

ALASKA'S SUBSISTENCE FRAMEWORKS

**State and Federal processes used by
Alaska Natives to participate in
subsistence hunting and fishing**

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ALASKA STATE SUBSISTENCE LAWS

Important constitutional, statutory, and regulatory provisions that guide decisions about subsistence uses of fish and game on state land.

THE ALASKA CONSTITUTION'S “EQUAL ACCESS” CLAUSES

Three key provisions in the Alaska Constitution prohibit granting any individual or group exclusive rights or special privileges to take fish and wildlife on State lands.

Currently, lands owned by Alaska Native Corporations (ANCs) are considered private lands subject to State regulations. So, the Alaska Constitution's provisions apply on ANC lands.

COMMON USE CLAUSE

- **Article 8, Section 3:** “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”

NO EXCLUSIVE RIGHT CLAUSE

Article 8, Section 15: “There shall be no exclusive right or special privilege of fishery ... in the natural waters of the state.”

UNIFORM APPLICATION CLAUSE

Article 8, Sec. 17: “Laws and regulations governing the use or disposal of natural resources...apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.”

SUSTAINED YIELD CLAUSE

Article 8, Sec. 4: “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”

While not considered one of the Equal Access clauses, this clause places a duty upon State management entities to to manage game populations and fish stocks for sustained yield.

INTERPRETING THE ALASKA CONSTITUTION'S EQUAL ACCESS CLAUSES

***McDowell v. State*, 785 P.2d 1 (Alaska 1989)** established the basis for Alaska's current "All Alaskans" subsistence laws and policy.

In this case, the Alaska State Supreme Court determined that an earlier State statute granting a preference to rural residents to take fish and game for subsistence purposes violated the Alaska Constitution's "Equal Access" clauses (Article 8, Sec. 3, 15, and 17) prohibiting exclusive or special privileges for taking fish and wildlife, and invalidated the statute.

RESULTS OF *MCDOWELL*?

- Alaska fell out of compliance with ANILCA, and the management of fish and game on federal lands retroceded back to the federal government, which issued regulations for subsistence hunting (1990) and fishing (1999) – more on that below.
- The State considers All Alaskans eligible to participate in subsistence hunts and fisheries regardless of where they live.
- Subsequent cases have limited *McDowell's* reach to apply only when a statute or regulation explicitly limits eligibility to participate in subsistence use based on residency, or if a restriction violates the equal protection test adopted by the Court and applied in other contexts. For example, a State regulation may restrict a group of users' access to subsistence resources if the restriction serves an important purpose and restricts access to the least degree possible to achieve this purpose.
- A regulation may also benefit or provide an advantage to rural or local users so long as it serves the important purpose of providing for subsistence needs and does so in a way that causes the least impact on others, i.e. non-local hunters, who may be otherwise eligible as subsistence users

ALASKA STATE SUBSISTENCE STATUTES AND REGULATIONS



**“SUBSISTENCE USES”
5 AAC 99.021(4), AS 16.05.940(34)**

Subsistence uses means the noncommercial, customary and traditional uses of wild, renewable resources by a resident 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 inedible 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; in this paragraph, family means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis

**“SUBSISTENCE WAY OF LIFE”
5 AAC 99.005**

“A way of life that is based on consistent, long-term reliance upon fish and game resources for the basic necessities of life.”

**STATE LAW PROVIDES A PRIORITY FOR SUBSISTENCE
USES – BUT ONLY FOR A “REASONABLE
OPPORTUNITY”
AS 16.05.258(F)**

“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 fish or game.”

“The meaning of reasonable opportunity involves the Board’s expertise and is committed to the Board’s discretion by statute, so the Board’s determination that a reasonable opportunity exists is consistent with the [subsistence] statutes if the determination has a reasonable basis.” *Manning v. State*, 355 P.3d 530, 535-36 (Alaska 2015).

**“CUSTOMARY AND TRADITIONAL”
(C&T)
AS 16.05.940(7)**

“The non-commercial, 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 the availability of the fish or game.”

8 FACTORS GUIDE BOARD C&T DETERMINATIONS 5 AAC 99.010(B)

- long-term consistent pattern of noncommercial taking, use and reliance established over a reasonable period of time not less than 1 generation
- pattern of taking or use recurring in specific seasons each year
- pattern of taking/use with methods and means of harvest characterized by efficiency and economy of effort and cost
- area where pattern of taking, use and reliance upon the stock/population has been established
- means of handling, prepping, preserving, and storing fish/game traditionally used by past generations
- pattern of taking/use that includes the generational handing down of knowledge of fishing/hunting skills, values, and lore
- pattern of taking/use/reliance where harvest efforts or products are distributed or shared, traded, or bartered
- pattern that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life

BOARD DISCRETION TO CONSIDER C&T WHEN MAKING SUBSISTENCE REGULATIONS

- *State v. Morry*, 836 P.2d 358 (Alaska 1992), the Boards have the discretion, *but are not required*, to take into consideration customary and traditional methods of subsistence takings when formulating subsistence regulations.
- *Alaska Fish & Wildlife Conservation Fund v. State*, 289 P.3d 90, 909 (Alaska 2012), upheld the State regulation setting criteria for identifying customary and traditional uses and holding that the State subsistence law does not protect all long term uses of fish and game, but instead is intended to provide for “actual subsistence uses and preserve a traditional culture and way of life.”

WHAT IS TIER II? AS 16.05.258(B)(4)

- “Tier II” is a priority system implemented when there are not enough fish or wildlife that can be harvested to provide a reasonable opportunity for all eligible subsistence users.
- Eligibility for Tier II permits is based on (1) the customary and direct dependence on the fish or game population by the subsistence user for human consumption as a mainstay of livelihood, and (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.
- Applicants for a Tier II permit are ranked by a point system. The more points a user receives, the greater chance the user gets a permit. 5 AAC 92.070.

ALASKA NATIVE PARTICIPATION IN STATE SUBSISTENCE PROCESSES

Engaging with the Board of Fisheries, Board of Game, and the Alaska Department of
Fish & Game

BOARD OF FISHERIES AND THE BOARD OF GAME

- The Alaska Legislature created the Board of Fish (BOF) and the Board of Game (BOG) (AS 16.05.221(a)-(b)).
- Each Board is tasked with developing regulations for the conservation, allocation and take of State fish and wildlife resources.
- Each Board seats seven members and has 1 chair (AS 16.05.221).
- Members serve for a term of 3 years, must be Alaska residents, and are appointed by the Governor and confirmed by the Legislature (AS 16.05.221).
- The affirmative vote of at least 4 members is required to pass any regulation (including subsistence regulations).

BOF AND BOG SCOPE OF AUTHORITY

- The BOF adopts regulations establishing open and closed seasons, areas for taking fish, setting harvest quotas, bag limits, harvest levels, means and methods of take, and allocation of fish between users (AS 16.05.251).
- The BOG makes allocation decisions regarding wildlife, and has authority to adopt regulations establishing open and closed seasons, areas for taking game, bag limits, quotas, and methods and means of take (AS 16.05.255).

BOF AND BOG SCOPE OF AUTHORITY SPECIFIC TO SUBSISTENCE

Both Boards determine :

- which fish and game populations are customarily and traditionally used for subsistence
- amounts of game populations and fish stocks necessary for subsistence
- identifications of C&T patterns of use and harvest
- reasonable opportunity needed to meet subsistence needs
- when and how to implement the subsistence priority (including Tier II)
- **identification of non-subsistence use areas (AS 16.05.258).**

SIDEBAR: **WAIT, WHAT ARE NON-SUBSISTENCE AREAS?**

- A non-subsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community (AS 16.05.258(c)).
- To determine whether dependence upon subsistence is a principal characteristic of an area or community, the Boards jointly consider the relative importance of subsistence in the context of a list of characteristics of the area or community.
- If the Boards decide you live in a non-subsistence area (i.e., all residents of the Kenai Peninsula, Anchorage, and the Mat-Su Valley) the Boards will not permit subsistence hunting or fishing in that area regardless of whether you have customarily and traditionally engaged in subsistence activities in that area.
- In *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995), the Alaska Supreme Court concluded that the creation of non-subsistence areas did not implicate the Equal Access clauses of the Alaska Constitution.
- “[i]nconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses.”

ENGAGING WITH THE BOARDS



REGULATORY PROPOSALS

- Members of the public may submit regulatory proposals to either the BOG or the BOF for consideration.
- These proposals are then considered and discussed by the Boards at their public meetings. Proposals can address statewide and region-specific matters.
- Members of the public may also submit comments on any regulatory proposal submitted to the BOG or the BOF.
- Members of the public can make public comments during BOF and BOG meetings on any regulatory proposal (limited to 3 minutes).

ADVISORY COMMITTEES (ACS)

- The BOF and BOG have discretion to establish advisory committees composed of people well informed on the fish or game resources of the locality (AS 16.05.260).
- ACs evaluate regulatory proposals, recommend management proposals to the appropriate Board, and cooperate and consult with people and organizations to do the same. They may also implement emergency closures during established seasons, if such authority is delegated by the Commissioner.
- AC recommendations are not entitled to deference by the BOF or BOG (but AC members get 5 minutes, instead of the mere 3 minutes afforded to members of the public, to comment on proposals at Board meetings).

CHALLENGING BOF AND BOG FACTUAL FINDINGS AND DETERMINATIONS

You can challenge Board of Fish and Game factual findings and determinations by filing a lawsuit.

BUT (there's always a but):

It's very difficult to successfully challenge these findings and determinations because courts give them the highest levels of deference, especially when they relate to seasons, bag limits, and methods and means.

EXAMPLES OF HOW DIFFICULT IT IS TO CHALLENGE BOARD FACT FINDINGS

- ***Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999)***, Courts do not substitute their judgment in place of the Board when reviewing Board factual findings and determinations that support the Board's enactment of specific policies and regulations.
- ***Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999)***, the Board of Fish has broad discretion to define the meaning of sustained yield and to determine what management decisions are consistent with it without determining an actual numerical level of yield.
- ***State v. Morry, 836 P.2d 358 (Alaska 1992)***, the Boards have the discretion to consider, but are not required to consider, customary and traditional methods of subsistence taking when formulating subsistence regulations.

CHALLENGING BOF AND BOG REGULATIONS

You can also challenge the implementation of Board regulations by seeking a preliminary injunction or temporary restraining order.

BUT (like I said before, there's always a but):

You must meet a high standard of proof showing that implementing those regulations would cause irreparable harm.

DIFFICULTY CHALLENGING BOARD REGULATIONS

In *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270 (Alaska 1992), the Alaska Supreme Court reversed a preliminary injunction issued by a Superior Court because the Board's failure to consider customary and traditional patterns of moose hunting was not enough to support a preliminary injunction replacing the Board's decision to hold a short general hunt instead of a longer subsistence hunt, and the superior court failed to adequately consider and protect the interests of **other hunters** and the resource when issuing its injunction

Also: Because the Boards are not required to consider or incorporate traditional knowledge into their deliberation process or regulations, it would be very difficult to challenge either a Board finding or regulation for failing to consider or integrate traditional knowledge.

ALASKA DEPARTMENT OF FISH & GAME (ADF&G)

- ADF&G implements and enforces fish and wildlife regulations promulgated by the BOF and BOG
- ADF&G was created by the Alaska Legislature and is charged with the protection, management, conservation and restoration of fish and game resources of the state.
- ADF&G has 5 divisions: commercial fisheries, sport fish, subsistence hunting and fishing, habitat, and wildlife conservation (AS 16.05.090).

THE COMMISSIONER OF FISH & GAME OVERSEES ADF&G

- Supervises and controls the Department, manages, protects, maintains, improves and extends fish and game resources, and delegates authority to subordinate Department officer and employees (AS 16.05.020(1)-(3)).
- The Commissioner has limited authority over fish and wildlife resources, and cannot order the Boards of Fish and Game to take specific action or change a management action adopted by the Board except when acting on new information related to conservation to take an in-season action
- Current Commissioner: Doug Vincent-Lang

ADF&G'S SUBSISTENCE DIVISION

- The Subsistence Division is a part of ADF&G established by statute to advise the Commissioner and Boards about customary and traditional uses of Alaska's fish and wildlife resources.
- However, neither Board is required to incorporate the Subsistence Division's recommendations into its regulations (AS 16.05.094).

ADF&G DOESN'T ALLOCATE RESOURCES

- ADF&G's longstanding policy is that it does not have authority to allocate resources between user groups – allocation is a decision that must be made by the BOF or BOG.
- But what happens when a BOF or BOG regulation requires ADF&G to make an allocative determination?
- **In the Sitka herring lawsuit** (current on appeal), the Court directed ADFG to make determinations effectively allocating opportunity to harvest herring between commercial/subsistence.
- This decision has potentially upended ADFG's longstanding policy that it does not make such allocation decisions, and ADFG is struggling to reconcile the ruling with its longstanding practice.

ANILCA: SUBSISTENCE LAWS AND REGULATIONS FOR FISH AND GAME ON PUBLIC LANDS

The framework under which decisions about subsistence uses on public lands are made.

WHAT IS ANILCA?

- The Alaska National Interest in Land Conservation Act was enacted in 1980.
- Title 8 of ANILCA provides a priority for rural residents to take fish and game on federal public lands for subsistence uses
- Unlike Alaska's subsistence laws, Alaska residents are eligible for ANILCA's subsistence priority on the basis of where they live. If they live in an area deemed "rural," they are eligible for the subsistence priority.

WHERE DOES ANILCA (AND ANILCA'S SUBSISTENCE PRIORITY) APPLY?

- ANILCA applies to public lands in Alaska (50 CFR 100.3).
- Public lands or public land means lands situated in Alaska which are Federal lands (with certain exceptions set out at 50 CFR 100.4).
- Federal lands are lands and waters and interests therein the title to which is in the United States, including navigable and non-navigable waters in which the United States has reserved water rights (50 CFR 100.4).

SIDEBAR: ANILCA'S SUBSISTENCE PRIORITY DIDN'T ALWAYS APPLY TO NAVIGABLE WATERS.

- Prior to 1995, federal management for the subsistence priority did not apply to navigable waters, i.e., rivers and streams.
- In 1995, thanks to *Katie John*, the Court of Appeals for the 9th Circuit agreed that the federal government held a reserved water right in navigable waters, and that the federal subsistence priority could apply to all navigable waters where the U.S. held reserved water rights.
- In 1999, after a 4-year regulatory delay, federal subsistence management under ANILCA finally expanded to include fisheries on all public lands and waters.

HOW ANILCA DEFINES “SUBSISTENCE USES” 50 CFR 100.4

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

STATE V. ANILCA DEFINITIONS OF “SUBSISTENCE USES”

State Definition – “All Alaskans”

- Subsistence uses means the noncommercial, customary and traditional uses of wild, renewable resources **by a resident 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 inedible 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; in this paragraph, family means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis.
- AS 16.05.940(34), 5 AAC 99.021(4)

ANILCA’s Definition – “Rural residents”

- Subsistence uses means the customary and traditional uses by **rural Alaska residents** of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.
- 16 U.S.C. 3113; 50 CFR 100.4

ANILCA SECTION 801 16 U.S.C. 3111

The purpose of ANILCA is “...the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence...”

ANILCA SECTION 803 16 U.S.C. 3113

- Defines subsistence uses as “[T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of sharing for personal or family consumption; and for customary trade.”

ANILCA SECTION 804 16 U.S.C. 3114

- “Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for non-wasteful subsistence uses **shall be accorded priority over the taking on such lands of fish and wildlife for other purposes...**”
- Permits allocation of take among subsistence users when there is not enough of a subsistence resource to satisfy all subsistence, uses based on three factors: (1) customary and direct dependence on resource; (2) availability of other subsistence resources; and (3) **local residency**.

SIDEBAR:

ANILCA USES LOCAL RESIDENCY TO ALLOCATE BETWEEN SUBSISTENCE USERS.

- This stands in stark contrast to how the State makes allocation determinations between subsistence users in the context of Tier II.
- In *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995), the Alaska Supreme Court concluded that considering a subsistence user's proximity of domicile to a subsistence area under Tier II regulations violated the Equal Access clauses because it barred Alaska residents from participating in certain subsistence activities based on where they lived.

ANILCA SECTION 805

16 U.S.C. 3115

- Creates six subsistence regions within Alaska, six corresponding Advisory Councils for those regions, and provides for the administration of those advisory councils.

ANILCA SECTION 807 16 U.S.C. 3117

- Provides a private right of action for subsistence users, tribes and organizations to sue the federal government for a failure to provide for subsistence uses or the subsistence priority
- If the subsistence user wins the lawsuit, they can recoup their costs and all of attorney fees spent prosecuting the lawsuit. *Native Village of Quinhagak v. U.S.*, 35 F.3d 388 (9th Cir 1994).
- During the brief period of time pre-*McDowell* when the State was managing under ANILCA, section 807 also allowed a subsistence user to bring the State into federal court to enforce subsistence rights

ANILCA SECTION 809

16 U.S.C. 3119

- Permits the Secretaries of Interior and Agriculture to enter into cooperative agreements with Alaska Native corporations or other persons or organizations to achieve ANILCA's policies and purpose

ALASKA NATIVE PARTICIPATION IN ANILCA

ANILCA established a regulatory process in which Alaska Natives can participate to secure access to and subsistence uses of fish and game on public lands.

ANILCA'S REGULATORY PROCESS FOR DEVELOPING AND IMPLEMENTING SUBSISTENCE REGULATIONS ON PUBLIC LANDS.

- ANILCA's implementing regulations establish a regulatory process through which Alaska Natives engage with the Federal Government on matters concerning subsistence uses of fish and game.
- Any person or organization can submit a regulatory proposal for matters regarding subsistence uses of fish and wildlife on public lands. The following administrative entities are involved in the review, deliberation, and approval or denial of all regulatory proposals.

FEDERAL SUBSISTENCE BOARD (FSB) 50 CFR 100.10

- Recommends to the Secretaries of Interior and Agriculture the approval or denial of regulatory proposals to establish subsistence seasons, bag limits, methods and means, and other matters related to subsistence
- Determines which communities are **rural** and are therefore eligible for ANILCA's subsistence priority (see Saxman case).
- Determines which communities have customary and traditional (C&T) uses of a resource, when to close fishing and hunting on federal lands to everyone except rural residents from communities with C&T of the resource
- Implements section 804 to determine which users or communities are eligible to continue subsistence harvesting when there is not enough to meet the needs of all eligible users

SIDEBAR: WHAT IS THE RURAL DETERMINATION PROCESS?

- ANILCA's subsistence priority only applies to rural residents, but ANILCA does not define which individuals or areas are designated as "rural."
- Under the FSB's regulations, all areas are considered rural unless the Board determines that the area is in fact "non-rural." 50 CFR 100.15; 50 CFR 100.23.
- When an area is reclassified as "non-rural," residents residing within that area lose access to ANILCA's subsistence priority – to devastating effects. Examples of this happening include the Kenai area and the Ketchikan area.
- Challenging the loss of a rural determination includes exhaustion of administrative remedies (like filing a request for reconsideration), and, if that fails, suing the FSB for injunctive and declaratory relief in federal court.

SIDEBAR: USING RURAL RESIDENCY FOR SUBSISTENCE HALIBUT.

- In 2003, on the recommendation of the International Pacific Halibut Commission (IPHC) and pursuant to the Northern Pacific Halibut Act, the North Pacific Fisheries Management Council (NPFMC) promulgated regulations establishing subsistence halibut fisheries for residents of rural communities with customary and traditional uses of halibut; individuals domiciled in a rural area described at §300.65(g)(3); and members of federally recognized Alaska Native Tribes with customary and traditional uses of halibut.
- Subsistence Halibut means halibut caught by a rural resident or a member of an Alaska Native tribe for direct personal or family consumption as food, sharing for personal or family consumption as food, or customary trade
- If a person moves from one rural area to another rural area (identified in regulation), they can subsistence fish for halibut anywhere that subsistence halibut is open.
- If a person relocates from a rural area to a non-rural area, or move outside of Alaska, they have to return to their IPHC regulatory area of tribal membership to engage in subsistence halibut fishing.

FSB DELEGATIONS OF AUTHORITY

- The FSB can delegate authority to Federal in-season managers to make specific decisions about openings and closures, means and methods, and other in-season decisions affecting subsistence uses of fish and game on public lands.
- The FSB has in at least one instance delegated authority to a tribe to manage a community hunt, but the legality of that delegation was vigorously challenged by the State of Alaska, and whether the FSB may delegate such in-season management authority to a Tribe remains an open question pending resolution on appeal.

THE FSB WAS CREATED BY REGULATION

- The FSB is not identified in ANILCA. Rather, it was created by ANILCA's regulations, does not derive its authority directly from the statute, and remains vulnerable to the regulatory process (i.e., it could be regulated out of existence).
- The Secretaries of Interior and Agriculture delegated authority to the FSB under section 805 of ANILCA to administer subsistence taking and uses of fish and wildlife on public lands for the Secretaries.

COMPOSITION OF THE FSB

- The FSB comprises 8 voting members:
 - One Chair (historically an Alaska Native, and currently Anthony Christiansen)
 - Two rural resident public members (currently Charles Brower (Barrow) and Rhonda Pitka (Beaver))
 - Five Federal agency representatives, usually the Regional Directors of USFWS, BIA, BLM, NPS, and USFS
 - A majority vote (at least 5) is required for the Board to act

REGIONAL ADVISORY COUNCILS (RACS)

- RACs develop, review, and recommend to the FSB the approval or denial of regulatory proposals and policies regarding subsistence take of fish and wildlife on public lands, determinations of customary and traditional uses of subsistence resources, rural status, and allocations of subsistence uses among rural residents (50 CFR 100.11(c)).
- Unlike the FSB, RACs are recognized in the text of ANILCA. 16 U.S.C. 3115.
- RACs have more authority and power to shape the federal regulatory process than State Advisory Committees because the FSB is required to defer to their recommendations with three limited exceptions.

SUBSISTENCE REGIONS REPRESENTED THROUGH ANILCA'S RACS

- Originally, ANILCA only identified “six different subsistence regions” throughout Alaska
- Now, there are ten different subsistence resource regions
- Eastern Interior, Western Interior, South Central, Southeast, Kodiak/Aleutians, Bristol Bay, Yukon-Kuskokwim Delta, Seward Peninsula, Northwest Arctic, North Slope

COMPOSITION OF RACS

- RAC members must be a resident of the region they represent.
- 70 percent of the members of each RAC represent subsistence interests within a region and 30 percent of the members represent commercial and sport interests within that region
- RAC members serve for 3-year terms. Each RAC appoints 1 Chair.
- RACs are subject to the Federal Advisory Committee Act (FACA).
- RACs must take into consideration a diversity of uses – including subsistence, sport, and commercial uses by urban residents – when reviewing and recommending regulations to the Board

FSB REQUIRED TO DEFER TO RAC RECOMMENDATIONS

- The FSB is required to defer to RAC recommendations unless those recommendations are (1) not supported by substantial evidence, (2) violate recognized principles of fish and wildlife conservation, or (3) would be detrimental to the satisfaction of subsistence needs. 16 USC § 3115.
- As used in ANILCA, recognized principles of management do not include traditional knowledge, and are usually based on Western science, and other quantifiable methods approved by other federal agencies.

LOCAL ADVISORY COUNCILS

- LACs are provided for in ANILCA and established by the FSB (16 U.S.C. §3115(a)(2); 50 C.F.R. § 100.12(a))
- LACs are intended to serve as a gap-filler where State Advisory Committee do not adequately assist RACs in fulfilling their functions. Notice and hearing and consultation with the State is required prior to the creation of a LAC.
- LACs are required to comply with FACA and any operational rules established by the FSB

SUBSISTENCE RESOURCE COMMISSIONS (SRCS)

- SRCs are established by section 808 of ANILCA with broad authority to make recommendations for subsistence management on National Park Service lands.
- SRCs review, draft, and recommend the approval of regulations to the Secretaries for implementation on National Park land ate through RACs and LACs
- Unlike the RACs, SRCs are not required to forward their regulatory recommendations to the FSB. SRCs can submit their regulatory recommendations directly to the Secretaries, and those recommendations are due essentially the same level of deference due RACs.

TRIBAL CONSULTATION

- While not required by the text of ANILCA, subsequently issued Executive Orders and DOI and FSB policy affords Alaska's federally recognized tribes and ANCSA corporations an opportunity for consultation about FSB and Secretarial actions during RACs and SRC proceedings
- Tribes and ANCSA corporations are also entitled to consultations whenever a federal land manager is required to make a determination under section 810 of ANILCA, which are required anytime an agency is considering permitting an action on federal lands that may have an impact of subsistence uses or resources. Permits issued to commercial hunting guides, for example, require an 810 analysis
- Consultations are performed by the Office of Subsistence Management

SIDEBAR:

WHAT IS THE OFFICE OF SUBSISTENCE MANAGEMENT (OSM)?

- OSM is an agency housed within USFWS that provides support to the FSB and helps administer ANILCA's subsistence priority
- OSM is also funded by USFWS
- Subsistence users have raised concerns about OSM's impartiality given that it is essentially a sub-agency of USFWS and given that it is funded by USFWS
- For a number of years, there has been chatter about separating OSM from USFWS, but no such action has yet occurred.

ENGAGING WITH THE FEDERAL
GOVERNMENT THROUGH
COOPERATIVE MANAGEMENT

WHAT IS COOPERATIVE MANAGEMENT?

- Cooperative management is not specifically defined in statute or regulation.
- Department of the Interior Secretarial Order 3342 contemplates that it is a discretionary partnership to manage a resource
- Cooperative management happens under a number of different statutory frameworks, including but not limited to ANILCA and the Marine Mammal Protection Act (MMPA)

EXAMPLES OF ALASKA NATIVE COOPERATIVE MANAGEMENT STRUCTURES

- Alaska Eskimo Whaling Commission
- Western Arctic Caribou Herd Working Group
- Ahtna Inter-Tribal Resources Commission
- Kuskokwim Inter-Tribal Fish Commission

ALASKA ESKIMO WHALING COMMISSION (AEWC)

- Formed in 1977 “[T]o safeguard the bowhead whale and its habitat and to support the whaling activities and culture of its member communities.”
- A Board of Commissioners, made up of one whaling captain from each of the 11 AEWC member whaling villages, governs the AEWC and enforces harvest rules and guidelines against its members
- The AEWC manages the Alaska subsistence bowhead hunt in the Bering, Chukchi and Beaufort Seas with the U.S. Department of Commerce/NOAA pursuant to Management Plan incorporated into a Cooperative Agreement with NOAA that was entered into under section 112(c) of the MMPA.

AEWC COOPERATIVE AGREEMENT

- Is the **exclusive enforcement mechanism** for any violation of the Marine Mammal Protection Act, Endangered Species Act, Whaling Convention Act, International Whaling Convention (including quotas set by the IWC), or AEWC Management Plan that may be committed by a member of the AEWC during the hunt
- Incorporates a management plan that establishes guidelines for the bowhead whale subsistence hunt
- Requires whaling crews to report the number of whale strikes during each hunt (to ensure compliance with the IWC quota)
- Quota violations and other violations of the management plan and Cooperative Agreement are adjudicated and enforced by the AEWC
- Requires NOAA to provide technical assistance to comply with the reporting requirement, and to consult with AEWC with any concerns about the Cooperative Agreement and any proposed agency action that may affect the bowhead whale and/or subsistence hunting
- Permits the AEWC to decide whether to refer violations to the NOAA for Federal prosecution. This has only happened once in the history of the AEWC.

WESTERN ARCTIC CARIBOU HERD WORKING GROUP (WACHWG)

- Created in 1997 “[T]o work together to ensure the long- term conservation of the Western Arctic caribou herd and the ecosystem on which it depends, and to maintain traditional and other uses for the benefit of all people now and in the future.”
- Has 20 voting members representing various user groups: subsistence, sport, conservation, hunting guides, reindeer herders and transporters
- Meets regularly to exchange traditional and Western scientific information, agree upon recommendations for research, monitoring, regulation, allocation, enforcement, education, and to promote communication among stakeholders
- Submits comments and regulatory proposals to the FSB and State BOG.

WACHWG COOPERATIVE AGREEMENT

- A Cooperative Management Plan, revised most recently in 2019, guides the Group, agencies and researchers in relation to specific recommendations and projects
- The Plan has 9 parts, each with a goal, strategies and proposed management actions: cooperation, population management, habitat, regulations, reindeer, knowledge and education

AHTNA INTER-TRIBAL RESOURCES COMMISSION (AITRC)

- AITRC comprises a representative from each of the eight Ahtna Native Village, Ahtna, Inc., and the Chitina Native Corporation
- In November 2016, AITRC and the DOI entered into a Memorandum of Agreement for a Demonstration Project for Cooperative Management of Customary and Traditional Subsistence Uses in the Ahtna Region
- MOA cited ANILCA Section 809 as a legal authority

AITRC MOA WITH DEPT. OF THE INTERIOR

- The MOA envisioned a management partnership
- FSB would establish authority to issue permits to AITRC for taking moose and caribou, and other wildlife on federal public lands in Ahtna traditional territory (Wrangell Saint Elias and Denali National Parks and BLM lands)
- Permits would authorize AITRC to manage hunting by tribal members consistent with C&T practices
- AITRC and federal wildlife managers would agree on a quota of moose and caribou that can be taken on federal lands that would meet subsistence needs and is consistent with conservation
- To date, the DOI has failed to fully implement the MOA.

KUSKOKWIM INTER-TRIBAL FISH COMMISSION (KRITFC)

- The KRITFC is an organization comprised of 33 federally recognized tribes who have C&T uses of salmon within the Kuskokwim Drainage
- The KRITFC is governed by a Board comprised of seven members. Board members represent one of seven particular regions along the Kuskokwim River, and are appointed to the Board by the member tribes from within each of those regions
- The KRITFC also has three tribal commissioners, one each from downriver, middle river, and upper river sections of the Kuskokwim, who serve as in-season managers. Commissioners meet regularly prior to and at least weekly during the summer subsistence fishing season with the Yukon Delta NWR Refuge Manager to develop pre-season salmon management plans and actions

KRITFC MOU WITH DEPT. OF THE INTERIOR

- An MOU was executed in March 2016 in response to prior seasonal restrictions on Chinook subsistence fishery and resulting hardship on tribal users and the Federal takeover of Chinook salmon management on the Kuskokwim to ensure conservation of fish and habitat and opportunity for the continuation of subsistence way of life through integrating Kuskokwim Tribes as broadly as possible into federal management structures
- Authorities include ANCSA, ANILCA, Federal trust responsibility, Executive Orders, and delegation of authority from member tribes to KRITFC to enter into the MOU.
- the MOU established a cooperative management structure that integrated tribal decision-making authority into management of subsistence uses of salmon on the Kuskokwim River
- KRITFC and FWS attempt to reach consensus on all pre-season and in-season management actions. Failure to reach consensus requires consultation with the Refuge Manager, FWS Regional Director, OSM Regional Director, and BIA Regional Director.

PROS / CONS OF KRITFC'S MOU

- Cooperative management pursuant to the MOU has helped successfully worked through some of seasonal management challenges, like identifying and agreeing upon subsistence opportunities and harvest limits.
- *But, Sturgeon II* raised jurisdictional questions (more on that below) Does not prevent State assertion of jurisdiction that interferes with administration of the federal subsistence priority
- Asserting federal/tribal jurisdiction over Native allotments and/or a reserved subsistence fishing right on ANCSA lands may be a means to incorporate upriver Villages more meaningfully into federal/tribal management plans

ENGAGING WITH THE FEDERAL
GOVERNMENT THROUGH
CO-MANAGEMENT

DEFINING CO-MANAGEMENT

- Like “cooperative management,” co-management is not specifically defined in statute or regulation.
- Generally, co-management is based on an existing legal duty or relationship typically defined in statutes or treaties.
- Secretarial Order 3342 defines co-management as “a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decision-making or that makes co-management otherwise legally necessary.”

EXAMPLES OF ALASKA NATIVE CO-MANAGEMENT RELATIONSHIPS WITH THE FEDERAL GOVERNMENT

- Alaska Migratory Bird Co-Management Council
- Alaska Native Organizations
- Alaska Nannut Co-Management Council

ALASKA MIGRATORY BIRD CO- MANAGEMENT COUNCIL (AMBCC)

- The AMBCC comprises Alaska Native representatives from 12 regions, U.S. Fish and Wildlife Service, and the Alaska Department of Fish and Game (50 C.F.R. § 92.10(b)).
- The Native Caucus comprises the Alaska Native regional representatives and makes regulatory recommendations to the full AMBCC.
- Each member casts one vote. The Chair of the Native Caucus casts one vote on behalf of the entire caucus;ADF&G and USFWS cast the other two votes.

AMBCC RESPONSIBILITIES

- Considers and recommends regulatory proposals for the subsistence harvest and customary and traditional use of migratory birds and their eggs in Alaska during the spring and summer subsistence seasons.
- Recommends law enforcement policies, population and harvest monitoring, education programs, research, and the use of traditional knowledge, and determines eligibility criteria for participation in spring and summer subsistence hunts.
- These recommendations are made to the Service Regulations Committee (a committee within USFWS), who then determines whether to advance those recommendations to the Pacific Flyway Council.
- Unlike the FSB, the AMBCC does not have a direct link to the Secretaries of Interior or Agriculture).

LEGAL BASIS FOR AMBCC CO-MANAGEMENT

- Four treaties between the U.S. and Canada, Mexico, Japan and Russia govern the indigenous subsistence harvest of migratory birds during the spring and summer seasons.
- In 1996 the US-Canada Treaty was revised to require that Alaska Natives be given an effective and meaningful role in the regulation of migratory birds, giving rise to the development of the AMBCC.
- **US-Canada Treaty Protocol(4)(b)(ii), Paragraph 4:** Indigenous inhabitants of the State of Alaska shall be afforded an effective and meaningful role in the conservation of migratory birds including the development and implementation of regulations affecting the non-wasteful taking of migratory birds and the collection of their eggs, by participating on relevant management bodies.
- **50 C.F.R. § 92.10** established the AMBCC.

LIMITATIONS TO AMBCC CO-MANAGEMENT AUTHORITY

- The extent of the AMBCC's co-management authority is limited by principles of treaty interpretation.
- In 1984 and 1985, USFWS entered into cooperative agreements allowing subsistence hunting of migratory birds in Alaska, but the Agreements were not consistent with the Canadian treaty requirements.
- Following *Alaska Fish and Wildlife Federation and Outdoor Council v. Dunkle*, 829 F.2d 933 (9th Cir. 1987), a lawsuit that challenged those Agreements, the Court of Appeals for the Ninth Circuit determined that interpretations of those treaties must harmonize with the terms of the most restrictive treaty.
- The subsistence harvest of migratory birds must be managed in consistent with the most restrictive of the four migratory bird treaties. Because the Canadian treaty enforces the most restrictive provisions, any regulatory proposals considered and recommended by the AMBCC must be consistent with the terms of the Canadian treaty

CO-MANAGEMENT OF ALASKA- CHUKOTKA SUBPOPULATION OF CHUKCHI SEA POLAR BEARS

- The Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population (the U.S.- Russia Agreement) was signed on October 16, 2000.
- The U.S.-Russia Agreement affirms that “native people of Alaska and Chukotka, in accordance with each Contracting Party’s domestic laws, to hunt polar bears to satisfy their traditional subsistence needs, and to manufacture and sell handicrafts and clothing;...”
- It also affirms “the essential role of the native people of Alaska and Chukotka in the conservation of the Alaska-Chukotka population of polar bears...and desire[s] to ensure their full involvement in the implementation and enforcement of this Agreement.

TITLE V OF THE MMPA IMPLEMENTS THE U.S.-RUSSIA AGREEMENT

- Subsequently, Congress adopted Title V of the MMPA to implement the U.S.-Russia Agreement domestically.
- Title V authorizes the USFWS to share authority to manage subsistence polar bear harvest with an Alaska Native organization (ANO) representing all subsistence polar bear hunting villages if the organization does two things:
 - enters into a cooperative agreement with the Secretary under Section 119; and
 - administers its co-management program in compliance with – and meaningfully monitors Alaska Native compliance with – the MMPA and the U.S.-Russia Agreement

CREATION OF THE ALASKA NANNUT CO-MANAGEMENT COUNCIL

- Previously, the Alaska Nanuq Commission was the ANO that worked with USFWS to implement the provisions of Title V and the U.S.-Russia Agreement in the U.S.
- In 2016, the ANC dissolved, and in 2017, the ANCC was formed and is the current ANO with which USFWS shares authority for the management of subsistence polar bear harvest from the Chukchi Sea subpopulation of polar bears.
- ANCC comprises 15 tribes from regions of Alaska that customarily and traditionally harvest polar bears for subsistence. Each tribe appoints a representative to serve on ANCC's Governance Board, and the Governance Board collectively makes determinations about how to implement the provisions of Title V – specifically, the approval and acceptance of a co-management agreement.

ANCC DUTIES AND RESPONSIBILITIES

- ANCC's co-management responsibilities include the implementation of domestic laws and the development and implementation of international policies.
- **Domestic:** ANCC is currently involved in negotiating a harvest management plan and co-management agreement under which it will share authority with the USFWS for management and enforcement of harvest regulations for the Chukchi Sea subpopulation of polar bears.

ANCC DUTIES AND RESPONSIBILITIES, CONT'D

- **International:** The U.S.-Russia Agreement established a Bilateral Commission to coordinate the conservation and study of polar bears and to set key standards, like annual harvest quotas, multi-year quota systems, and treaty boundary lines.
- The Bilateral Commission comprises two members from Russia and two members from the U.S. The U.S. team comprises one representative of the Federal government and one Alaska Native representative – usually the Chair of the ANCC.
- The Alaska Native representative has significant influence over Commission terminations. ALL U.S. decisions must be made by consensus. If the Alaska Native representative does not agree with a U.S. position, that position cannot be presented to the Bilateral Commission.

ALASKA NATIVE ORGANIZATIONS CO-MANAGE MARINE MAMMALS

- Alaska Native Organizations (ANOs) throughout Alaska have entered into cooperative agreements with either USFWS or NOAA for the co-management of marine mammals.
- An ANO is a group designated by law or formally chartered which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska. (16 U.S.C. 1362 (23)).
- Cooperative agreements provide that to the extent allowed by law, TEK and indigenous knowledge are integrated into management decisions
- Some examples include the Aleut Marine Mammal Commission, the Ice Seal Committee, the Alaska Beluga Whale Committee, the Alaska Sea Otter and Stellar Sea Lion Commission
- Indigenous Peoples Council on Marine Management, serves as an umbrella organization for ANOs in Alaska and provides assistance, including financial support (through passing down grants) to ANOs throughout the state.

MMPA SECTION 119(A)

- **MMPA Section 119(a)** provides that “The Secretary may enter into cooperative agreements with ANOs to conserve marine mammals and provide co-management of subsistence use by Alaska Natives
- Section 119 cooperative agreements may include grants to ANOs for, among other purposes, collecting and analyzing data on marine mammal populations, monitoring harvest for subsistence use, participating in research conduct by the federal or state governments, academic institutions and private organizations, and developing co-management structures with federal and state agencies

MMPA SECTION 112(C)

- **MMPA Section 112(c)** provides that “The Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this title or title IV and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person.”
- The only example of a Section 112(c) cooperative agreement is the cooperative agreement between the AEWC and NOAA, discussed above
- When the AEWC and NOAA entered into the cooperative agreement, the MMPA did not yet contain Section 119

POLICY AND LEGAL DEVELOPMENTS AFFECTING SUBSISTENCE

Federal policies and state and federal litigation have a lasting impact upon subsistence access and rights.

SECRETARIAL ORDERS

- The Department of the Interior issues Secretarial Orders establishing policies relating to DOI conduct and how DOI implements certain procedures and programs.
- Secretarial Orders can establish opportunities for Alaska Natives to engage in resource management, but those opportunities are usually limited to management of federal resources

SECRETARIAL ORDER 3342, OCTOBER 2016

- **S.O. 3342, “Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources.”**
- Encouraged cooperative management agreements and other collaborative partnerships between Department of Interior resource managers and tribes that will further shared interests in the management of Federal lands and resources
- Established a process and provided institutional support to ensure that land and resource managers evaluated and developed opportunities to further establish partnerships that benefit tribes and Federal agencies

SECRETARIAL ORDER 3342, CONT'D

- Directed agencies to identify opportunities for cooperative management arrangements and collaborative partnerships with tribes and undertake efforts to partner with tribes in the management of the natural and cultural resources over which the agencies maintain jurisdiction and responsibility
- Limited cooperation and collaboration to DOI's legal responsibilities and authorities
- Whether agencies can delegate so-called inherently federal functions to tribes is an open question
- Implementation has to occur within available financial resources, i.e., if there isn't sufficient congressional funding, nothing happens

LAWSUITS AFFECTING SUBSISTENCE AND CO-MANAGEMENT

- The federal statutory and regulatory frameworks establishing ANILCA's subsistence priority is very complicated.
- These complications and competition for resources from outside sources make the frameworks vulnerable to litigation – and change.
- These changes implicate the ability of Alaska Natives to continue accessing natural resources they have managed and subsisted upon since time immemorial.

KATIE JOHN CASES

- In a series of three complex federal lawsuits that began in the 1980s and ended in 2013, the *Katie John* cases determined that the federal government has reserved water rights in navigable waters and can exert federal management jurisdiction over those waters (which would normally be managed by the State).
- Remember that ANILCA applies to “public lands,” and that public lands include “lands, waters, and interests therein...”
- Federal reserved water rights in navigable waters (which otherwise would be subject to state jurisdiction) is an “interest therein”
- As a result, the federal government gained the ability to manage for ANILCA’s subsistence priority over significant portions of navigable waters throughout Alaska.

STURGEON CASES

- John Sturgeon's displeasure at being cited for driving his airboat on the Nation River in violation of NPS regulations led to two U.S. Supreme Court decisions that implicate the federal government's ability to manage for ANILCA's subsistence priority on navigable waters.
- In the second case, the U.S. Supreme Court concluded that the Nation River was not "public land" as that term is defined by ANILCA because running waters can't be owned, Alaska holds title to the lands beneath the river, and federal reserved water rights do not give the government plenary authority over the waterway
- As a result, it concluded that the NPS could not regulate non-public lands and waters under ANILCA.

STURGEON CONT'D

- But, the U.S. Supreme Court included a crucially important footnote in its decision:
 - “As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term “public lands,” when used in ANILCA’s subsistence-fishing provisions, encompasses navigable waters like the Nation River...Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit’s holdings that the Park Service may regulate subsistence fishing on navigable waters.”

NPS REGULATIONS ISSUED AFTER STURGEON KEEP *KATIE JOHN* CASES INTACT

- The new rule severely limits NPS's authority over navigable rivers in Alaska, and thus the agency's ability to satisfy its statutory mandate to protect and maintain water quality and habitat.
- “In Alaska, unless otherwise provided, only the public lands (federally owned lands) within the Park area boundaries are deemed a part of that Park area, and non-public lands (including...submerged lands and the waters flowing over them) shall not be regulated as part of the National Park System.”
- The final rule takes the position that there are no impacts on the effects of the *Katie John* cases, “Because the 9th circuit precedent remains valid law for purposes of NPS's subsistence regulations, the revised definition of federally owned lands does not upset the application of the *Katie John* cases...”
- In case you're curious: 85 Fed. Reg. 72,956 (Nov. 16, 2020).

ALASKA V. FSB

- In 2020, the State filed a lawsuit seeking an injunction and declaratory relief from two separate actions taken by the FSB: the delegation of authority to the Organized Village of Kake to administer an emergency moose hunt on USFS land during the pandemic, and the closure of sub-units of Game Management Unit 13 to non-subsistence uses of moose and caribou.
- The U.S. District Court concluded the State's challenge to the Kake hunt was moot and upheld the FSB's authority to close public lands to non-subsistence uses for public safety and to prevent competition.
- The State's appealing of the U.S. District Court's opinion to the 9th Circuit. Is currently pending.

POSSIBLE LAWSUIT: DOI V. ALASKA

- This possible lawsuit arises out of the dual management structure on the Kuskokwim River.
- the YDNWR cooperatively manages federal waters within the Refuge for subsistence harvest of salmon with the KRITFC, and has been scheduling fishing openings for the past few years to provide subsistence users with harvest opportunities.
- For the past two years, the State of Alaska has proceeded to open subsistence harvest to salmon on the Kuskokwim River on days when there is no federal opening - directly implicating the Refuge's attempts to manage for a subsistence priority.

STATE NAVIGABLE WATERS LAWSUITS

- Filed in October 2021 to force Federal recognition of State ownership of submerged lands beneath four rivers in Interior Alaska: South Fork of the Koyukuk River, middle Fork of the Koyukuk River, the Bettles River, and the Dietrich River
- Practical result of an outcome in favor of the State would potentially limit the ability of the Federal government to manage these rivers for ANILCA's subsistence priority.

RESERVED RIGHTS UNDER ANCSA

An untested legal theory could create subsistence opportunities on ANCSA lands outside of State jurisdiction.

ALASKA NATIVES HOLD RESERVED RIGHTS TO C&T SUBSISTENCE USES OF FISH AND GAME ON ANCSA LANDS

- ANCSA's extinguishment of aboriginal title did not terminate the reserved right to customary and traditional subsistence uses of fish and game resources on ANCSA lands.

CONGRESS DID NOT CLEARLY AND UNAMBIGUOUSLY TERMINATION SUBSISTENCE HUNTING/FISHING RIGHTS

- Congress's policy in enacting ANCSA was to achieve a fair and just settlement of all claims...in conformity with the real economic and social needs of Natives, and expressed the expectation that "both the Secretary and the State [would] take ay action necessary to protect the subsistence needs of the Natives. H. Conf. Rep. No. 92-746, at 37 (1971).
- Congress was clearly aware throughout process of ANCSA of importance of subsistence hunting and fishing to AK Native people. Nothing demonstrates that Congress set aside that concern. An active debate surrounding ANCSA was over what additional rights for hunting and fishing Natives would have on lands that were not their own.
- Congress required regional ANCs to to allocate settlement lands among Alaska Native villages after considering the "historic use, subsistence needs, and population of the village."

ANILCA SUPPORTS THIS THEORY

- The first sentence of Title 8 of ANILCA acknowledges that the ability of the continuation of subsistence uses is essential to Alaska Natives on “Native” lands (i.e., ANCSA lands).
- The reference in Title 8 of ANILCA to “Native lands” suggests that Congress realized ANCSA lands alone were not enough to meet customary and traditional needs, and was starting to figure out how to structure additional rights on additional lands.

WHAT ARE RESERVED RIGHTS?

- Reserved rights are recognized and discussed at length in the *Winters* case.
- In *Winters*, the allocation of sufficient water was necessary to realize the purpose of the reservation (i.e., farming). But the State was regulating water to users up-stream of the reservation so that the reservation couldn't be used for its intended purpose. The State was preempted from doing that so that the reservation could receive sufficient water to realize the purpose for which it was created.
- A reserved right is a right that may not be explicit, but which is necessary to fulfill purpose of an agreement.

TENTATIVE CONCLUSION

- Based on Winters, Congressional intent to reserve hunting and fishing rights on ANCSA lands for Alaska Natives, and the interpretation of ANCSA's provisions through the Indian canons of construction, Alaska Natives have reserved rights to the customary and traditional uses of fish and game resources on ANCSA lands.
- Many unanswered questions; research continues!