding Resource Uses in Alaskan Socioeconomic Systems* in Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities 264 (Div. of Subsistence, Alaska Dep't of Fish & Game Technical Paper No. 61, 1983) (R. Wolfe & L. Ellanna compilers) [hereinafter Resource Use]. Sometimes fewer than all households in a community harvest a particular animal species; some households produce more than others, due to factors such as lack of working members, health, age, skill, and capital equipment. The networks of exchange and distribution ensure that food and material products produced by a portion of the community are disseminated to support less productive and less fortunate community members, such as the elderly and widows. *Id.* at 264-65. See also T. Berger, Village Journey: The Report of the Alaska Native Review Commission 57 (1985) (noting that the system of distribution and exchange of subsistence products among Alaska Natives operates "according to complex codes of participation, partnership, and obligation," ensuring that subsistence products are available to every household, including those without hunters); K. Atkinson, Note, *The Alaska Nation Interest Lands Conservation Act: Striking the Balance in Favor of "Customary and Traditional" Subsistence Uses by Alaska Natives*, 27 Nat. Res. J. 421, 434-35 (1987).

43. These regulations are promulgated under Alaska Stat. §§ 16.05.251, 16.05.920 (1992).

44. Alaska Admin. Code tit. 5, § 01.005 (Jan. 1990).

45. *Id.* § 01.730.

46. *Id.* § 01.015(b)(2).

herring spawn on kelp is 32 pounds per individual or 158 pounds per household of two or more persons.<sup>47</sup> At the ADF & G's discretion, an additional permit for more than the annual limit may be issued if harvestable surpluses of roe on kelp are available.<sup>48</sup> The ADF & G also may specify on the permit the locations and times for harvesting, and the species of kelp that may be taken.<sup>49</sup> The amount of fish taken for subsistence use may not exceed permit-prescribed quantities,<sup>50</sup> and subsistence-taken fish, their parts, and their eggs may not be purchased or sold.<sup>51</sup>

Although technically prosecuted for violations of federal law (the Lacey Act), defendants Alexander and Peele effectively stood accused of breaking state law (regulations set out in the Alaska Administrative Code (AAC)). The Lacey Act<sup>52</sup> renders unlawful, *inter alia*, the import, export, transport, sale, receipt, acquisition, or purchase in interstate or foreign commerce, any fish taken, possessed, transported, or sold in violation of any law or regulation of any state. Thus, in order to convict Peele and Alexander under the Lacey Act, the United States charged and was required to prove that the defendants violated Alaska law, in this case by exceeding the amount of roe on kelp harvestable under the defendants' subsistence permits,<sup>53</sup> and by attempting to sell the eggs and kelp.<sup>54</sup>

Alexander and Peele argued in defense that their activities qualified as "customary trade,"<sup>55</sup> a subsistence use protected by ANILCA.<sup>56</sup> They further asserted that the state regulations on which the government based its Lacey Act indictments impermissibly interfered with customary trade and should be struck down as invalid.<sup>57</sup>

## LEGAL FRAMEWORK

### Federal Laws Addressing Subsistence Uses of Fish and Wildlife in Alaska

Two federal statutes govern the subsistence use of fish and wildlife in Alaska and set the tenor, direction, and limits of state law in this field: The Alaska Native Claims Settlement Act<sup>58</sup> (ANCSA) and ANILCA.<sup>59</sup>

---

47. *Id.* § 01.730(g).

48. *Id.*

49. *Id.*

50. *Id.* § 01.015(b)(1).

51. *Id.* § 01.010(d).

52. 16 U.S.C. § 3372(a)(2)(A) (1988).

53. Allegedly contravening Alaska Admin. Code tit. 5, §§ 01.730 (a), (g) (Jan. 1990). *Alexander*, 938 F.2d at 946.

54. Allegedly contravening Alaska Admin. Code tit. 5, § 01.010(d) (Jan. 1990). *Alexander*, 938 F.2d at 945.

55. *Alexander*, 938 F.2d at 945.

56. See Pub. L. No. 96-487, *supra* note 2.

57. *Alexander*, 938 F.2d at 945.

58. Pub.L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1624) [hereinafter ANCSA].

59. Pub.L. No. 96-487, *supra* note 2.

### The Alaska Native Claims Settlement Act

In ANCSA, Congress declared as a matter of policy that, among other things:

The settlement [of claims of Alaska Natives] should be accomplished rapidly. . . in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding . . . to the legislation establishing special relationships between the United States Government and the State of Alaska.<sup>60</sup>

Through ANCSA, Congress extinguished land claims of Alaska Natives, including all aboriginal titles and claims of aboriginal title based on use and occupancy, both inland and offshore, and all existing aboriginal hunting and fishing rights.<sup>61</sup> Judicial interpretation indicates that Congress, in passing ANCSA, meant, (1) to allow the Secretary of the Interior (hereinafter 'Interior') and the State of Alaska to protect subsistence concerns by any necessary means, and (2) to address subsistence needs in future legislation if necessary.<sup>62</sup> Future legislation took the form of ANILCA.<sup>63</sup>

### The Alaska National Interest Lands Conservation Act

Enacted in 1980, ANILCA made clear, among other things, Congress' intent "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so."<sup>64</sup> The congressional findings in Title VIII of ANILCA recognize that, "the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional and social existence."<sup>65</sup> As a matter of policy, management and

---

60. 43 U.S.C. § 1601.

61. *Id.* § 1603(4); Village of Gambell v. Clark, 746 F.2d 572, 579 (9th Cir. 1984), *appeal after remand*, 744 F.2d 1414 (9th Cir. 1985), *rev'd and remanded in part, sub nom.* Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) (holding that ANCSA extinguished aboriginal hunting and fishing rights claimed by Alaska Natives).

62. United States v. Tadamitsu Sakurai, 1988 WL 142332 (D. Alaska 1988) (citing Village of Gambell v. Clark, 746 F.2d 572, 579-80 (9th Cir. 1984)).

63. Under "declaration of findings" in ANILCA, Congress states, *inter alia*: "[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act . . . and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents. . . ." 16 U.S.C. § 3111(4).

64. 16 U.S.C. § 3101(c).

65. *Id.* § 3111(1).

conservation of fish and wildlife, and utilization of public lands in Alaska are "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands . . . ." <sup>66</sup> Furthermore, Congress mandated that nonwasteful subsistence uses of fish, wildlife, and other renewable resources be given the status of "priority consumptive uses" on Alaska's public lands when resource taking must be restricted. <sup>67</sup> When such restrictions become necessary, the subsistence priority is implemented through "appropriate limitations" <sup>68</sup> based on the following criteria: (1) customary and direct dependence upon the wildlife or fish population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. <sup>69</sup>

Congress determined that rural residents with personal knowledge of local conditions and requirements should have a meaningful role in the management of fish and wildlife and of subsistence uses on Alaska's public lands. <sup>70</sup> Accordingly, subsections 3115(a)-(c) of ANILCA, (1) establish subsistence resources regions, local advisory committees, and regional advisory councils, and (2) detail the membership, duties, and authority of the regional councils. <sup>71</sup> All of these provisions are reflected in Title 5, Chapter 96 of the AAC. <sup>72</sup>

The parallels between ANILCA and certain statutes and regulations of the State of Alaska do not arise by coincidence. Rather, subsection 3115(d) of Title VIII of ANILCA provides that if Alaska implements laws applicable to state land consistent with the subsistence provisions of ANILCA by December 2, 1981, those state laws, unless repealed, will supersede specified sections of ANILCA and govern subsistence uses on Alaska's federal lands. <sup>73</sup> In other words, Congress offered Alaska the opportunity to manage fish and wildlife resources on federal lands—comprising over one-half of the land in the State of Alaska <sup>74</sup>—as a *quid pro quo*

---

66. *Id.* § 3112(1).

67. *Id.* § 3112(2). Restrictions on taking might be necessary "in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population. . . ." *Id.*

68. *Id.* § 3114.

69. *Id.* § 3114(1)-(3). Applying the first of these criteria to Hydaburg, one would find a village with virtually no economy and, therefore, heavily dependent on subsistence resources. The village's senior citizen's home and two general stores employ a handful of people. Industry in the area consists of the commercial fishery and one lumber mill. To participate directly in the commercial fishery, one must purchase a limited entry fishing permit (approximately \$100,000) and equipment such as a seine boat (\$100,000-500,000). Commercial fisherpersons hire deck hands who generally earn \$20,000 or less in a good season. A lumber mill in the village of Klawock, a two-hour drive on rough roads from Hydaburg, also offers employment to about 30 people. This mill closes frequently. Interview with J. Rashleger, *supra* note 28.

70. 16 U.S.C. § 3111(5).

71. *Id.* § 3115.

72. Alaska Admin. Code tit. 5, §§ 96.010-96.060 (1990 & Cum. Supp. 1991). See discussion *infra* note 86 and accompanying text.

73. 16 U.S.C. § 3115(d)(1988).

74. Boardman, *supra* note 38, at 1003; D. Hulen, *Court Rules Subsistence Open to All*, Anchorage Daily News, July 14, 1992, at A1 (approximately 60 percent of land in Alaska is federally owned).

for implementation of state laws consistent with the subsistence policies expressed in ANILCA.<sup>75</sup>

### Alaska's Constitutional, Statutory, and Administrative Regulation of Subsistence Uses of Fish and Wildlife

The Alaska Constitution reserves fish, wildlife, and waters occurring in their natural state to the people for common use.<sup>76</sup> No exclusive right or special fishing privilege may be created or authorized in the natural waters of the state.<sup>77</sup> Laws and regulations governing the use and disposal of natural resources must apply equally to all persons similarly situated in the state.<sup>78</sup>

In anticipation of ANILCA's enactment, Alaska adopted its first comprehensive subsistence law in 1978 (hereinafter "1978 Law").<sup>79</sup> The statutory definition of "subsistence uses" in that law was:

[c]ustomary and traditional uses in Alaska of wild renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption. . . .<sup>80</sup>

The ANILCA, enacted two years later, defines "subsistence use" as the:

[c]ustomary 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 inedible 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.<sup>81</sup>

75. Boardman, *supra* note 38, at 1017 n.127.

76. Alaska Const. art. VIII, § 3.

77. *Id.* § 15.

78. *Id.* § 17.

79. Alaska Stat. §§ 16.05.251(b), 16.05.255(b) (Supp. 1978) [hereinafter 1978 Law]; see also Bobby v. Alaska, 718 F.Supp. 764, 767 (D. Alaska 1989); Op. Att'y Gen. 1991 WL 663-91-0331, at \*2 (AK-AG Feb. 23, 1991) (citing Alaska Stat. §§ 16.05.251(b), 16.05.255(b) (Supp. 1978)) [hereinafter Op. A.G. 2/23/91].

80. Alaska Stat. § 16.05.940(26) (Supp. 1978) (emphasis added), reprinted in Bobby v. Alaska, 718 F.Supp. 764, 791 app. I (D. Alaska 1989).

81. 16 U.S.C. § 3113 (emphasis added).

Note that the state definition limited customary trade to use for "personal or family consumption."<sup>82</sup> Alaska's present statute defining customary trade still includes this limitation,<sup>83</sup> the federal definition does not.

Using guidelines set forth in Alaska's Administrative Procedure Act,<sup>84</sup> the Boards of Fisheries and Game ('Boards') adopt the state's game and fish regulations, which appear in the AAC. The Boards must solicit regulation changes at least twice annually and accept from any interested person a petition for the adoption, amendment, or repeal of a regulation.<sup>85</sup>

The AAC provides a mechanism for gathering public input about fish and wildlife matters,<sup>86</sup> including subsistence taking. Specifically, the AAC establishes fish and game advisory committee and council systems. The committee system serves as the primary forum for discussion of wildlife and fisheries management issues by residents at the *local* level.<sup>87</sup>

Advisory committees exist within each of Alaska's six fish and game resource management regions.<sup>88</sup> New committees may be formed by the Boards<sup>89</sup> at the request of 25 interested people.<sup>90</sup> An individual qualifies for membership on a committee if he or she has knowledge of

82. Alaska Stat. § 16.05.940(26) (Supp. 1978), reprinted in *Bobby v. State of Alaska*, 718 F.Supp. 764, 791 app. I (D. Alaska 1989).

83. See Alaska Stat. § 16.05.940(31) (1987 & Cum. Supp. 1991). This version of the statute reads,

"subsistence uses" means the *noncommercial*, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state 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 by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption . . . .

*Id.* (emphasis added to denote changes from the 1978 statute).

84. Alaska Stat. § 44.62.

85. Alaska Admin. Code tit. 5, § 96.625(a)-(b) (1990).

86. See *id.* §§ 96.010-96.920 (Jan. 1990).

87. *Id.* § 96.080(b). The committees provide "a local forum for the collection and expression of opinions and recommendations on matters relating to the management of fish and wildlife resources." *Id.* § 96.010. Each local committee may: (1) develop regulatory proposals for submission to the appropriate board; (2) evaluate regulatory proposals submitted to them and make recommendations to the appropriate board; (3) provide a local forum for fish and wildlife conservation and use, including any matter related to fish and wildlife habitat; (4) advise the appropriate regional council regarding the conservation, development, and use of fish and wildlife resources; (5) work with the appropriate regional council to develop subsistence management plans and harvest strategy proposals; and (6) cooperate and consult with interested persons and organizations, including government agencies, to accomplish (1)-(5) [*supra*]. *Id.* § 96.050.

88. *Id.* §§ 96.021, 96.210. In the southeast Alaska Region, committees exist in the following villages: Angoon, Craig, Edna Bay, Elfin Cove, Gastineau Channel, Hydaburg, Hyder, Icy Straits, Kake, Ketchikan, Klawock, Klukwan, Pelican, Petersburg, Port Alexander, Saxman, Sitka, Sumner Strait, Tenakee, Upper Lynn Canal, Wrangell, and Yakutat. *Id.* § 96.021 (Cum.-Supp. July 1991).

89. Alaska's Board of Fisheries and Board of Game acting together are known as the "Joint Board." Alaska Admin. Code tit. 5, § 96.910(2) (Jan. 1990).

90. *Id.* § 96.020.

and experience with the fish and wildlife resources and uses of such resources in the area, and has a reputation within the community consistent with the responsibilities of committee membership.<sup>91</sup> The membership of each committee must be representative of the fish and game user groups and each town or village in the area served by the committee.<sup>92</sup>

Regional councils assist committees<sup>93</sup> in reaching consensus and achieving "the greatest possible local participation in the decisionmaking process."<sup>94</sup> Councils provide a forum for the collection and expression of opinions and recommendations on matters relating to fish and wildlife resources at the *regional* level, assist the Boards in making decisions about regulations, and provide "for public participation in the regulatory process to help adequately protect subsistence uses."<sup>95</sup>

The 1978 Law gave subsistence uses priority over other uses of wildlife and fish.<sup>96</sup> Under this law, the Boards could not restrict subsistence uses of resources unless they first eliminated all other uses.<sup>97</sup> The 1978 Law also established two tiers of subsistence users.<sup>98</sup> At the first tier, all Alaskans were eligible to participate in the subsistence harvest of fish and game *if* sufficient wild resources existed.<sup>99</sup> Movement to the second tier occurred in the event of a resource shortage. At this level the Alaska Boards were authorized to establish subsistence eligibility criteria based on local residence, customary dependence, and unavailability of other resources.<sup>100</sup>

Regulations promulgated by the Boards after enactment of the 1978 Law included a preamble recognizing subsistence uses as "customary and traditional uses by rural Alaska residents."<sup>101</sup> The Boards also developed a number of criteria for identifying customary and traditional uses of wildlife and fish in an attempt to restrict the number of Alaskans qualified to participate in the subsistence harvest at the *tier one* level.<sup>102</sup> In

91. *Id.* § 96.040.

92. *Id.* § 96.060(e)(1).

93. *Id.* §§ 96.080(b), 96.250(b).

94. *Id.* § 96.250(b).

95. *Id.* § 96.200 (emphasis added).

96. Alaska Stat. § 16.05.258(c) (1987).

97. *Id.* § 16.05.258(a)-(c).

98. See Alaska Stat. § 16.05.251 (1978).

99. *Id.*

100. Alaska Stat. § 16.05.251 (1978). See also *State v. Morry*, Nos. S-4632, S-4660, 3866, 1992 WL 158378, at \*10 (Alaska July 10, 1992), *reh'g denied* (Aug. 13, 1992).

101. Op. A.G. 2/23/91, *supra* note 79, at \*3 (quoting Alaska Admin.Code tit. 5, § 99.010(a)-(b)).

102. *State v. Morry*, Nos. S-4632, S-4660, 3866, 1992 WL 158378 at \*10 (Alaska July 10, 1992), *reh'g denied* (Aug. 13, 1992); Op. A.G. 2/23/91, *supra* note 79, at \*3. Seven of the criteria remain in use; the original eight were: (1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions; (2) a use pattern recurring in specific seasons of each year; (3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances; (4) the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence [repealed 1/17/91]; (5) the means

1982 Interior found state law sufficiently consistent with Title VIII of ANILCA to permit Alaska to preempt federal subsistence management.<sup>103</sup> Shortly thereafter, however, the Alaska Supreme Court, in *Madison v. Alaska Dep't of Fish & Game*,<sup>104</sup> effectively invalidated the Boards' traditional use criteria on the ground that the regulation failed to comport with its authorizing statute, which provided for the establishment of restrictions based on customary and traditional uses only at the tier two level.<sup>105</sup> The state Supreme Court's action made all Alaskans eligible to participate in subsistence harvests<sup>106</sup> and took Alaska out of compliance with ANILCA.<sup>107</sup> Interior threatened to assume jurisdiction over subsistence management on federal lands.<sup>108</sup>

To remedy this problem, the Alaska legislature enacted a new statute in 1986 that conformed to the subsistence regulation invalidated by the *Madison* court.<sup>109</sup> The statute again prioritized subsistence use, but not only at the tier two level—the new law also restricted eligibility to participate in subsistence harvests at the tier one level to certain resi-

---

of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate; (6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation; (7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable community of persons, including customary trade, barter, sharing, and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community may include specific villages or towns, with an historical preponderance of subsistence users, and encompasses individuals, families, or groups who in fact meet the criteria described in this subsection ["within a definable community of persons" and "a community may include . . ." repealed 1/17/91]; and (8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and which provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life [language modified slightly 1/17/91]. Alaska Admin. Code tit. 5, § 99.010(b) (1990) (current version at 5 Alaska Admin. Code tit. 5, § 99.010(b) (Cum. Supp. July 1991)).

103. See Letter from J. Watt, Secretary of the Dep't of the Interior, to Hon. J. Hammond, Gov. of the State of Alaska (May 14, 1982), reprinted in *Bobby v. Alaska*, 718 F.Supp. 764, 812–13 app. II (D. Alaska 1982).

104. 696 P.2d 168 (Alaska 1985).

105. See *State v. Morry*, Nos. S-4632, S-4660, 3866, 1992 WL 158378, at \*10 (Alaska July 10, 1992), *reh'g denied* (Aug. 13, 1992).

106. See *id.*

107. See *Bobby v. Alaska*, 718 F.Supp. 764, 776 (D. Alaska 1989). "*Madison* opened subsistence hunting and fishing to urban as well as rural residents of Alaska . . . The result in *Madison* was . . . totally at odds with ANILCA, which defines the subsistence uses which are entitled to priority in terms of 'the customary and traditional uses by rural Alaska residents of wild, renewable resources.'" *Id.* (citing 16 U.S.C. § 3113) (emphasis added).

108. See Letter from W. P. Horn, Ass't Secretary, Fish & Wildlife & Parks, Dep't of the Interior, to Hon. W. Sheffield, Gov. of the State of Alaska (Sept. 23, 1985), reprinted in *Bobby v. Alaska*, 718 F.Supp. 764, 813–14 app. II (D. Alaska 1989).

109. See 1986 Alaska Sess. Laws Ch. 52 (codified as amended at Alaska Stat. §§ 16.05.258, 16.05.940.26 (1986)), reprinted in *Bobby v. Alaska*, 718 F.Supp. 764, 791–93 app. I (D. Alaska 1989); see also Op. A.G. 2/23/91, *supra* note 79, at \*3–4.

dents "domiciled in a rural area of the state,"<sup>110</sup> rather than to all Alaska residents.<sup>111</sup>

Interior opined that this statute brought Alaska back into compliance with ANILCA.<sup>112</sup> The Ninth Circuit Court of Appeals disagreed, however, finding the state's statutory definition of 'rural Alaska' inconsistent with ANILCA.<sup>113</sup> Meanwhile, in *McDowell v. State*,<sup>114</sup> the Alaska Supreme Court invalidated the new statute's tier one rural residency requirement on the ground that it conflicted with the common use provisions<sup>115</sup> of Alaska's Constitution.<sup>116</sup> *McDowell* made all Alaska residents eligible once again to participate in subsistence uses and harvests at the tier one level.<sup>117</sup> Since these judicial decisions rendered the state noncompliant with ANILCA, the door to federal management of subsistence uses on federal lands was reopened.<sup>118</sup>

The executive and legislative branches of Alaska's government explored a number of potential remedies to this dilemma.<sup>119</sup> The legisla-

110. Alaska Stat. § 16.05.940(25) (1987) (renumbered version codified at Alaska Stat. § 16.05.940(26) (Cum. Supp. 1991)). The statute defines "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." See *id.*

111. *State v. Morry*, Nos. S-4632, S-4660, 3866, 1992 WL 158378, at \*10.

112. See *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989) (citing Letter from Ass't Secretary, Fish and Wildlife and Parks, Dep't of the Interior, to Hon. W. Sheffield, Gov. of the State of Alaska (Nov. 7, 1986)).

113. *Kenaitze Indian Tribe*, 860 F.2d at 317-18 ("To accept the state's contorted definition of rural would materially change the sweep of [ANILCA], second-guessing the congressional policy judgment . . . This we may not do."); see also Op. A.G. 2/23/91, *supra* note 79, at \*6 n.1. The *Kenaitze* court held that the Assistant Secretary of the Interior for Fish and Wildlife and Parks had no statutory authority to approve Alaska's revised (as opposed to original) definition of "rural." *Kenaitze Indian Tribe*, 860 F.2d at 315. The Alaska National Interest Lands Conservation Act vests courts alone with the authority to assess the state's performance under the federal statute. *Id.* Thus, the *Kenaitze* court refused to defer either to the federal agency's assessment, or to the State of Alaska's assessment, of Alaska's reformulated statute. *Id.* at 315-16.

114. 785 P.2d 1 (Alaska 1989), *reh'g denied* \_\_ P.2d \_\_ (1990).

115. See *supra* notes 76-78 and accompanying text.

116. *McDowell v. State*, 785 P.2d 1, 12 (Alaska 1989). Ironically, when Congress first drafted ANILCA, its protections extended only to Native Alaskans engaged in subsistence uses of fish and wildlife. The State of Alaska requested that the language be broadened to include "rural residents" of the state in order to avoid a conflict with the anti-preference provisions of Alaska's Constitution. *Kenaitze Indian Tribe*, 860 F.2d at 313 n.1.

117. *State v. Morry*, Nos. S-4632, S-4660, 3866, 1992 WL 158378, at \*10.

118. Op. A.G. 2/23/91, *supra* note 79, at \*5 (footnote omitted).

119. See *id.* The state's department of law considered at least the 11 following possible solutions: (1) Ask the Alaska Supreme Court to reconsider its *McDowell* decision. This was done, but the Court denied rehearing; (2) amend Alaska's Constitution to authorize a subsistence priority for rural residents. A joint resolution to this effect in the 16th Alaska Legislature failed to receive the required two-thirds majority in the House of Representatives; (3) amend Alaska's Constitution to authorize a subsistence priority for Alaska Natives. Neither the House nor the Senate took final action on the joint resolution to this effect during the 16th Alaska Legislature; (4) amend ANILCA to remove the federal subsistence priority for rural residents. Alaska's congresspeople indicated that without consensus among Alaskans, this was not a

ture failed to pass ameliorative legislation during its regular session in 1992. Two subsequent special sessions produced a compromise statute (hereinafter "1992 Law") defining the use and allocation of subsistence resources within the state.<sup>120</sup>

The 1992 Law became effective on July 15, 1992 and will sunset after three years.<sup>121</sup> All Alaskans may qualify to be subsistence users at the 'tier I' level under this law.<sup>122</sup> It directs the Boards to identify the boundaries of 'nonsubsistence areas,' defined as areas or communities "where dependence upon subsistence is *not* a principal characteristic of the economy, culture, and way of life of the area or community."<sup>123</sup> The 1992 Law proscribes subsistence hunting and fishing in nonsubsistence areas,<sup>124</sup> but provides for both subsistence and nonsubsistence fishing and hunting in

---

viable option; there has been no consensus on the resolution; (5) amend ANILCA to pre-empt state law as necessary to grant rural residents a subsistence priority across the state. Alaska's congresspeople indicated that without consensus among Alaskans, this was not a viable option; there has been no consensus on the resolution; (6) amend ANILCA to pre-empt state law as necessary to grant Alaska Natives a priority across the state. The Alaska congressional delegation again indicated that absent a consensus among Alaskans, this was not a viable alternative; there has been no consensus on the resolution; (7) interpret ANILCA Section 804 as pre-empting state law on federal lands, with state implementation. Alaska Governor Cowper felt this was not an appropriate policy choice for the state; (8) negotiate an agreement with Interior pursuant to which Interior would implement the ANILCA priority, but only through closure management with the state in order to avoid dual resource management, and leaving wildlife and fish management with the state. This was believed to be an inappropriate policy choice for Alaska, because it effectively would enable some Alaskans to hunt and fish on federal land while denying other Alaskans such opportunities; (9) amend state law to give Alaskans most dependent on fish and wildlife a subsistence priority, and then amend ANILCA to conform to the state law. This was deemed administratively unworkable. Additionally, since this approach involves federal legislation, Alaska's congresspeople required consensus among Alaskans; there was no consensus; (10) use management tools already in place to benefit Alaskans most dependent on wildlife and fish. Interior indicated that this option would not be consistent with ANILCA; (11) initiate litigation challenging the constitutionality of ANILCA's subsistence priority for rural residents, and Congress' power to require such a priority. Alaska Governor Cowper determined that taking such action would not be in the state's interest. *Id.* at \*5-6.

120. See An Act Relating to the Taking of Fish and Game, ch. 1, H. No. 601, 2d Sp. Sess. 17th Leg. (Alaska Sess. Laws 1992) (codified at Alaska Stat. § 16.05.258, and Temporary and Special Acts and Resolves 1992 (1992)) [hereinafter 1992 Law].

121. See *id.*, Temporary and Special Acts and Resolves 1992 at ch. 1, sec. 12 (1992).

122. Memorandum from J. Griffin, Ass't Att'y Gen., Alaska, to C. Rosier, Comm., Alaska Dep't of Fish and Game 7 (July 28, 1992) [hereinafter Griffin Memorandum].

123. Alaska Stat. § 16.05.258(c) (1992) (emphasis added). The boundaries drawn by the Boards must be reasonably related to twelve criteria set forth in the 1992 Law, and must align with the legislature's purpose to give subsistence uses a preference. Griffin Memorandum, *supra* note 122. There may be fewer areas under the 1992 Law where subsistence fishing and hunting are permitted, because the Boards must consider three factors (i.e., economy, culture, and way of life) rather than one factor (i.e., economy), to determine what constitutes a "nonsubsistence" area, and the determination must be based on a consideration of an area as a whole. *Id.* at 5, 7.

124. Alaska Stat. § 16.05.258(c) (1992).

subsistence areas under certain conditions.<sup>125</sup> The Boards, moreover, need provide only a "reasonable opportunity" for subsistence uses.<sup>126</sup>

The 1992 Law also defines both "customary and traditional" uses of fish and game,<sup>127</sup> and 'customary trade' of fish and game resources.<sup>128</sup> Neither the previous Alaska statutes nor ANILCA defines these terms. This absence of legislatively established meanings prior to 1992 gave rise to uncertainty in interpretation of the law, as courts were left with little guidance ultimately to determine what constituted a permissible customary and traditional use, and an impermissible commercial enterprise use, of a subsistence resource under given circumstances.

## ANALYSIS

### Subsistence Use of Resources and the *Alexander* Case

Alexander and Peele's harvest of roe on kelp took place in the context of the state-federal debate, described above, over control of subsistence resources on Alaska's federal public lands. Federal officials charged the *Alexander* defendants with criminal liability for failure to comply with state regulations. Specifically, federal officials alleged that defendants had exceeded their subsistence use privileges by taking too much, and disposing improperly, of the resource in question.

In addition to setting limits on the *amount* of herring roe on kelp that may be harvested, the Alaska Administrative Code prohibits the *sale*

125. Specifically, if part of a population or stock in a subsistence area (1) can be harvested consistent with sustained yield, (2) is reasonably necessary for subsistence uses, and: a) is sufficient to provide for *all* consumptive uses, then nonsubsistence uses and a reasonable opportunity for subsistence uses of the stock or populations must be permitted by regulation. Alaska Stat. § 16.05.258(b)(1)(A) (1992); b) is sufficient to provide for *some* nonsubsistence consumptive uses, then a reasonable opportunity for subsistence uses must be permitted, and nonsubsistence consumptive uses may be permitted if subsistence uses are prioritized. *Id.* § 16.05.258(b)(2) (1992); c) is sufficient to provide for subsistence but *no* other consumptive uses, then a reasonable opportunity for subsistence uses must be permitted and other consumptive uses must be eliminated. *Id.* § 16.05.258(b)(3) (1992); d) is *not* sufficient to provide a reasonable opportunity for subsistence uses, then all nonsubsistence consumptive uses must be eliminated and distinctions must be made between, and limits placed upon, subsistence users. *Id.* § 16.05.258(b)(4) (1992).

126. *See id.* § 16.05.258(b) (1992). The 1992 Law defines "reasonable opportunity" as "an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game." *Id.* § 16.05.258(f) (1992).

127. *Id.* § 16.05.940(6) (1992). The Alaska legislature chose to define "customary and traditional" as "the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration other availability of the fish or game." *Id.*

128. *See* § 16.05.940(7) (1992). "Customary trade" means "the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources; the terms of this paragraph do not restrict money sales of furs and furbearers." *Id.*

of herring eggs collected for subsistence.<sup>129</sup> The federal prosecutor in *Alexander* argued that the latter regulatory provision is consistent with ANILCA, and that the sale of roe for cash is, by definition, not a subsistence use of the resource.<sup>130</sup> In response, Alexander and Peele asserted that the regulation impermissibly interferes with their ability to conduct 'customary trade,' a subsistence use expressly protected by ANILCA.<sup>131</sup> According to the defendants, customary trade includes sales for cash.<sup>132</sup> The Ninth Circuit thus faced two threshold questions in the *Alexander* appeal: (1) Whether ANILCA protects customary trade as a subsistence use, and (2) whether customary trade encompasses sales for cash. The court answered both questions in the affirmative.<sup>133</sup>

Subsistence use under ANILCA explicitly includes 'customary trade.'<sup>134</sup> However, the federal statute does not define customary trade or otherwise indicate whether cash sales are a protected subsistence use. Based on the legal dictionary definition of 'trade,' which includes "[t]he act . . . of buying and selling for money; traffic; barter,"<sup>135</sup> the *Alexander* court found that customary trade encompasses sales for cash.<sup>136</sup> The court reasoned that, since ANILCA lists 'barter' as a separate subsistence use,<sup>137</sup> the phrase "customary trade" would be surplusage unless it included transactions for money.<sup>138</sup> Judge Kozinski also noted that the Board of Fisheries recognizes limited exchanges for cash as a component of customary trade.<sup>139</sup> The court concluded that Alaska law conflicts with ANILCA to the extent that the former forbids cash sales that are part of customary trade.<sup>140</sup>

The *Alexander* court refused to preclude defendants' challenge of state law in the context of a criminal prosecution absent proof of congress-

---

129. "It is unlawful to buy or sell subsistence-taken fish, their parts, or their eggs, unless otherwise specified in this chapter." Alaska Admin. Code tit. 5, § 01.010(d) (Jan. 1990). There are no exceptions included elsewhere in the chapter.

130. *Alexander*, 938 F.2d at 945-46.

131. *Id.* at 946.

132. *Id.*

133. *Id.* The federal prosecutor also accused Peele and Alexander of violating state law by exceeding the catch limits set forth in Section 01.730 of the Alaska Administrative Code, which states: "(a) [H]erring spawn on kelp may be taken under authority of a subsistence fishing permit . . . (g) [T]he annual possession limit for herring spawn on kelp is 32 pounds for an individual or 158 pounds for a household of two or more persons . . ." Defendants challenged these limits, arguing that the Joint Board failed to allow for cash sales made in customary trade when it set the permit amounts. *Alexander*, 938 F.2d at 946-47. The appellate court found that defendants presented no evidence in support of their contention. The challenge, therefore, was rejected without prejudice to its renewal on remand. *Id.* at 947.

134. See *supra* note 81 and accompanying text.

135. *Alexander*, 938 F.2d at 946 (quoting Black's Law Dictionary 1492 (6th ed. 1990)).

136. *Id.*

137. See *supra* note 81 and accompanying text.

138. *Alexander*, 938 F.2d at 946 (footnote omitted).

139. *Id.* (citing 5 Alaska Admin. Code § 99.010(b)(7) (footnote omitted)).

140. *Id.* (footnote omitted).

sional intent to forbid such a challenge.<sup>141</sup> Section 3117 of ANILCA authorizes civil action in federal district court by "[l]ocal residents and other persons and organizations aggrieved by a failure of the State . . . to provide [for the priority of subsistence uses of fish and wildlife]."<sup>142</sup> This provision creates "the sole Federal judicial remedy"<sup>143</sup> for such grievances. Judge Kozinski expressed initial uncertainty concerning "whether this language precludes the defense of statutory invalidity in a criminal proceeding."<sup>144</sup> He determined that Section 3117 of ANILCA does not prevent a federal court from assessing during a criminal adjudication the validity of state regulations,<sup>145</sup> because: (1) applying a superior law over an inferior one arguably is not a 'judicial remedy' within the meaning of Section 3117;<sup>146</sup> (2) Congress almost certainly did not create this "purely civil statute" with the intent to limit rights of criminal defendants;<sup>147</sup> and (3) Section 3117 speaks only of a sole federal judicial remedy, and does not prohibit state courts from holding state law preempted by a conflicting federal law; thus Congress is unlikely to have prohibited federal courts from holding state law preempted by a conflicting federal law.<sup>148</sup>

Nonetheless, the *Alexander* court concluded that, although the state law here conflicts with a federal statute, it would not be appropriate in this instance to strike down the regulation:

The prohibition on cash sales is an integral part of the framework protecting Alaska's fisheries from the predations of those who are not entitled to subsistence uses. In most cases, it works just fine; the conflict with ANILCA is only problematic in the rare situations where the regulation is enforced against an Alaska native who is arguably engaged in customary trade.

There's no reason to throw a monkey-wrench into the state regulatory machinery when a little fine tuning will do.<sup>149</sup>

---

141. *Id.* at 947 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (footnote omitted)). The *Alexander* court's decision is consistent with the general rule of statutory construction pursuant to which ambiguities in the construction of Indian legislation are to be construed liberally in favor of Native Americans. *United States v. Tadamitsu*, No. A88-026 CR, 1988 WL 142332, at \*8 (D. Alaska Nov. 8, 1988). Title VIII of ANILCA and ANCSA both can be categorized as Alaska Native legislation. *Id.* (footnote omitted). Courts have expressed doubts about whether the rule applicable to Indian legislation necessarily should be applied in the context of Native Alaskan legislation. *See id.* at \*8-10. Neither of the parties nor the court in *Alexander* raised this issue.

142. 16 U.S.C. § 3117(a).

143. *Id.* § 3117(b).

144. *Alexander*, 938 F.2d at 947.

145. *Id.* at 948.

146. *Id.* at 947 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) . . . ; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824) . . . (footnote omitted)).

147. *Alexander*, 938 F.2d at 947-48.

148. *Id.* at 948 (citing *Bobby v. Alaska*, 718 F.Supp. 764, 787 (D. Alaska 1989)).

149. *Id.* at 948.

Judge Kozinski thus held that subsistence users such as Alexander and Peele can raise as a defense in criminal prosecutions ANILCA's protection of customary trade.<sup>150</sup> The court noted that certain factors limit this defense; namely, (1) the defendant "must be a rural Alaska [N]ative for whom such trade is 'customary and traditional,'"<sup>151</sup> and (2) the trade must be a component of a subsistence lifestyle rather than a "significant commercial enterprise."<sup>152</sup>

This portion of Judge Kozinski's opinion is misleading in a number of respects. First, Alaska's regulatory scheme appears not to work 'just fine.' The state and federal governments have yet to reach a consensus regarding which Alaskans may take fish as subsistence users.<sup>153</sup> The language of ANILCA, however, does make clear that rural Alaska *residents*—a category not limited to Alaska Natives—may engage in subsistence uses, including customary trade.<sup>154</sup>

Second, the particular regulation under scrutiny in *Alexander* is enforced against Alaska Natives arguably engaged in customary trade much more frequently than suggested by the phrase "rare situations."<sup>155</sup> This may be attributed in part to the difficulty in drawing lines of demarcation between customary trade and commercial enterprise uses of subsistence resources; it illustrates the clash, discussed below,<sup>156</sup> between non-Native and indigenous resource management systems. The problem probably would be reduced considerably if Native governments were able to

150. *Id.* Such defendants bear the burden of proof by a preponderance of the evidence that they were engaged in customary trade. *Id.*

151. *Id.* (citing 16 U.S.C. § 3113) (emphasis added). Section 3113 of ANILCA actually says, "[a]s used in this Act, the term 'subsistence uses' means the customary and traditional uses by rural Alaska residents of wild, renewable resources . . . for customary trade." 16 U.S.C. § 3113 (emphasis added). It may be, however, that only Alaska's Native peoples will be able to prove the "customary and traditional" component of their subsistence use.

152. *Alexander*, 938 F.2d at 948 (citing 5 Alaska Admin.Code, § 99.010(b)(7) [sic]; S. Rep. No. 413, 96th Cong., 2d Sess. 234 (Nov. 14, 1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5178)). The U.S. Senate Committee on Energy and Natural Resources specified that, "The definition [of subsistence use] has been modified to eliminate the 'for personal or family consumption' limitation upon the taking of wild, renewable resources for 'customary trade.' The Committee does not intend that 'customary trade' be construed to permit the establishment of significant commercial enterprises under the guise of 'subsistence uses.' The Committee expects the Secretary and the State to closely monitor the 'customary trade' component of the definition and promulgate regulations consistent with the intent of the subsistence title." S. Rep. No. 413, 96th Cong., 2d Sess. 234 (Nov. 14, 1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5178. Alaska enacted regulations pursuant to which, "customary trade may include limited exchanges for cash, but does not include significant commercial enterprises . . ." Alaska Admin. Code tit. 5, § 99.010(b)(7) (Jan. 1990).

153. See *supra* note 118 and accompanying text.

154. See *supra* note 81 and accompanying text.

155. Telephone Interview with S. Holliday, Counsel for Defendant-Appellant Peele (Oct. 16, 1991); Telephone Interview with S. Billingslea, Counsel for Defendant-Appellant Alexander (Aug. 1992).

156. See *infra* note 205 and accompanying text.

participate more fully in development of regulations and of the basic regulatory systems.<sup>157</sup>

Prior to the Alaska legislature's recent creation of definitions for "customary and traditional"<sup>158</sup> and "customary trade,"<sup>159</sup> the Boards attempted to draw lines between customary trade and commercial enterprises.<sup>160</sup> Federal courts prior to *Alexander* used the regulations of the Boards as a baseline, and did not permit defendants to use customary trade as a pre-trial defense<sup>161</sup> or as a challenge to their convictions.<sup>162</sup>

157. Alaska Natives do participate in the regulatory systems established by the state and federal governments. For example, the ADF & G estimates that three Alaska Natives currently sit on the seven-member Board of Fisheries, and two sit on the seven-member Board of Game. Telephone Interview with R. Larson, Executive Director, Alaska Boards of Fisheries and Game (Feb. 17, 1993). Alaska Natives also have been appointed to past Boards of Fisheries and Game; the ADF & G does not maintain statistics on the racial or ethnic composition of the Boards. *Id.* Notwithstanding such participation by Alaska Natives, the fact remains that the dominant regulatory systems are non-Native in origin and character.

158. See Alaska Stat. § 16.05.940(7) (1992).

159. See *id.* § 16.05.940(8) (1992).

160. For example, the Board of Fisheries completely banned cash sales of herring roe on kelp caught for subsistence. See Alaska Admin. Code tit. 5, § 01.010 (Jan. 1990). Yet the Board of Fisheries was required to provide Alaska Natives with a reasonable opportunity to engage in noncommercial, customary, and traditional uses of harvestable subsistence resources, Alaska Stat. §§ 16.05.251(31), 16.05.258 (1987 & Cum. Supp. 1990). Fisheries and game regulations specify that customary trade may include limited exchanges for cash. Alaska Admin. Code tit. 5, § 99.010(b)(7) (Jan. 1990). The Board's ban on cash sales of herring eggs on seaweed thus may be viewed as an implicit determination that *any* cash sale of this resource constituted a commercial enterprise. Cf. *United States v. Alexander*, 938 F.2d 942, 946. This situation produced at least two undesirable consequences. First, notwithstanding ANILCA's express purpose of protecting rural Alaskans' subsistence use of fish and game resources, Alaska Native defendants whom the government chose to pursue ironically had to resort to using customary trade as a *defense* and, therefore, were saddled with the burden of proof once the government established that a state subsistence law had been violated. Cf. *United States v. Skinna*, 931 F.2d 530, 533 (9th Cir. 1991), *amending on denial of rehearing and rehearing en banc, and superseding* 915 F.2d 1250 (9th Cir. 1990). Second, prosecutors had to gauge on a case-by-case basis whether a given Alaska Native charged with violation of an Alaska fish or game law would be able to establish a sufficient customary trade defense.

161. See, e.g., *United States v. Tadamitsu Sakurai*, No. A88-026 CR., 1988 WL 142332. In this case, a federal district court in Alaska identified regulations promulgated by the Joint Board as the appropriate "benchmark standard" to assess whether use of a subsistence resource constitutes customary trade or a commercial enterprise. The pertinent regulation, as in *Alexander*, set the annual possession limit for herring spawn on kelp, in the absence of available harvestable surpluses, at 32 pounds per individual and 158 pounds per household of two or more persons. *Id.* (citing Alaska Admin. Code tit. 5, § 01.730(g)). The *Tadamitsu Sakurai* defendants allegedly sold and conspired to sell "substantially more" than this amount: "if the government proves its case," found the court, "[the moving defendants] may be shown to have succeeded in grossing well into five figures, a significant commercial enterprise for anyone." *Tadamitsu Sakurai*, No. A88-026 CR, 1988 WL 142332, at \*1. The court consequently denied two Haida defendants' pretrial motions to dismiss; the motions were premised in part on the argument that defendants' activities constituted no more than "customary trade" protected by ANILCA: "The indictments in this case charge a large scale commercial enterprise of selling herring roe on kelp to foreign commercial buyers, a far cry indeed from the 'subsistence' and 'customary trade' areas of protected activity carved out by Congress in ANILCA." *Id.* at \*1, \*16.

162. See *Skinna*, 915 F.2d 530; *United States v. Frank*, No. 89-30157, 912 F.2d 470 (table) (text in WL).

*United States v. Skinna*<sup>163</sup> and *United States v. Frank*<sup>164</sup> involved two southeast Alaska Natives who were found guilty of transporting in interstate commerce illegally taken herring spawn on kelp in violation of the Lacey Act. These defendants, like Alexander and Peele, appealed their convictions.<sup>165</sup> In *United States v. Skinna*,<sup>166</sup> the defendant argued that the Alaska laws underlying his conviction conflicted with ANILCA and, therefore, were invalid.<sup>167</sup> The Ninth Circuit Court of Appeals refused to vacate the conviction, holding that, (1) the defendant's claim that the Alaska statutes are void must be reduced to a claim that they are void as applied to proven instances of customary trade, (2) the defendant never attempted to have his proposed use of the roe on kelp identified by the Alaska Board of Fisheries as customary, and (3) the defendant did not present evidence in district court to support a claim that his activities constituted customary trade.<sup>168</sup>

The Court observed in *Skinna* that the defendant's "proposed sale of 32,000 pounds of spawn on kelp for \$91,000 hardly falls with the [Alaska Board of Fisheries'] regulatory criterion."<sup>169</sup> Since the defendant did not present evidence to the district court regarding what might constitute customary trade as distinct from such trade as defined by regulation, the court concluded that, "[f]or all we know from this record, customary trade of the Alaska peoples may never have encompassed large commercial transactions."<sup>170</sup>

In *United States v. Frank*,<sup>171</sup> another panel of the Ninth Circuit Court of Appeals<sup>172</sup> found it 'apparent' that the Alaska Board of Fisheries' regulations "do not contemplate an aggregation of permits for the purpose of conducting what amounts [here] to a rather large commercial venture."<sup>173</sup> The court again rejected the argument that the state regulations at issue conflict with ANILCA on its face and as applied; the *Frank* court cited *Skinna*'s consideration and rejection of the same argument.<sup>174</sup>

---

163. 931 F.2d 530.

164. No. 89-30157, 912 F.2d 470 (table) (text in WL).

165. See *United States v. Skinna*, 931 F.2d 530 (9th Cir. 1991); *United States v. Frank*, No. 89-30157, 912 F.2d 470 (9th Cir. 1990) (table) (text in WL) (convictions affirmed where appellant, a Haida Indian, asserted, *inter alia*, that his Lacey Act convictions were improperly based on Alaska subsistence fishing regulations that conflict with ANILCA).

166. 931 F.2d 530 (9th Cir. 1991).

167. *Id.*

168. *Id.* at 532-33.

169. *Id.* at 533.

170. *Id.* at 533.

171. No. 89-30157, 912 F.2d 470 (table) (text in WL).

172. Judge Fernandez sat on the panels which ruled unanimously in *United States v. Skinna* and *United States v. Frank* to uphold the defendants' convictions. Judge Fernandez also sat on the panel, but dissented from the majority decision, in *United States v. Alexander*.

173. *Frank*, No. 89-30157, 912 F.2d 470, \*4 (table) (text in WL).

174. *Id.*

Alexander and Peele, unlike the defendants in *Skinna* and *Frank*, did present evidence at trial to support the argument that their transport of, and attempt to sell, herring roe on kelp falls within the purview of customary trade as practiced by their ancestors.<sup>175</sup> The *Alexander* court did not address the question whether the defendants' activities constituted protected customary trade.<sup>176</sup> Rather, since the district court refused to permit the jury to decide if the defendants were engaged in customary trade as opposed to a significant commercial enterprise, the court vacated Alexander's and Peele's convictions and remanded for a new trial.<sup>177</sup>

In summary, the state regulations, as a component of the law governing subsistence fishing and hunting in Alaska, require more than minor adjustments to meet the objectives of ensuring maintenance of sustainable natural resources, protecting the rights of Alaska Natives and other subsistence users, and reserving authority, as sought by the State of Alaska, over the entirety of Alaska's fish and wildlife populations. Alaska's 1992 Law closes gaps in the substantive law governing subsistence use of resources, but absent the support of Alaska Natives, the 1992 Law is not likely to be a step in the direction toward remedying the problems highlighted by *Alexander* and related cases. As discussed below, a fundamental conflict remains unresolved and largely unaddressed. This debate does not involve the substantive elements of regulation of the subsistence use of resources in Alaska. Rather, the conflict concerns whether, and the extent to which, non-Native governments should be permitted to dictate and enforce the terms of subsistence regulations against Alaska Natives. Failure to deal adequately with this issue potentially could undermine the implementation of any regulatory scheme devised for Alaska by the federal and state governments.

---

175. *Alexander*, 938 F.2d at 948.

176. Congress recognizes expressly in ANILCA that, "the continuation of the opportunity for subsistence uses . . . is essential to native physical, economic, traditional, and cultural existence . . ." 16 U.S.C. § 3111(2). Courts interpreting ANILCA have held that Congress did not intend to preclude limited cash sales of subsistence resources as part of customary trade, an authorized subsistence use. *Alexander*, 938 F.2d at 946; *United States v. Tadamitsu Sakurai*, No. A88-026, 1988 WL 142332, at \*12 (D. Alaska Nov. 8, 1988) (order regarding motions to dismiss). Such sales must not, however, reach the level of "significant commercial enterprises." S. Rep. No. 413, 96th Cong., 2d Sess. (Nov. 14, 1979), reprinted in 1980 U.S.C.A.N. 5070, 5178 (legislative history of ANILCA); *Tadamitsu Sakurai*, No. A88-026 CR, 1988 WL 142332, at \*5. The *Alexander* court noted that the size of a transaction or the manner in which an Alaska Native conducts it may place the transaction beyond the definition of customary trade. 938 F.2d at 949.

177. *Alexander*, 938 F.2d 949. Alexander's and Peele's prosecutions were not continued. Due to administrative considerations, the United States Attorney's Office decided not to file for a new trial. Telephone Interview with S. Holliday, *supra* note 155.

## Alaska Natives and the Impact of Regulation of the Subsistence Way of Life

In *Alexander*, the federal government argued that even if Alaska's subsistence regulations conflict with ANILCA, the defendants' convictions should stand, because Alexander and Peele, prior to going fishing, had available the option of petitioning the Board of Fisheries<sup>178</sup> to change its permit limits.<sup>179</sup> The ANILCA provided for establishment of a system of subsistence regions, regional councils, and local committees to encourage Alaska's subsistence users to take part in the formulation of subsistence policies and regulations.<sup>180</sup> These fora are intended to provide a means for public input and "the greatest possible local participation in the decisionmaking process."<sup>181</sup>

Judge Fernandez, dissenting in *Alexander*, agreed with the federal prosecutor. Judge Fernandez argued that Alexander and Peele should have pursued the "administrative remedies" described above to gain greater access to the fishery, rather than "[gone] ahead and conducted their depredations [sic]."<sup>182</sup> In contrast, the *Alexander* majority found incongruous,

[t]he image of these two defendants driving their beat-up Dodge station wagon to the Board of Fisheries to argue that a small section of the regulations is inconsistent with an obscure phrase in a massive federal statute . . .; they are fishermen, not legal scholars. Their only meaningful opportunity to challenge the regulations was at their trial.<sup>183</sup>

178. See discussion of Alaska's regional council system, *supra* note 85 and accompanying text.

179. *Alexander*, 938 F.2d at 947.

180. 16 U.S.C. § 3115. See also Alaska Admin. Act tit. 5, § 96.250(b) (Jan. 1990). See *supra* notes 72 and 86 and accompanying text for a more detailed discussion of these provisions.

181. Alaska Admin. Code tit. 5, § 96.250(b) (Jan. 1990); see also *id.* §§ 96.021, -050 (Jan. 1990). Alaska Natives do participate in this system. The Tlingit Indians of Southeast Alaska, for example, send representatives to every meeting of the Alaska Boards of Fish and Game. The representatives report back to the Tlingit Court of Elders, which advises on resource use. Hon. W. Brady, Tlingit Indian and Sitka Tribal Court Member, Address at the Conference on Traditional Peacemaking and Modern Tribal Justice Systems, Albuquerque, N.M. (Oct. 29, 1992). Commentators have expressed doubt, however, about the efficacy of Alaska's implementation of the regional and local advisory council systems provided for in ANILCA. See D. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice?"*, 60 U. Colo. L. Rev. 1009, 1021 (1989).

182. *Alexander*, 938 F.2d at 951 (Fernandez, J., dissenting).

183. *Alexander*, 938 F.2d at 947. Alexander and Peele's failure to appear before the Board of Fisheries with their grievance actually may have had less to do with their presumed lack of familiarity with the law and administrative processes, than with a general attitude among Native Alaskan subsistence fisherpeople that the government—whether state or federal—has no right to regulate traditional fishing practices. See *infra* note 214 and accompanying text for an elaboration on this hypothesis.

In any event, determined the majority, the requirement of exhaustion of administrative remedies does not apply in criminal proceedings.<sup>184</sup>

Even if the exhaustion requirement did apply, Alexander and Peele might have found the Board of Fisheries less than sufficiently responsive to their needs as subsistence resource users. Section 3117(a) of ANILCA provides for just such an eventuality, specifying that an aggrieved party, after exhaustion of any administrative remedies, may file a civil action against the State of Alaska for review of subsistence regulations.<sup>185</sup>

In *Bobby v. State of Alaska*,<sup>186</sup> the residents of a rural Alaskan village brought such a challenge against the state Board of Game. The *Bobby* court found unlawful the applicable subsistence hunting regulations promulgated by the Board of Game.<sup>187</sup> Among other things, the court pointed out that restrictions on resource harvest times and quantities are applied predominantly in the context of sport<sup>188</sup> and commercial uses. The subsis-

---

184. *Bobby*, 718 F.Supp. at 787.

185. 16 U.S.C. § 3117(a). Pursuant to this provision, "[l]ocal residents . . . aggrieved by a failure of the State . . . to provide for the priority for subsistence uses . . . may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority." *Id.* One could argue that the framers of ANILCA intended this to be the sole source of remedy under this statute. The *Alexander* court, in what could be construed as a response to this argument, emphasized principles of judicial economy. Specifically, the Court noted that if defendants Peele and Alexander were not permitted to challenge the state regulation in the context of their criminal trials, they still could pursue civil action under Section 3117 of ANILCA. See *Alexander*, 938 F.2d at 948 n.10. Assuming the defendants obtained a favorable judgment in the civil suit, they then could collaterally attack their convictions as inconsistent with federal law. The end result would be the same, except "the delay and number of proceedings would triple." *Id.*

186. 718 F.Supp. 764 (D. Alaska 1989).

187. *Bobby*, 718 F.Supp. at 776. The Court found the *season* regulations "necessarily arbitrary for they substantially fail to accommodate what the board has determined to be the customary and traditional use of moose and caribou for subsistence purposes without first eliminating other consumptive uses." *Id.* at 779 (citing Alaska Stat. § 16.05.258(c) (1986)). Regarding *bag* limits, the court determined that the Board of Game "clearly did not . . . come to grips with the question of how much game . . . [was] required to accommodate the customary and traditional use of these game populations by Lime Village residents." *Id.* at 780.

188. *Id.* at 777. The Alaska Supreme Court recently invalidated certain Alaska Department of Game brown bear regulations as applied to subsistence hunters. The defendant in *State v. Morry*, an Inupiat subsistence hunter, obtained a bear hunting permit, killed a bear and distributed the meat to various households, and notified an ADF & G agent of the killing. The agent 'sealed' the bear hide with a tag, but did not 'seal' the skull because it needed to be cleaned. A state trooper later learned of and investigated the bear killing, and filed criminal charges against the defendant for failure to seal the bear skull and otherwise comply with permit requirements. The trooper recommended 30 days in jail and an \$800 fine as punishment. 836 P.2d at 360 (Alaska 1992). The *Morry* court based its holding on the alternative grounds that, (1) the trophy hunting regulations do not constitute compliance with Alaska's subsistence laws, which mandate that the Board of Game adopt regulations for subsistence use of the resource in question, *id.* at 363 (citing Alaska Stat. § 16.06.258(c)); and (2) the Board of Game violated the Alaska Administrative Procedures Act by failing to hold a pre-adoption hearing regarding the consistency of the regulations in question with the subsistence law. *Id.* at 364.

tence situation differs in that subsistence hunters use the resource in question for basic living needs and may go hungry without access to adequate quantities of it.<sup>189</sup> Thus, admonished the court, the Board of Game must always "proceed with scrupulous care and caution in imposing seasons and bag limits on subsistence hunting."<sup>190</sup>

The Haida people do not subsist predominantly on roe on kelp, but this resource does provide an important supplement to the Haidas' diets and incomes.<sup>191</sup> Additionally, use of roe on kelp plays an important role in the traditional Native lifestyle. As recognized in *Bobby*, such subsistence uses must "be accommodated, as regards both the quantity or volume of use and the duration of the use. Need is not the standard . . . [I]t matters not that other food sources may be available at any given time or place. The standard is customary and traditional use of [the resource]."<sup>192</sup>

Meanings attached to the term "subsistence" itself highlight a divergence between Alaska Native and non-Native perceptions of resource use. What the state and federal governments call "subsistence" is a *way of life* to Alaska Natives.<sup>193</sup> "Subsistence living" means something more expansive than a marginal existence:

The relationship between the Native population and the resources of the land and the sea is so close that an entire culture is reflected. The traditional law . . . was passed from generation to generation, intact, through the repetition of legends and observance of ceremonies which were largely concerned with the use of land, water, and the resources contained therein. Subsistence living was not only a way of life, but also a life-enriching process. Conservation and perpetuation of subsis-

---

189. *Bobby*, 718 F.Supp. at 777.

190. *Id.*

191. The Haida Indians of southeast Alaska gather the following subsistence resources on a seasonal basis: seaweed (a non-kelp variety), yane (sea cucumber), crab, deer, gumboots (a type of shellfish), salmon, greens (sea asparagus), herring eggs, abalone, clams, cockles, octopus, and seal. Interview with J. Rashleger, *supra* note 28. The Haida spend time collecting these foods and making hooligan oil and seal oil, drying fish and seaweed, smoking salmon and seal, canning fish and dog salmon eggs, tanning deer hides, and making "stink" eggs (fermented salmon eggs). *Id.*

192. *Bobby*, 718 F.Supp. at 778. See also *State v. Morry*, 836 P.2d 358, 370 (Alaska 1992) (distinguishing between "customary and traditional" uses, versus *methods of harvesting*, subsistence resources, and holding that the Alaska Boards of Game and Fish, "have the discretion, but are not mandated, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations"). The *Morry* holding, *supra*, must be read in light of the subsequently enacted 1992 Law, which defines "customary and traditional" with reference to *use patterns*, see Alaska Stat. § 16.05.940(6), and mandates that the Boards of Fisheries and Game identify, and provide conditionally for the harvest of, game and fish stocks customarily and traditionally used for subsistence. See *id.* § 16.05.258.

193. Brady, *supra* note 181.

tence resources was part of that way of life, and was mandated by traditional law and custom.<sup>194</sup>

Furthermore, subsistence living, from the Alaska Native's point of view, produces abundant food and other products;<sup>195</sup> subsistence does not connote "eking out" a living and foraging for sufficient food.<sup>196</sup>

The distribution and exchange of resources like roe on kelp occur in networks that operate at a community level in Alaska's subsistence-based socioeconomic systems.<sup>197</sup> These complicated systems require the organized participation of almost all women, men, and children in each village.<sup>198</sup> Subsistence activities thereby provide for the social and economic well being of an entire network of extended families that comprise a given community.<sup>199</sup> Not surprisingly, it has been found that increased use of harvested foods can relate to a strengthening of cultural identity among Alaska Natives.<sup>200</sup> Maintenance of the subsistence way of life thus may be viewed as a measure of Alaska Natives' ability to achieve self-determination, because absent subsistence, the lives of Alaska Natives would be defined by external standards, rather than by cultural forces within the Native communities.<sup>201</sup>

Finally, as discussed in the context of *Alexander*,<sup>202</sup> subsistence uses of resources do not necessarily occur in "cashless" economies. Subsistence hunters and fishers avail themselves of "modern" technologies pur-

194. Berger, *supra* note 42, at 54 (quoting Alaska Native Nelson Frank of Sitka, Alaska).

195. *Tadamitsu Sakurai*, No. A88-026 CR, 1988 WL 142332, at \*10, \*11; Berger, *supra* note 42, at 54. The court in *Tadamitsu Sakurai* noted that Congress, when it passed the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624, understood Alaska Natives, as a group, to be among America's most poor and undernourished citizens. *Tadamitsu Sakurai*, No. A88-026 CR, 1988 WL 142332, at \*10, \*11 n.14. This observation says nothing, however, about Native Alaskans' perceptions of themselves and the manner in which they pursue, and have always pursued, a living.

196. *Id.* at \*10.

197. Wolfe, *Understanding Resource Uses in Alaskan Socioeconomic Systems*, in *Resource Use*, *supra* note 42, at 265. Subsistence-based socioeconomic systems, which are 'food extractive' in nature, stand in contrast to economies based on activities such as manufacturing, trade, government, finance, or defense. *Id.* at 272. The characteristics of a subsistence-based system include: (1) a "mixed economy," with mutually supportive "market and "subsistence" sectors; (2) a "domestic mode of production" where kinship-based production units control production capital, labor, and land; (3) a stable and complex seasonal round of production activities within the community connected to the seasonal arrival and fluctuations of game and fish resources; (4) substantial non-commercial networks of distribution, exchange, and sharing of materials and food; (5) traditional systems of land use and occupancy; and (6) complex systems of values, beliefs, and knowledge associated with resource uses passed from generation to generation as the cultural and oral traditions and customs of a social group. *Id.*

198. Berger, *supra* note 42, at 56.

199. Wolfe, *supra* note 42, at 265.

200. R. Schroeder & R. Nelson, *Sitka: Resource Uses in a Large, Non-Road Connected Community of Southeast Alaska*, in *Resource Use*, *supra* note 42, at 240.

201. Case, *supra* note 181, at 1010.

202. See discussion *supra* note 42 and accompanying text.

chased with cash.<sup>203</sup> Currency and contemporary technologies are used within the socioeconomic systems of all of Alaska's communities.<sup>204</sup> The distinction between subsistence-based and nonsubsistence-based socioeconomic systems thus may be said to turn on how a community integrates technology and cash into its economic and social activities, and not on the presence *per se* of cash or technology.<sup>205</sup>

Alaska subsistence law as presently formulated clashes with, rather than complements, subsistence living and resource management as it is known to Alaska Natives. As an initial matter, the idea of regulating subsistence in the manner employed by the state and federal governments is anomalous to many Alaska Natives. As expressed by one tribal elder, "[w]e were quite surprised to have to go and get permission [to continue our way of life]."<sup>206</sup>

Non-Native resource management systems rely on data garnered through scientific study and the development of written laws.<sup>207</sup> The nature of government bureaucracies generally ensures that those who write the rules are separated organizationally from those who enforce the rules.<sup>208</sup> In contrast, Native or indigenous research, management, and enforcement occur coextensively with harvesting resources and living in Native communities.<sup>209</sup>

Traditional beliefs, practices, and unwritten customs delineate the bounds of acceptable conduct in the realms of hunting and fishing among Alaska Natives.<sup>210</sup> The following southeast Alaska Native myth, for example, functions as a fishing "regulation": A man was fishing for herring off of Herring rock, near Sitka, well into the night. He did not notice any physical changes taking place to his body as he fished, but by dawn, he had been transformed into an owl. The owl flew away into trees, the location of which is still pointed out today.<sup>211</sup> As a "regulation" the story warns that one who over-harvests herring (fishes past sunset) will suffer undesirable consequences (turn into an owl). This and similar indigenous

---

203. Wolfe, *supra* note 42, at 252.

204. *Id.* Members of subsistence communities themselves often do not conceptually separate the cash and subsistence aspects of the same activity. Berger, *supra* note 42, at 58. Commercial fishing and subsistence fishing with nets, for example, take place contemporaneously and complement each other by bringing both fish and cash into the mixed economies of riparian villages. *Id.*

205. Wolfe, *supra* note 42, at 252. See *supra* note 197 for an enumeration of the characteristics of a subsistence-based economic system.

206. Brady, *supra* note 181. See also Case, *supra* note 181, at 1013 n. 25 (observing that Alaska Natives generally perceive as unnecessary the bag limits, seasons, and other 'routine' scientific, non-Native methods of protecting wild, renewable resources, which methods conflict with traditional Native hunting and fishing practices).

207. *Id.* at 1012.

208. *Id.*

209. *Id.*

210. *Id.*

211. Schroeder & Kookesh, *supra* note 15, at 15.

subsistence resource management strategies historically ensured the survival of communities and conservation of resources, and melded with the cultural, social, and economic elements of Alaska Native societies.<sup>212</sup>

The subsistence way of life, as discussed above, also traditionally includes use of up-to-date equipment; an abundance of products; and, since the late 19th Century, use of at least some cash as a means of exchange. The relatively recent rise in international demand for goods such as roe on kelp has created an opportunity for Alaska Natives to expand a market, a means of exchange, and the production of historically abundant local resources. There has been a simultaneous increase in demand for fish and game by commercial and sport hunters. The Alaska Boards thus have been placed in the unenviable position of having to mete out access to renewable but not inexhaustible supplies of wild resources, to a growing number of competitors within the confines of an ever-changing body of statutory and decisional law.<sup>213</sup>

Adding fuel to the fire, the regulation of subsistence resources by non-Native governments is viewed from the perspective of many Alaska Natives as a threat to tribal sovereignty.<sup>214</sup> Victor Haldane, a Haida elder, alluded to this during the district court trial in *Alexander*.<sup>215</sup> Mr. Haldane testified about the Haida people's customary trade of roe on kelp. In the course of his testimony, Mr. Haldane stated that he "does not consider the State of Alaska to have any authority to regulate the herring spawn on kelp fishery in southeast Alaska."<sup>216</sup> Alaska Native concerns thus may be said to pertain not only to *how* a given subsistence resource should be regulated, but also to *which government* possesses the power to regulate in the first place.<sup>217</sup>

While it is unrealistic to expect the complete withdrawal of the Alaska and federal governments from the arena of subsistence regulation on state and federal lands, a number of steps should be taken to meet the subsistence needs of Alaska Natives more effectively. First, the Alaska Constitution should be amended to reflect a clear public policy of recognizing subsistence as the priority use of Alaska's fish and game resources.<sup>218</sup> Second, emphasis should be placed on consistent and strict

---

212. Case, *supra* note 181, at 1013-14; Berger, *supra* note 42, at 59.

213. Cf. *Bobby v. Alaska*, 718 F.Supp. 764, 776 (D. Alaska 1989).

214. Letter from J. Rashleger, *supra* note 15.

215. 942 F.2d 942.

216. Brief of Appellee at 14, *United States v. Peele*, 938 F.2d 942 (9th Cir. 1990) (No. 89-30253) (citing Reporter's Transcript of Trial 178).

217. Letter from J. Rashleger, *supra* note 15. Cf. Berger, *supra* note 42, at 65 (quoting Suzy Erlich of Kotzebue, Alaska) ("[W]hen the state uses [the term] subsistence, it is a privilege. To us, subsistence is our inherent right because that is how we have always been and . . . how we will always be.').

218. Alaska Natives, among others, have expressed support for this strategy. See AFN Retreat Recommendations (Subsistence Recommendations) (Alaska Federation of Natives, Inc. ed., Sept. 1992) (compilation from Alaska Federation of Natives Retreat at Saxman, Alaska).

implementation of the subsistence-oriented objectives of ANILCA on all of Alaska's public lands.

Finally, a greater share of direct control over subsistence management must be yielded to Alaska Natives. One commentator who promotes this objective uses the term "co-management regime" to describe power-sharing arrangements between public administrators and Native user groups.<sup>219</sup> A few such regimes, including one provided for in ANILCA,<sup>220</sup> have been established to resolve conflicts between indigenous and non-Native resource management systems in Alaska and Canada.<sup>221</sup> These efforts should be encouraged and expanded, and their success measured against both indigenous and non-Native standards. The regimes could be considered a success from the Alaska Native perspective, for example, to the extent that they give Native people a more effective voice in resource management by closing the gaps between indigenous and non-Native systems of fish and game regulation.<sup>222</sup> The ANILCA falls short in this respect because it provides Alaska Natives with only "an enhanced consultative role"<sup>223</sup> in subsistence rule making, and no definite role in research or enforcement.<sup>224</sup>

Any subsistence management program which lacks meaningful input from, and participation by, Alaska Natives risks sabotage by the Native people whose lives are most affected, and whose voices have been largely ignored in practice in this context. Alaska Natives are prepared and fully capable of participating in management of the resources that form an integral of part of their lives.<sup>225</sup> It would be difficult to justify *not* giving Alaska Natives more control over management of subsistence resources. The success of a co-management regime from the non-Native perspective, therefore, should be based not only on criteria such as whether the State of Alaska is able to regain control of management of fish and wildlife resources on federal land, and whether the federal government must continue to expend money and other resources to police compliance with Section VIII of ANILCA, but also on whether the state and

---

219. See Case, *supra* note 181, at 1012.

220. See *supra* note 70 and accompanying text.

221. See, e.g., Case, *supra* note 181, at 1012, 1025-32 (discussing the establishment of the Eskimo Walrus Commission and the Alaska Eskimo Whaling Commission, and the success of both Native Commissions in reaching cooperative management agreements with the state and federal governments); B. Polasky, *From the Subsistence Director's Pen—Marine Mammal Coalition and Happenings*, 5 Rural Alaska Resources Ass'n Newsl. (Rural Alaska Community Action Program, Inc., Anchorage, Alaska), July 1992, at 3 [hereinafter RARA Newsletter] (reporting on formation of the Indigenous Council for Marine Mammals (ICMM), a goal of which is to advocate incorporation of traditional Native knowledge into the scientific study of marine resources, and a cooperative agreement reached between the ICMM and the ADF & G).

222. See Case, *supra* note 181, at 1032-33.

223. *Id.* at 1033-34.

224. *Id.* at 1033.

225. See Polasky, *supra* note 221, at 4. See also Berger, *supra* note 42, at 71 (observing that, "Self-governing Native peoples have protected and maintained the fish and wildlife resources of Alaska for thousands of years").

federal governments must continue to respond to the growing number of legal, political, and other challenges presented by dissatisfied and disenfranchised Alaska Natives.<sup>226</sup>

## CONCLUSION

We have been promised punishment for trying to survive.<sup>227</sup>

In his dissent in *Alexander*, Judge Fernandez observed the following about Alexander and Peele: "All over the globe and at all times in the past, [people] have pillaged nature and disturbed the ecological equilibrium, usually out of ignorance, but also because they have always been more concerned with immediate advantages than with long-range goals."<sup>228</sup> One could hardly controvert the statement that humans of every epoch have exploited the Earth to its farthest reaches. Notwithstanding this historical fact, neither the *Alexander* majority nor any court since has cast Alexander and Peele into the ranks of exploiters. No jury had the opportunity to determine whether the defendants' activities did or did not constitute customary trade as practiced by the Haida Indians. The majority of Haida and other Native peoples who participate in the subsistence harvest of fish and game do so only for themselves, their families, and those who cannot harvest for themselves.<sup>229</sup> Present laws pertaining to use of subsistence resources simply do not to accommodate these traditional ways in many significant respects.<sup>230</sup>

Every regulatory system is subject to abuse. Alaska Natives implicitly acknowledge this through cultural myths like the owl story.<sup>231</sup> Nevertheless, a resource management system can work effectively. Indigenous people amply demonstrated this, inhabiting Alaska and other

226. Over 200 Alaska Native leaders gathered in Juneau, Alaska, in June 1992 to testify and lobby during a special legislative session called by Governor Hickle to address the subsistence issue. J. Kitka, *Guest Article by the Alaska Federation of Natives: The Subsistence Issue*, in RARA Newsletter, *supra* note 221, at 5. More than 500 people also attended a public rally at the state capitol in support of subsistence. *Id.* These actions exemplify Alaska Natives' depth of concern about and level of commitment to having an effective voice regarding the subsistence matter.

227. Berger, *supra* note 42, at 66 (quoting Jasper Joseph of Emmonak, Alaska).

228. 938 F.2d at 950-951 (Fernandez, J., dissenting) (quoting R. Dubos, *A God Within* 161 (1976)).

229. See *supra* notes 39, 196 and accompanying text; Letter from J. Rashleger, *supra* note 15.

230. As the Alaska federal district court observed in *Bobby*: "It appears well established by the [administrative] record that customary and traditional uses of [game] have a communal aspect . . . . Simply put, the very young, the old, and the infirm of the community are provided with meat by the healthy adult members of the community who are skilled at hunting. It is not clear from the Board of Game findings or the discussions of the board members how this aspect of . . . the subsistence tradition of hunting and game-sharing interrelates with bag limits. The court is concerned that the established bag limits do not accommodate this traditional aspect of . . . hunting of moose and caribou." *Bobby*, 718 F.Supp. at 780. See *supra* text accompanying note 185 for further discussion of this case.

231. See *supra* text accompanying note 211.

regions for hundreds of years, exploiting a variety of natural resources, and yet not disrupting the ecological equilibrium. One must acknowledge, however, that competition for resources in the contemporary world far exceeds that faced by any indigenous group in the past. Owl stories alone can no longer restrain the most voracious—and short sighted—competitors. Nor, by the same token, should non-Natives risk regulating the Alaska Native subsistence way of life out of existence. The value and efficacy of indigenous management systems and Native co-control must be recognized and incorporated into subsistence regulation schemes. Only shared stewardship will ensure the survival of all.

M. LYNNE BRUZZESE

*The author would like to thank Mary Beth West, Esquire, Office of the Legal Adviser, U.S. Department of State, formerly Visiting Professor of Law at the University of New Mexico School of Law, for the excellent comments and suggestions she contributed throughout the process of preparing this Comment for publication.*