

PROTECTION OF ALASKA NATIVE CUSTOMARY AND TRADITIONAL HUNTING AND FISHING RIGHTS THROUGH TITLE VIII OF ANILCA

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This paper analyzes the degree to which the administration of Title VIII of the Alaska National Interest Lands Conservation Act¹ (ANILCA) of 1980 protects customary and traditional hunting and fishing by Alaska Natives and their tribal communities. A recent Memorandum of Understanding² (MOU) entered into by the United States Fish and Wildlife Service (USFWS) and the Kuskokwim Inter-Tribal Fish Commission (KRITFC) for co-management of subsistence fisheries will be used as a means to analyze the issue. This paper concludes with suggestions for improving the administration of Title VIII to better secure Alaska Native and Tribal rights for self-determination.

BACKDROP

Professor Robert T. Anderson has written a thorough analysis of the history and application of federal law to Alaska Native hunting and fishing rights, including ANILCA, and readers of this paper are encouraged to read Professor Anderson's law review article for an in depth understanding of these issues.³ Title VIII is administered largely through authority delegated by the Secretaries of Interior and Agriculture to the Federal Subsistence Board (FSB).⁴ The Office of Subsistence Management (OSM) performs the majority of administrative support for

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1. Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. §§ 3111-3126).

2. Memorandum of Understanding Between United States Department of the Interior U.S. Fish and Wildlife Service Alaska Region and Kuskokwim River Inter-Tribal Fish Commission (May 11, 2016), <http://napaimute.org/wp-content/uploads/2016/05/KRITFC-DOI-USFWS-MOU.pdf> [hereinafter MOU].

3. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17 (2007).

4. 50 C.F.R. § 100.10 (2016).

the FSB,⁵ including administration of the regional advisory councils (RACs). Section 805 of ANILCA mandates the establishment of RACs to provide a meaningful forum for the involvement of local residents knowledgeable about subsistence uses in the region.⁶

RACs form recommendations regarding the takings of subsistence resources on the public lands that are to be adopted by the FSB, unless a recommendation is not supported by substantial evidence, is detrimental to subsistence uses, or violates recognized principles of management.⁷ Two RACs share jurisdiction over the Kuskokwim River drainage: the Yukon-Kuskokwim RAC (Y-K RAC) and the Western Interior RAC (WIRAC).⁸ The Kuskokwim River is second largest in Alaska, only surpassed by the Yukon. Thirty-three Native Villages, all governed by federally recognized tribes, are located in the drainage. Salmon is an essential cultural and nutritional resource for these tribes. Chinook salmon are the most highly valued because they are the largest and highest in fat content, and because they are the first salmon to return in the spring after the ice recedes. Their early arrival coincides with the driest weather and thus the best time for preserving salmon.⁹ Native fish camps are marked with large covered drying racks filled with strips of Chinook salmon over a cold alder or cottonwood smoke. The finished product is highly valued and shared and traded with other Native Villages throughout the state.¹⁰

Chinook are far more than a vital source of nutrition. They play an essential role in the traditional, cultural, and spiritual way of life for the tribal communities in the drainage.¹¹ Unfortunately, Title VIII uses the

5. “The Office of Subsistence Management is a branch of the U.S. Fish and Wildlife Service created to support the Federal Subsistence Board and the Federal Subsistence Regional Advisory Councils. The staff of the Office of Subsistence Management includes fish and wildlife biologists, anthropologists, technical and administrative staff, and liaisons to the Alaska Department of Fish and Game and the Alaska Native community. The staff provides support for the regulatory process and the Fisheries Resource Monitoring Program.” FEDERAL SUBSISTENCE MANAGEMENT PROGRAM, <https://www.doi.gov/subsistence/osm> (last visited Oct. 7, 2016).

6. 16 U.S.C. § 3115 (2016); 50 C.F.R. § 100.11(a).

7. *Id.*

8. 50 C.F.R. § 100.22.

9. See Ken Marsh, The Chinook Tradition Feeding Alaskans and a Hungry World, CHINOOK NEWS, Summer 2014, http://www.adfg.alaska.gov/static/home/library/pdfs/chinooknews/cn_summer2014_n1.pdf (highlighting the importance of the Chinook salmon fishery to the region).

10. See generally Federal Subsistence Board, STAFF ANALYSIS FSA 14-03 (2014) [hereinafter FSA 14-03]; Federal Subsistence Board, STAFF ANALYSIS FSA 15/03/05/07/08 (2015) [hereinafter FSA 15/03/05/07/08].

11. See *Phillip v. State*, 347 P.3d 128, 135 (Alaska Ct. App. 2015).

term “subsistence” to protect Alaska Native hunting and fishing rights. This is not a term that is used by Alaska Natives. Numerous Native leaders have spoken at annual and special conventions of the Alaska Federation of Natives rejecting “subsistence” as a term that minimizes a complex and holistic way of interacting with their traditional lands, waters and the plants and animals that share this territory.¹² “Subsistence” lends itself to narrow interpretations associated with nutritional survival, a form of welfare necessary only for those who continue to reside in remote areas where access to grocery stores and jobs is limited.¹³ In order to protect Native hunting and fishing rights, Title VIII must protect the full scope of opportunity Congress described as the policy of the law: to provide for the continuation of “Native physical, economic, traditional and cultural existence.”¹⁴ This paper analyzes the success of the Federal Subsistence Management Program in achieving this goal.

The first weakness in the federal management regime is the failure to authorize tribal customs and traditions to govern subsistence hunting and fishing by tribal members. Regulation and management of subsistence takings and resources are nearly identical to those governing sport hunting in Alaska.¹⁵

Title VIII defines “subsistence uses” as “customary and traditional uses.”¹⁶ As Alaska’s legislature acknowledges, “customary and traditional uses . . . originated with Alaska Natives and are culturally, socially, spiritually and nutritionally important.”¹⁷ Customary and traditional uses are defined and applied by the FSB pursuant to eight

12. The United States Senate Energy and Natural Resources Committee recently held a Full Committee Hearing “[t]o examine wildlife management authority within the State of Alaska under the Alaska National Interest Lands Conservation Act and the Alaska Native Claims Settlement Act.” Senator Lisa Murkowski began the hearing by stating that “subsistence is about a way of life . . . [for] our Native people around the State . . . So to identify your, not only your cultures, but, really, your spirituality with your food source, I think, is something that is important when we talk about subsistence because it is more than just putting food on the table.” *Subsistence: Hearing to Examine Wildlife Management Authority Within the State of Alaska Under the Alaska National Interest Lands Act and the Alaska Native Claims Settlement Act Before the S. Comm. On Energy and Nat. Res.*, 113th Cong. 3 (2013) (statement of Lisa Murkowski, U.S. Senator from Alaska).

13. See *Native Vill. of Quinagak v. United States*, 35 F.3d 388, 389-90 (9th Cir. 1994) (describing subsistence as a necessary measure for food in rural areas).

14. 16 U.S.C. § 3111(1) (2016).

15. See 50 CFR 100.14(a) (2016) (granting authority to the FSB to adopt state regulations as federal subsistence regulations).

16. 16 U.S.C. § 3113.

17. An act relating to the taking of fish and game, § 1, 1992 Alaska 2d Spec. Sess. Laws ch. 1, 1-2.

criteria.¹⁸ The criteria are generally applied only to determine if a Native Village or rural community has customary and traditional uses of an area for a wildlife population or fish stock.¹⁹ A positive customary and traditional use determination established eligibility for the opportunity and priority for subsistence uses mandated by Title VIII.²⁰

The federal subsistence management program largely fails, however, to incorporate Alaska Native traditional knowledge, management practices, and customs into the implementation and regulation of the subsistence hunting.²¹ For example, Alaska tribes must establish their right to subsistence hunting for moose within their traditional hunting grounds based on their customary and traditional practices, including “a pattern of use . . . which provides substantial cultural, economic, social and nutritional elements to the community.”²² Yet, after a tribe has demonstrated the cultural basis for hunting moose, the actual opportunity provided for hunting has little if anything to do with culture, custom, tradition or tribal management. This is a major problem for achieving the Title VIII’s goal of providing an opportunity that will allow for the continuation of “Native physical, economic, traditional and cultural existence.”²³

Tribes know what is needed to sustain their way of life. Other federally protected hunting rights for Alaska Natives ensure a tribal role in management.²⁴ The FSB could better fulfill the intent of Title VIII by giving a broader interpretation and application to subsistence uses as “customary and traditional uses” and acknowledging that tribes should

18. 50 C.F.R. 100.16(b). The criteria include consideration of whether a pattern of use is: long-term and consistent; applicable to specific seasons; based on methods and means of harvest; consistent in harvest and use; traditionally performed; intended to hand down knowledge; distributed throughout the community; reliant on a diversity of fish and wildlife resources. *Id.*

19. *Id.* § 100.16(a); Alaska v. Fed. Subsistence Bd., 544 F.3d 1089, 1098 (9th Cir. 2008).

20. Alaska v. Fed. Subsistence Bd., 544 F.3d at 1092–93.

21. The FSB has adopted a tribal consultation policy, available through OSM; however, consultation requires no substantive impact on decision making and is not a substitute for a recognized tribal role in developing and implementing management decisions. *Government-to-Government Tribal Consultation Policy*, FED. SUBSISTENCE BD. (adopted May 9, 2012), <https://www.doi.gov/sites/doi.gov/files/migrated/subsistence/upload/FSB-Tribal-consultation-policy-5-1-12.pdf>.

22. 50 CFR 100.16(b)(8); Alaska v. Fed. Subsistence Bd., 544 F.3d at 1098.

23. 16 U.S.C. § 3113 (2016).

24. *See, e.g.*, 16 U.S.C. § 1388 (establishing process for cooperative agreements between Alaska Native organizations and the Secretary of the Interior to conserve and co-manage marine mammal subsistence use); DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 276–78 (3d ed. 2012) (discussing annual subsistence whaling quotas obtained by the Alaska Eskimo Whaling Commission).

be incorporated to the fullest extent in implementing subsistence hunting and fishing for their members.

A second and related weakness of Title VIII, one that can only be addressed through a change in federal law, is the limitation of protection for customary and traditional uses to “rural” residents of Alaska.²⁵ The foundation for the “rural” eligibility standard is similar to using the terms “subsistence” and “food security,” through which essential nutritional needs become the narrow focus.²⁶ The subsistence priority can be, and often is, justified on the basis of the cost of store-bought food in remote Alaskan communities.²⁷ If there is a store, and if it has food available for sale, the cost is above the means of many rural residents. This justification for a rural priority falls far short, however, in describing the importance of Alaska Native and Tribal hunting and fishing to their way of being. Under a rural priority, Alaska Natives are forced to choose between the opportunity to continue their connection to their tribes and traditional and cultural practices, or the opportunity to succeed in other ways.

A young Native person, for example, raised in a Native Village and who wants to work as a fish biologist, lawyer or doctor, will, after attending college, likely need to spend some time in an urban area to gain expertise and advance in his or her career, even if the end goal is to return to the Village and work for the tribe. The individual may return to his or her family and Village every summer to go to fish camp, in the fall to hunt and berry pick, and go home for a potlatch or other traditional gatherings. He or she remains a Native person deeply connected to his or her tribe, Village, and traditional ways of life, but is not a rural resident. As such, the individual is not entitled to a subsistence priority to hunt, fish and gather on federal public lands with extended family who remain in the Village or with his or her tribe. No cultural, social, economic or nutritional justification exists to force a Native person into this kind of situation. Rather, this forced assimilation is contrary to the policy of self-determination that has been recognized by Congress and Presidents for decades.²⁸ Forced assimilation is also implicitly recognized in the United Nations Declaration on the Rights of Indigenous Peoples as a violation of their fundamental human rights as Indigenous Peoples.²⁹

25. 16 U.S.C. § 3113.

26. Native Vill. of Quinhagak v. United States, 35 F.3d 388, 394 (9th Cir. 1994).

27. See 5 AAC 92.070(b); State, Dept. of Fish and Game v. Manning, 161 P.3d 1215, 1225 (Alaska 2007).

28. For a description of Federal termination and self-determination policies see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §§ 1.06–1.07 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

29. See *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS 4 (Mar. 2008), www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (“Recognizing and reaffirming that indigenous individuals are

This paper will not delve any further into the failure of the rural priority to protect Native rights except for this observation: Many Alaska Natives and tribal representatives from the Yukon drainage were opposed to implementing the federal rural subsistence priority for the Chinook salmon fisheries on the Yukon River because they did not want their family members who had moved to non-rural areas of Alaska to be excluded from coming back to fish camps to fully participate in this essential customary and traditional part of their existence.³⁰ The rural subsistence priority in ANILCA fails to provide the full and essential scope of rights necessary to protect the opportunity for Alaska Natives to continue their tribal hunting and fishing way of life. The only solution is a change in federal law that recognizes a priority for Alaska Native hunting and fishing rights on federal public lands and waters, and the right of Alaska tribes to manage these uses.

Under the Obama administration, there has been significant progress in advancing the implementation of the rural priority in a way that increases Native and tribal involvement and leads to more protection of customary and traditional uses and practices. Two rural subsistence users have been added to the FSB.³¹ Both rural representatives and the FSB Chair are appointed by the Secretary.³² Those who have been appointed are all Alaska Natives practicing customary and traditional uses and residing in Native Villages.³³ These appointments shift voting power more in the direction of subsistence users. The FSB has changed from a six-member Board dominated by federal agency representatives to an eight-member Board in which rural Native subsistence users have three votes.³⁴ The FSB has also affirmed a commitment to fully implement section 805(c) of ANILCA and defer to RAC recommendations related to the taking of subsistence resources.³⁵ RAC recommendations often seek to implement strong protection for customary and traditional uses, practices, and tribal involvement.³⁶

entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.”) (emphasis added). Article 8 provides: “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.” *Id.* at 5.

30. Federal Subsistence Board, STAFF ANALYSIS FSA 15-01/04/06/09/10 (2015); FSA 14-07/08 (2015).

31. 50 C.F.R. § 100.10(b) (2016).

32. *Id.*

33. *Alaska Natives represented on Federal Subsistence Board*, INDIANZ.COM (Jan. 30, 2012), <http://www.indianz.com/News/2012/004409.asp>.

34. 50 C.F.R. § 100.10(b)

35. *Id.* § 100.10(e).

36. *See, e.g.*, Federal Subsistence Board, STAFF ANALYSIS WSA 16-01 (2016)

THE KRITFC COOPERATIVE MANAGEMENT MOU

Under direction of the Secretary of the Interior, the United States Fish and Wildlife Service (USFWS) has entered into a MOU with the KRITFC that is a significant step towards Federal/Tribal cooperative management of subsistence fishing.³⁷ The MOU implicitly acknowledged that federally recognized tribes located in rural areas can and should play a meaningful role in implementing the provisions of Title VIII for tribal members who reside in these rural villages. The MOU, signed in May of 2016, establishes a process for regular weekly and, when necessary, emergency face-to-face consultations, with three designated tribal commissioners representing the thirty-three tribal governments within the Kuskokwim drainage and the Manager of the Yukon Delta Wildlife Refuge.³⁸ Consultations must occur prior to either party committing to a fishery management action.³⁹ If the parties cannot agree on a management action through the consultations, the tribes can request a meeting with the heads of the involved federal agencies, including the Regional Director of the FWS, the FSB Chair, the Assistant Regional Director of OSM, the Regional Director of the Bureau of Indian Affairs and the refuge manager to mediate the unresolved issues.⁴⁰ If that mechanism fails, the parties have committed to establish a timely process for the KRITFC to appeal a disputed Refuge in-season management action to the full FSB.⁴¹

The MOU also resulted in a joint Refuge and KRITFC commitment to revise the authority delegated from the FSB to the Refuge manager for in-season subsistence fishery management.⁴² The FSB is authorized to delegate authority to the Refuge manager for fishery management decisions that must be made outside of the FSB's public notice requirement and meeting schedule.⁴³ The current delegation of authority is exercised through a 2002 letter to the Refuge manager from the FSB.⁴⁴

(discussing the impact on Federally-qualified subsistence users resulting from the decline of the caribou population).

37. MOU, *supra* note 2. The Department of the Interior cited this MOU as an example of existing cooperative management in a recent Secretarial Order. Secretarial Order 3342, Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally recognized Indian tribes in the Management of Federal Lands and Resources at 6 (Oct. 21, 2016).

38. MOU, *supra* note 2, at 3.

39. *Id.* at 4.

40. *Id.*

41. *Id.*

42. Letter from USFWS and KRITFC to the FSB Chairman (Mar. 31, 2016) (on file with OSM).

43. 50 C.F.R. § 100.10(d)(6) (2016).

44. Letter from FSB to Yukon Delta National Wildlife Refuge Manager (May 3, 2002) (on file with OSM).

This letter does not include any mention of the KRITFC or consultation with the tribes.⁴⁵ Moreover, the practice of the Refuge and FSB in exercising delegated authority has been to completely defer to management by the Alaska Department of Fish and Game (ADF&G), unless the Refuge has been specifically authorized by the FSB to assert federal control over the federal waters in order to provide for rural subsistence needs or protect conservation of fish stocks.⁴⁶ The FSB practice of deferring to State management for implementation of a federally protected fishing right except in times of extreme conservation crisis significantly limits the reach of the federal right and restricts tribal involvement in management. A new letter of delegation could incorporate the KRITFC consultation requirements and ensure that the Refuge and KRITFC are actively engaged in management for Kuskokwim salmon every season rather than only during a conservation or subsistence crisis.

The MOU also includes a novel subcommittee established by the two RACs that share authority to make recommendations for federal subsistence management actions for the Kuskokwim drainage.⁴⁷ The two-RAC system for a single river drainage presents problems for federal fishery management. The Y-K RAC largely represents Kuskokwim Villages located in the lower and middle part of the Kuskokwim drainage while the WIRAC represents the upper river villages. Subsistence needs, uses, practices, and customs can differ between the villages represented by the two RACs. Under federal management, the two RACs rarely meet together or have any substantive coordination or exchange of information and views. Thus, the two RACs can and do make different recommendations for salmon management for the same fish stocks and river drainage. If there are conflicting recommendations, the FSB is free to either disregard the RAC recommendations or provide them deference.⁴⁸ This disjointed management disempowers local tribes engaged through the membership of tribal members on the RACs. It also fosters conflict among subsistence users and tribes rather than bringing them together to develop a unified approach to manage the entire Kuskokwim River drainage for conservation and subsistence.

45. *Id.*

46. *See, e.g.*, FSA 14-03, *supra* note 10; FSA 15-02/03/05/07/08, *supra* note 10.

47. Draft Subcommittee Charge—Kuskokwim River Fishery Subcommittee, Jan. 1, 2016 (on file with the OSM). The two RACs and FSB must approve the charter before the subcommittee can be implemented.

48. 16 U.S.C. § 3115(c) (2016). Deference is due a RAC recommendation unless it is not supported by substantial evidence, violates recognized principles of management, or is detrimental to providing for subsistence uses. *Id.* RAC recommendations that disagree based on one or more of these grounds are therefore not due deference. *Id.*

The new process established through the MOU involves a subcommittee composed of two members from each of the two RACs, three KRITFC Commissioners and two representatives selected from the Kuskokwim River Salmon Working Group, a stakeholder advisory group formed by ADF&G.⁴⁹ The purpose of the subcommittee is to bring the two RACs, KRITFC and State of Alaska together to develop unified management plans and recommendations for the FSB, and to ensure that these recommendations are afforded the maximum deference consistent with federal law.⁵⁰

The foundation for the MOU was laid out during the 2015 season when the FSB determined through a special action that the harvestable surplus of Chinook salmon was less than what was necessary to meet conservation needs and provide for the needs of qualified rural subsistence users.⁵¹ The FSB, therefore, took over salmon management of the drainage for the 2015 season in order to implement the rural priority,⁵² something the state has been unable to do since the Alaska Supreme Court's *McDowell* decision in 1989.⁵³ The FSB identified thirty-two Kuskokwim Native Villages as having customary and traditional subsistence use of Chinook salmon.⁵⁴ Pursuant to section 804 of ANILCA, the FSB was required to allocate the limited available harvest of Chinook salmon among the residents of these villages on the basis of three criteria: availability of alternative resources, customary and direct dependence, and proximity of the users to the resource.⁵⁵ These criteria provided little help for allocating a minimal harvest among the Native Villages on the Kuskokwim since they all share essentially the same cultural and nutritional needs for Chinook. The FSB and OSM therefore determined that the best way to implement this system was to authorize the tribes to implement a village-based permit system. A share of the total allowable drainage-wide harvest was allocated among the villages, and the tribes allocated each village's share among all the village residents, tribal members and non-members. Additionally, the Refuge manager and KRITFC voluntarily engaged in regular consultations regarding 2015 management actions.

In 2016, operating under the first year of the MOU, the KRITFC developed a tribal fishery management plan that adopted Chinook

49. *Id.*

50. *Id.*; Letter from USFWS and KRITFC, *supra* note 42.

51. MOU, *supra* note 2, at 1.

52. FSA 14-03, *supra* note 10; FSA 15-02/03/05/07/08, *supra* note 10.

53. *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (holding that a rural residency preference for fishing rights was unconstitutional).

54. FSA 14-03, *supra* note 10, at 11.

55. FSA 14-03, *supra* note 10; FSA 15-02/03/05/07/08, *supra* note 10.

salmon escapement goals proposed by the Refuge.⁵⁶ The tribal management plan included short subsistence openings, and limits on gillnet size and fishing locations in order to achieve the escapement goals. The plan also included harvest monitoring by the Commission, and a method to ensure that the allowable subsistence harvest could be equitably shared among the thirty-three Native Villages in the drainage. Although it was not formally adopted by the refuge, the tribal management plan formed the basis for many of the Commission/Refuge actions during the 2016 season.⁵⁷

CONCLUSIONS AND SUGGESTIONS

The MOU advances Alaska Native hunting and fishing rights, and tribal self-determination. The MOU takes a step towards implementing Title VIII to include traditional knowledge and customary tribal management. The KRITFC includes Commissioners who are elders, and their knowledge goes into development of the tribal management plans and tribal position for the in-season consultations with the Refuge. This practical application of traditional knowledge by decision-makers is significantly different from an agency talking about gathering traditional knowledge to incorporate into its management. Providing the opportunity for the continuation of the Alaska Native hunting and fishing way of life is more likely to succeed if the people who live that way are fully engaged in determining how their uses of fish and wildlife should be managed to sustain that way of life.

The establishment and implementation of the MOU is due to the policy priorities of President Obama's administration. Specifically, Deputy Secretary of the Interior Michael Connor's directive to establish a demonstration project that meaningfully incorporated the Kuskokwim tribes into subsistence management for subsistence fisheries initiated and drove the MOU.⁵⁸ The addition of two seats for rural subsistence users on the FSB, and directing implementation of deference to RAC recommendations, provided support within the federal subsistence management program to move the MOU and tribal cooperative management demonstration project forward. There is much to do, however, before the MOU is fully implemented, and there is much more

56. 2016 KRITFC Framework & Guidelines for Salmon Management, Discussion Draft (on file with the OSM)

57. Personal communication with KRITFC officers (2016). Provisions in the KRITFC plan for distributing the harvest among the villages was not implemented primarily because there was not enough time to accomplish it before the fishing season began.

58. MOU, *supra* note 2, at 1.

ahead before the full potential of tribal cooperative management is realized. Another President with a different policy could undermine the gains or bring progress to a halt.

One means for better securing a tribal role in managing Title VIII is to officially recognize it as Indian legislation through a Secretarial Order, Solicitor Opinion or perhaps as official FSB policy. Through Title VIII, Congress enacted a subsistence priority for rural residents rather than explicitly for Alaska Natives.⁵⁹ In doing so, however, Congress found that the opportunity for the continuation of subsistence uses was “essential to Native physical, economic, traditional and cultural existence.”⁶⁰ Accordingly, Congress explicitly invoked its “constitutional authority over Native affairs. . . to fulfill the policies and purposes” of ANCSA.⁶¹ During the enactment of ANCSA, Congress made clear its intent that the Secretary should take whatever actions were necessary to protect Native subsistence uses, including withdrawing public lands for that purpose.⁶² This Congressional policy went unfulfilled, and establishing the rural priority in Title VIII was Congress’ remedy.⁶³

The fact that Title VIII reserved subsistence rights for Alaska Natives through a rural priority that is not exclusive to Alaska Natives is not determinative as to whether it is Indian legislation. Title VIII can be viewed as providing the right to subsistence hunting and fishing on federal public lands similar to off reservation hunting and fishing rights reserved in many treaties settling lower forty-eight tribal aboriginal title claims.⁶⁴ In ANCSA, Congress expressed the intent to ensure Native subsistence opportunity on federal lands in addition to the subsistence opportunity available on lands conveyed to Alaska Natives through ANCSA.⁶⁵ The off-reservation hunting and fishing rights reserved by acts of the United States for many Northwest tribes are rights to share the harvest with non-Indians.⁶⁶ Such non-exclusive hunting and fishing rights are clearly considered Indian legislation and interpreted through

59. 16 U.S.C. § 3114 (2016).

60. *Id.* § 3111(1).

61. *Id.* § 3111(4).

62. Congress expressed its expectation that “both the Secretary and the State [would] take any action necessary to protect the subsistence needs of the Natives.” H. R. CONF. REP. NO. 92-746, at 37 (1971), reprinted in 1971 U.S.C.C.A.N. 2247, 2250; *see also* Anderson, *supra* note 3, at 36-37.

63. 16 U.S.C. § 3114.

64. COHEN’S HANDBOOK, *supra* note 28, § 18.04.

65. When Congress expressed its expectation at the passage of ANCSA that the Secretary do what was necessary to protect Native subsistence, it cited the Secretary’s authority to withdraw public lands to fulfill this responsibility. H. R. CONF. REP. NO. 92-746, at 37 (1971), reprinted in 1971 U.S.C.C.A.N. 2247, 2249.

66. COHEN’S HANDBOOK, *supra* note 28, § 18.04[2][d].

the Indian canons of construction.⁶⁷ The vast majority of rural communities in Alaska are Native Villages, and the vast majority of Native Villages are rural communities. Title VIII was enacted to provide the opportunity for these rural Native Villages, as well as non-Native communities, to sustain their subsistence hunting and fishing way of life on the public lands.⁶⁸

The Ninth Circuit has issued conflicting decisions regarding the interpretation of Title VIII as Indian legislation. In *People of Gambell v. Clark*,⁶⁹ the Court found the protection for subsistence uses in Title VIII "to be co-extensive with the extinguishment of aboriginal rights [in ANCSA] that made those measures necessary."⁷⁰ Employing this rationale, the Court found that Title VIII was Indian legislation and interpreted what it determined was an ambiguous provision in Title VIII pursuant to the Indian canons of construction.⁷¹ The U.S. Supreme Court recited the Ninth Circuit's reasoning that Title VIII was Indian legislation,⁷² but rejected reliance on the canons of constructions because it found the plain language controlling and therefore no ambiguity that required application of the canons.⁷³

In *Hoonah Indian Ass'n v. Morrison*,⁷⁴ the Ninth Circuit refused to apply the Indian canons of construction to a case interpreting provisions of section 810 of ANILCA which is a procedural protection for subsistence uses before permitting other uses on public lands.⁷⁵ The holding in *Hoonah* is dicta as evidenced by the Court's finding that the statutory construction at issue was not ambiguous and therefore no application of the canons of construction would apply.⁷⁶ The reasoning in *Hoonah* ignores the explicit language in Title VIII that relies on Congress' constitutional power under the Indian Commerce clause and invoking that power to fulfill the policies and purposes of ANCSA.⁷⁷ *Hoonah* also relies on reasoning that Title VIII cannot be classified solely as Indian legislation because the rights protected are not exclusively for Alaska

67. See *United States v. Winans*, 198 U.S. 371 (1905) (explaining that Indian rights gained via federal treaty while land is part of a territory are not extinguished because that land becomes a state).

68. 16 U.S.C. § 3111(1).

69. 746 F.2d 572 (9th Cir. 1984).

70. *Id.* at 580.

71. *Id.* at 581-82. The Indian canons of construction require that ambiguous provisions be interpreted as the Alaska Natives would have understood them and liberally in favor of Alaska Natives. COHEN'S HANDBOOK, *supra* note 28, § 2.02.

72. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 537 (1987).

73. *Id.* at 555.

74. 170 F.3d 1223, 1228-29 (9th Cir. 1999).

75. *Id.*; 16 U.S.C. § 3120.

76. *Hoonah Indian Ass'n*, 170 F.3d at 1228 n.3.

77. 16 U.S.C. § 3111(4).

Natives.⁷⁸ The Court did not cite any authority that directly supports this conclusion.

One way in which to reconcile these conflicting decisions is to limit the reach of the application of Title VIII as Indian legislation to those issues directly related to implementation of Title VIII's subsistence protections to rural Native Villages and the rural tribal members of those villages. In a section 810 case like *Hoonah*, the canons may not apply with the same strength because the impacts and remedy are applicable to all rural subsistence users of the public lands at issue. However, in a case involving the implementation of sections 803 and 804 to provide the opportunity necessary for customary and traditional uses of the tribal members of a rural Native Village, application of the canons to an ambiguous term like "customary and traditional" is consistent with the intent of Congress to fulfill the policies and purposes of ANCSA.

Interpreting Title VIII as Indian legislation would provide a secure foundation for establishing true tribal/federal cooperative management to implement the Act for rural Native Villages. If interpreted by the Secretary as Indian legislation, applicable provisions of Title VIII would be subject to the Indian canons of construction, including the canon that ambiguous provisions must be liberally interpreted in favor of Alaska Natives.⁷⁹ This could provide a more secure foundation for interpreting the term "customary and traditional use" in section 804⁸⁰ as encompassing the full scope of rights and opportunity necessary to provide for the continuation of the Alaska Native subsistence way of life. Tribal traditional knowledge and customs could determine important issues such as the quota and methods, means, and seasons that are consistent with tribal cultural and nutritional needs.

As Indian legislation, the application of Title VIII to rural Native Villages would be subject to the federal trust responsibility to Alaska Natives and tribes. Protection of tribal self-governance is an essential aspect of the federal trust responsibility.⁸¹ Courts provide broad deference to the Secretary for actions implementing the trust responsibility.⁸² The Secretary also receives significant deference for interpretations of Title VIII and how best to implement its provisions.⁸³ A

78. *Hoonah Indian Ass'n*, 170 F.3d at 1229.

79. COHEN'S HANDBOOK, *supra* note 28, §§ 2.02, 18.04.

80. 16 U.S.C. § 3114 (2016).

81. See DEP'T. OF INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM, 17-20 (2013). See also DEP'T. OF INTERIOR, SECRETARY'S ORDER 3335: REAFFIRMATION OF FEDERAL TRUST RESPONSIBILITY TO RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (2014).

82. See, e.g., *Parravano v. Masten*, 70 F.3d 539, 544 (9th Cir. 1995).

83. See *John v. United States*, 720 F.3d 1214, 1229, 1245 (9th Cir. 2013) (discussing the deference provided under *Chevron*).

Secretarial determination that Title VIII is Indian legislation is therefore likely to be upheld as is the establishment of a tribal cooperative management structure to implement the provisions of Title VIII as they apply to Native Villages.

If Title VIII were interpreted as Indian legislation, tribes would be eligible to enter into contracts, compacts, and annual funding agreements for implementing Title VIII in Native Villages under the Indian Self-Determination and Education Assistance Act.⁸⁴ This would provide a funding source for tribes to build management capacity and better engage in co-management. It would also provide greater self-determination in the management of customary and traditional hunting and fishing and the fish and wildlife populations the tribes depend on to meet their nutritional, cultural, and economic needs.

Under the existing administrative framework and interpretation of Title VIII, the Secretary can make significant progress to establish a meaningful role for tribes in managing subsistence opportunity and resources. However, clearly establishing Title VIII as Indian legislation provides a secure foundation that bridges different administrations and sets a clear path for moving towards true and full cooperative management for Alaska tribes. The comprehensive solution to protect the Alaska Native tribal hunting, fishing, and gathering way of life on federal public lands, is to amend Title VIII to explicitly provide a Native hunting and fishing right on federal public lands that is managed under tribal authority.

84. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4272-73, sec. 204, § 403 (1994) (codified at 25 U.S.C. §§ 5363).