ARIZONA JOURNAL
OF
ENVIRONMENTAL LAW & POLICY

VOLUME 12 SUMMER 2022 ISSUE 3

SOVEREIGNS OF NO TERRITORY:
ALASKA NATIVES, ANCSA, AND TRIBAL SELF-DETERMINATION

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This Note examines Alaska Native systems of private land ownership as imposed through the Alaska Native Claims Settlement Act (ANCSA) and evaluates existing and potential alternatives in the interest of self-determination, sovereignty, and land ownership. ANCSA was passed in 1971 to resolve conflicts over the land in Alaska, and it established a system of tribal corporations which is distinct from the federally recognized tribes in the contiguous United States. With few exceptions, Alaska Native tribes do not hold their lands in trust and tribal land in Alaska is not considered "Indian Country." This distinction from the tribes in the contiguous United States carries administrative, jurisdictional, and environmental consequences. Alaska Native tribal governments are without territorial reach and are severely limited in their authority. Alaska Native villages face additional challenges with regards to subsistence living and environmental considerations due to the extinguishment of native claims through ANCSA. This Note explores aspects of self-determination both retained by and denied to Alaska Native tribes and analyzes the conflicted legacy of ANCSA 50 years after its enactment.

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I. Indigenous Land Tenure and Title in the United States

The importance of land to the Indigenous tribes of the United States can scarcely be understated. As written by Frank Pommersheim, "[l]and is inherent to Indian people; they often cannot conceive of life without it."[1] Legal definitions of Indian landholding have been judicially created, defined, and re-defined throughout the history of the United States, as Congress struggled to impose Anglo systems of land ownership on the tribes. The history of Indian land in the United States is rife with assimilationist policies aimed at dismantling and erasing tribes themselves, with the ultimate goal of ensuring the acquisition of private land ownership for white settlers throughout the United States.

Presently, the United States is decades into an era of utilizing federal policy to promote tribal self-determination rather than destruction.[2] Protecting tribal authority and administration of tribal lands is essential to the goal of self-determination. Indian country, among other things, serves to grant tribal governments territorial reach, over which they are able to exercise quasi-sovereign authority.[3] At the heart of Indian country as it exists today is the concept of aboriginal title. Aboriginal title, as defined by one state court, recognizes Indigenous tribes' "right of occupancy to lands that is protected against claims by anyone else unless the tribe abandons the lands or the sovereign extinguishes the right. The right arises from a tribe's occupation of a definable, ancestral homeland before the onset of European colonization."[4]

Of the 574 federally recognized tribes in the United States, approximately 229 are located in Alaska.[5] As with the tribes in the contiguous United States, Alaska Natives were initially recognized as possessing aboriginal title over their land, if only the right to occupancy.[6] However, in part because of Alaska's late achievement of statehood, federal policy towards Alaska Native people and villages[7] is constantly changing and wholly distinct from the majority of Native American tribes in the United States.[8] This distinction manifests in two significant ways: first, Alaska Native villages exist under a unique system of regional

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[1] Frank V. Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 246–47, 250–51 (1989).

[2] STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES, 12–13 (4th ed. 2012).

[3] *Id*. at 82.

[4] State v. Elliott, 616 A.2d 210, 212 (Vt. 1992).

[5] "Tribal Nations and the United States: An Introduction." National Congress of American Indians. https://www.ncai.org/about-tribes.

[6] Alaska Native Claims Settlement Act, Pub. L. No. 90–203, 85 Stat. 588 (971) (codified at 43 U.S.C. §§ 1601–1629).

[7] Alaska Native communities self-identify with a variety of terms, including village, tribe, council, community, association, and corporation. Terms such as "village" and "tribe" will be used interchangeably throughout this Note to refer to these Alaska Native communities, excluding village corporations established pursuant to the Alaska Native Claims Settlement Act, which will be referred to as Alaska Native Corporations (ANCs).

[8] WILLIAM CANBY, JR., FEDERAL INDIAN LAW IN A NUTSHELL, 439 (5th ed. 2009).

corporations created by a single piece of Congressional legislation. Second, Alaska Native land is not, as per the Supreme Court, "Indian country."[9]

Fifty years ago, Congress passed the Alaska Native Claims Settlement Act (ANCSA), creating a unique system of land tenure as well as administration of Alaska Native matters.[10] ANCSA extinguished aboriginal title and instituted a number of state-chartered Native regional corporations to oversee Alaska Native matters, including federal funds and landholdings.[11] Following this Congressional legislation, in 1998, the Supreme Court ruled in *Alaska v. Native Village of Venetie* that Alaska Native land was not "Indian country."[12] This decision operated to restrict the power of Alaska Native tribal governments to tax, exercise jurisdiction, and practice other inherent powers of self-government that Indigenous tribes in the United States have long been recognized to possess.[13]

In the wake of ANCSA and *Alaska v. Venetie*, Alaska Native tribal governments have had to persist despite extremely limited governing authority.[14] Without territorial reach, Alaska Native tribal governments cannot exercise jurisdiction over any matters save for regulating domestic relations and punishing tribal members who violate tribal law.[15] Recently, the need for justice reform in Alaska Native villages has been recognized nationally.[16] Due to limited law enforcement resources and the inaccessibility of many Alaska Native villages, criminal cases fall through the cracks of the Alaska state justice system at high rates, and upstream crime prevention is virtually nonexistent.[17] As a whole, Alaska Native tribal governments have been materially restricted in the exercise of inherent sovereign powers and self-determination, despite even the state of Alaska recognizing that Alaska Natives possess such powers of self-government.[18]

As this Note will explore, the consideration of Alaska Native land as not constituting "Indian country" is both consequential to issues of jurisdiction and detrimental to Alaska Native self-determination. First, this Note will examine the definition and scope of Indian country, as well as its implications with regards to tribal governance. Next, the history and details of ANCSA will be discussed, and the impact of the Supreme Court decision *Alaska v. Native Village of Venetie* will be analyzed insofar as it abrogated Indian country in Alaska. This Note will then discuss the implications of present Alaska Native land ownership and administration with regards to tribal self-determination, and will explore whether

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[9] Alaska v. Native Vill. of Venetie Tribal Gov't, 552 U.S. 520, 523 (1998).

[10] CANBY, *supra* note 9, at 443.

[11] *Id*. at 445.

[12] *Venetie*, 552 U.S. at 523.

[13] *Id*.

[14] CANBY, *supra* note 8, at 459.

[15] PEVAR, *supra* note 2, at 264.

[16] Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 101 (2015).

[17] *Id*.

[18] PEVAR, *supra* note 2, at 264. As discussed *infra* note 87, the Alaska Supreme Court recognized in John v. Baker that Alaska Native tribes retain inherent sovereign authority to regulate internal tribal affairs. 982 P.2d 738 (Alaska 1999).

the reconsideration of Alaska Native land as Indian country would alleviate various challenges faced by Alaska Natives.

A. "Indian Country" in the Contiguous United States

Indian country has been defined by Congress as "[meaning] all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . all dependent Indian communities within the borders of the United States . . . and [] all Indian allotments, the Indian titles to which have not been extinguished."[19] Though Indian country is a unitary concept, as implied by the definition, multiple types of land tenure fall under its umbrella.[20] The legal conception of Indian country, and what it means for Indian tribes and nations, has been defined piecemeal by the federal government over the course of the United States' history.

The term "Indian country" has been used at least since the early acts of the United States Congress, which delineated boundary lines between the United States and the Indian tribes through the various Indian Trade and Nonintercourse Acts passed from 1790 to 1834.[21] Within these Acts, Congress restricted the transfer of Indian lands to citizens of the United States, prohibiting the settlement, surveying, and purchase of Indian land.[22] The Indian Trade and Nonintercourse Act of 1796 provides that "no purchase, grant, lease, or other conveyance of lands . . . from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution."[23] Though such transfers of Indian land in these early days of the United States were prohibited, and Indian claims to lands were recognized, the precise nature of the *legal title* to Indian country was left ambiguous in the Indian Trade and Nonintercourse Acts.

The issue of Indian land title was addressed in *Johnson v. M'Intosh*, the first of a trilogy of Supreme Court cases authored by Chief Justice John Marshall that, together, form the foundations of federal Indian law.[24] The ultimate question at issue in *M'Intosh* was whether an Indian tribe could convey valid title to a tract of Indian country.[25] The Court answered in the negative, holding that Indians did not

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[19] 18 U.S.C. § 1151.

[20] CANBY, *supra* note 8, at 140.

[21] "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 5th Cong. (1799). The early Indian Trade and Nonintercourse Acts also provided for a rudimentary system of jurisdiction for offenses committed by U.S. citizens against Indians, or vice versa.

[22] An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 4th Cong. (1796).

[23] *Id*.

[24] Johnson v. M'Intosh, 21 U.S. 543 (1823); CANBY, *supra* note 2, at 15–19.

[25] *M'Intosh,* 21 U.S. at 571–72. Interestingly, no tribe or tribal leader was a party to *Johnson v. M'Intosh*; the "dispute" in question was between white landowners who had been granted title to certain lands by the leaders of the Illinois and Piankeshaw nations. Additionally, the titles attached to the suit were not actually competing or even geographically touching. What is perhaps the most

possess the power to hold and convey title, but instead had only the "Indian right of occupancy."[26] Marshall's opinion in *M'Intosh* was consistent with the Trade and Nonintercourse Acts, but the doctrines affirmed within it have carried sweeping consequences for tribes.[27] When Marshall defined the tribes as "domestic dependent nations," so too did he affirm that tribes were, and are, devoid of power to convey Indian land without the United States' say in the matter.[28] Further, *M'Intosh* all but paved the way for the recognition of Congressional plenary power over Indian affairs and the disenfranchisement of tribes from participating in decisions affecting their very existence.[29]

The 19th century saw the establishment and implementation of communal reservation systems, in which tribes were granted reservations through treaties and vast tracts of land were "ceded" to the United States government and opened to settlement.[30] In this way, westward expansion of the United States was accomplished and Indian lands shrank considerably.[31] The communal reservation system was the dominant federal policy for several decades, during which innumerable tribes were subject to coerced and/or forced removal to reservations.[32] However, as the desire for expansion into Indian lands grew, so did the idea that Native Americans should be assimilated once and for all.[33] The General Allotment Act (GAA) of 1887, also known as the Dawes Act, introduced a new type of land tenure, one which would prove to be disastrous for the Indian tribes.[34] This form of land tenure was allotment, designed to disintegrate communal Indian reservations into privately-held parcels and, unequivocally, to extinguish tribes themselves.[35]

"'Allotment' was a policy designed to force Native Americans to leave their communal lands and to assimilate into the rest of America while opening their remaining territory to non-Native ownership and use."[36] The goal of this federal

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consequential decision in federal Indian law was made without any tribal representation and without a case or controversy.

[26] *Id*. This concept of the "Indian right of occupancy," one of the most impactful and longstanding terms used by Chief Justice John Marshall in *M'Intosh*, has been continually used by later courts to diminish Indian claims to ancestral homelands and curb tribal self-government. *See generally* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR (2010).

[27] *See generally* Armen H. Merijan, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609 (2010).

[28] PEVAR, *supra* note 2, at 24–25.

[29] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). Writing for the court in *Lone Wolf*, Justice White legitimized the unilateral abrogation of treaties by the United States government under the pretense that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning."

[30] PEVAR, *supra* note 2, at 8–9.

[31] Merijan, *supra* note 27, at 618.

[32] PEVAR, *supra* note 2, at 8–9.

[33] *See* Merijan, *supra* note 27, at 615. "[T]he communal system allowed tribes to maintain their cultural and linguistic unity in the face of an assimilationist, ethnocidal mob lurking at the gates."

[34] *Id*.

[35] Cnty. of Yakima v. Yakima Indian Nation, 502 U.S. 251, 254 (1992).

[36] Merijan, *supra* note 27, at 616.

policy was to convert tribes into agrarian societies. Under the GAA, Indians were individually allotted parcels of land, often 40, 80, or 160 acres in size, which were held in trust by the federal government for a period of 25 years; any remaining lands were sold off.[37] Indians were restricted from alienating their lands for that 25-year period; once that period was up, Indians could convey land title to anyone.[38] As a result of the impoverishment which befell many Indians, countless chose to sell their land parcels once the trust period ended:[39]

> Many Indians were told, literally overnight, to change their previous, centuries old lifestyle, and become farmers on their own parcel of land. The incidence of ownership over land was a completely foreign concept the the vast majority of reservation Indians. So too was the payment of taxes once a fee patent was issues. Consequently, tax foreclosures on parcels of individual land were rampant, shrinking Indian Country precipitously.[40]

As a direct result of allotment, Indian landholdings in the United States shrank by approximately 65 percent, or 90 million acres, between the years of 1887 and 1934.[41] The damage of the Dawes Act is still apparent today, exemplified through the fractionation of ownership interests in Indian allotments. Allotment has also led to a severe mismanagement of Indian trusts funds by the Bureau of Indian Affairs, and considerable sums of money owed to Indians will likely never be distributed due to poor record keeping and ill-conceived policy.[42]

Today, the vast majority of Indian land is held in trust with the federal government.[43] This means that Indian tribes may possess and exercise governing authority over their lands in fee simple title, but the federal government is the holder of that title.[44] Large portions of reservation lands are communally owned by the tribe, rather than privately owned by individuals, and held in trust with the United States.[45] Many Native Americans hold individual land allotments originally grated through the GAA, distinct from communal land ownership but still considered Indian country.[46] The Pueblos of New Mexico present a notable distinction from

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[37] *Id*.

[38] PEVAR, *supra* note 2, at 9.

[39] *Id*.

[40] James T. Hamilton, *Progressing Back: A Tribal Solution for a Federal Morass*, 27 AM. INDIAN L. REV. 375, 378-79 (2003).

[41] *Id*. at 377 n.7.

[42] *See* Cobell v. Salazar, 573 F.3d 808, 809 (D.C. Cir. 2009). *Cobell* represents a class-action lawsuit filed on behalf of 500,000 Native Americans in order to compel the federal government to fix its trust management practices with Individual Indian Monies (IIM) accounts. To illustrate the of the extent of the mismanagement, "in a trust case concerning a class of 500,000 beneficiaries, the government could not even produce the trust documents for the five named plaintiffs in the case, including Cleghorn and Cobell. The government had agreed to produce these documents by March of 1997. But with their records in complete disarray, they failed to produce documents for any of the named plaintiffs by the deadline, and long thereafter." Merijan, *supra* note 27, at 626.

[43] CANBY, *supra* note 8, at 424.

[44] *Id*.

[45] *Id*.

[46] *Id*.

the dominant system of Indian land tenure; whereas most of Indian country is held in trust with the United States government, the Pueblos of New Mexico hold their own land in fee simple.[47]

These various types of tenure over reservation land have given rise to innumerable legal complexities and ambiguity, generating different conclusions as to issues of taxation and jurisdiction depending on who owns the land, who is conducting business on the land, and what type of land title it is.[48] A significant portion of the case law defining and re-defining Indian country has arisen in order to provide these conclusions. For instance, land held by non-Indians in fee simple, so long as it is within the external reservation boundaries, is considered Indian country. However, allotments held by non-Indians within the external reservation boundaries are not because the Indian title to those allotments has been extinguished.[49]

The consideration of whether a tract of land is Indian country or not is hugely consequential to jurisdictional disputes.[50] Judge William Canby writes that "[t]he most complex problems in the field of Indian Law arise in jurisdictional disputes among the federal government, the tribes, and the states."[51] In order for a tribe to exercise jurisdiction over the vast majority of disputes that may come before it, it needs to first be ascertained whether the conduct in question occurred in Indian country. If the conduct did not occur in Indian country, then the tribe is virtually without authority to exercise criminal or civil jurisdiction. This is the case with Alaska Native tribes, which operate an entirely unique system of land tenure that began in 1971.

B. The Alaska Native Claims Settlement Act

The United States' 1867 purchase of Alaska from Russia left the Alaska Native tribes in a state of uncertainty with regards to the future of aboriginal title.[52] The

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[47] During the Spanish inquisition into New Mexico, the Pueblos, which were sedentary villages, were conveyed land title by New Spain. Mexico later reaffirmed these land grants, and, after New Mexico became part of the United States in the Treaty of Guadalupe Hidalgo, the United States recognized the validity of those titles. It is a clear example of the Anglo-centrism in federal Indian law that tribes could not attain title to their own lands, but title granted to tribes by a separate European power was recognized as valid. Today, Pueblo land is considered Indian country, but despite the Pueblos holding their own lands in fee simple, they are restricted from alienating it. *See* CANBY, *supra* note 8, at 434. *See infra* note 81 for a discussion on the Indian country status of Pueblo lands versus Alaska Native tribes as addressed in *Alaska v. Venetie*.

[48] CANBY, *supra* note 8, at 139.

[49] *Id*.

[50] *Id*. at 138.

[51] *Id*.

[52] Russian ownership over what is now Alaska did not result in any land titles conveyed to, or taken from, Alaska Native villages. Russian occupation more so embodied the term *terra nullius*– "land belonging to no one." As stated by one author, "*terra nullius* developed out of indifference and neglect by the colonial powers, which initially did not want to settle in these perceived hostile and barren regions, and thus did not find it necessary to deal with indigenous ownership rights and to conclude treaties or deeds of sale with the indigenous inhabitants." Katja Gocke, *Recognition*

Treaty of Cession which finalized the purchase of Alaska stated that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[53] Similarly, the Alaska Organic Act of 1884 provided that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[54] The intent of this language was clear; Alaska Native tribes had the right of occupancy, but no more until Congress was apt to decide otherwise.

Many decades passed before Congress was put under pressure to enact legislation addressing aboriginal title in Alaska; unlike in the contiguous United States, where an influx of Anglo-American settlers migrating Westward created pressures to establish reservations for the tribes and open the remaining lands for purchase by private parties and public use, no such pressure yet existed in Alaska.[55] "While Alaska Natives had claims to aboriginal title, and were obviously part of the landscape, it was not clear at all whether Alaska Natives could obtain fee title to individual parcels of land under applicable federal law."[56] In fact, just one statutory reservation in Alaska was established during this decades-long period.[57] The Alaska Native Allotment Act was passed in 1906, which allowed some Alaska Natives to apply for homestead allotments, similar to the allotments conveyed during that period in the lower 48 states.[58] After the Indian Reorganization Act (IRA) was enacted in 1934 and the Secretary of the Interior was granted the authority to establish new reservations, the Secretary created only six such reservations.[59]

Once Alaska achieved statehood in 1959, it became clear that land claims between settlers and Alaska Natives, as well as between Alaska Native villages, would soon need to be addressed.[60] One of the reasons for this was the discovery of oil at the far Northern edge of Alaska, which spurred the constructions of the

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and Enforcement of Indigenous People's Land Rights in Alaska, the Northern Regions of Canada, Greenland, and Siberia and the Russian Far East, 4 Y. B. POLAR L. 279 (2012).

[53] Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539, 542.

[54] An Act providing a civil government for Alaska, 23 Stat. 24, 26 (1883).

[55] CANBY, *supra* note 8, at 439.

[56] Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 42 TULSA L. REV. 17, 23 (2007).

[57] CANBY, supra note 8, at 439. The Annette Islands, located south of Juneau, Alaska, were set aside as a reservation for the Metlakatla Indians, who had migrated from British Columbia, Canada.

[58] *Id*.

[59] *Id*. The Supreme Court later held in Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) that these IRA reservations were temporary in nature and could be revoked without compensation by Congress.

[60] *Id*.

800-mile-long trans-Alaska pipeline.[61] Congress enacted the Alaska Native Claims Settlement Act in 1971 as the solution to competing land claims in Alaska, and to allow for the Alaska pipeline's construction. "Initially, ANCSA was perceived as an innovative, effective mechanism for promoting Native independence."[62] The settlement was reached through collaboration with the Alaska Federation of Natives (AFN), a group that formed in 1966 to address aboriginal rights in Alaska.[63] However, in the 50 years that have passed since Congress enacted ANCSA, opinions of it are divided.[64]

Viewing the legislation on its face, it is easy to see why ANCSA draws controversy; in lieu of promoting the inherent sovereignty and self-determination of Alaska Native villages and tribal governments, ANCSA imposes a corporate system of membership and landholding, complete with shares and for-profit business structures.[65] Such a system could scarcely be farther removed from the manner in which Alaska Native villages have existed for millennia, and it is entirely unique to Alaska Natives. While federally recognized tribes in the contiguous United States tend to resemble resemble states in government structure and authority—maintaining jurisdiction, operating educational institutions, overseeing tribal enterprises, and performing innumerable other ordinary government functions—Alaska Native tribal operations are essentially split into two, divided between organized villages and their respective corporations.

The text of ANCSA begins by essentially resetting aboriginal title in Alaska, including land claims and subsistence rights. The Act provides that "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished."[66] With this sweeping declaration, all Alaska Native rights to occupancy were extinguished, as well as the six reservations established pursuant to the IRA.[67] Homestead allotments that had been conveyed to Alaska Natives,

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[61] Jason Brune. *Alaska needs federal action to clean up contaminated ANCSA lands*, ANCHORAGE DAILY NEWS (Dec. 25, 2021), https://www.adn.com/opinions/2021/12/25/alaska-needs-federal-action-to-clean-up-contaminated-ancsa-lands/.

[62] Shannon D. Work, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 OR. L. REV. 195, 196 (1987).

[63] *History*, Alaska Federation of Natives, https://www.nativefederation.org/history/. The Alaska Federation of Natives is still active today and retains a membership of 168 tribes, 166 ANCs, 8 regional corporations, and 12 regional nonprofits.

[64] *See* Jenna Kunze, *This month in history: Alaska Native Claim Settlement Act*, NATIVE NEWS ONLINE (Dec. 21, 2021), https://nativenewsonline.net/currents/this-month-in-history-alaska-native-claim-settlement-act. ANCSA created a cutoff for shareholder eligibility for Alaska Native born after Dec. 18, 1971, meaning that many younger generations of Alaska Natives are not able to be shareholders in the regional corporations. A 1992 amendment to ANCSA allowed regional corporations to remove the cutoff date, as well as eliminated a blood quantum requirement. To date, six of the 12 regional corporations have eliminated the 1971 cutoff.

[65] 43 U.S.C. §§ 1606, 1607.

[66] 43 U.S.C. § 1603.

[67] Statement of Julie Kitka, President, Alaska Federation of Natives, Before the Secretarial Commission on Indian Trust Administration and Reform (Aug. 19, 2013), https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Trust-Statement-of-

however, remained, as they did not fall under the umbrella of aboriginal title.[68] The Act's specific provisions regarding Alaska Native landholdings are described by Stephen Pevar:

> ANCSA gave Alaska Natives $962.5 million in compensation[69] for extinguishing all of their aboriginal land claims, and in addition, it gave them ownership rights to 40 million acres of land. Of these 40 million acres, the surface estate in 22 million acres was divided among the two hundred Native villages according to the size of their membership, with each village entitled to incorporate itself under state law and then to select its homelands. The remaining 18 million acres and the subsurface estate of the entire 40 million acres were conveyed to thirteen Native regional corporations . . . . the corporations were given fee title to these estates, thus allowing the corporate owners to sell their interests at any time to anyone.[70]

The Native regional corporations described include 12 state-chartered corporations, each representing a geographic region of Alaska and the Alaska Native villages therein, and one additional corporation to represent the interests of nonresident Alaska Natives.[71] ANCSA empowered these state-chartered Native corporations—of which there are 13, to represent 229 tribes—to manage Alaska Native landholdings and ANCSA funds. However, in doing so, ANCSA effectively divested Alaska Native tribal governments of sovereign powers. "Today, tribal governments in Alaska are without the resources necessary to address issues that threaten the survival of their communities."[72] The following case, *Alaska v. Native Village of Venetie Tribal Government* (1998), exemplifies this shift and its consequences.

Julie-Kitka-81913.pdf. ANCSA created an exception for one reservation–the Annette Island Reserve–and allowed the tribes on former reservations to retain that reservation in exchange for forgoing all other ANCSA benefits. Four of the six tribes took advantage of the provision at the time, and a 1976 congressional amendment to ANCSA later permitted a fifth to choose that option as well.

[68] *Id*.

[69] It is noteworthy that compensation was granted to Alaska Natives for the land turned over to the federal government, as the Supreme Court had earlier ruled that Alaska Natives and Native Americans were not entitled to any compensation of the sort. *See* Tee-Hit-Ton v. United States, 348 U.S. 272 (1955).

[70] PEVAR, *supra* note 2, at 262.

[71] *Id*. The regional corporations were divided upon cultural lines, representing large indigenous groups. The twelve regions are the Ahtna, Aleut, Arctic Slope, Bering Straits, Bristol Bay, Calista, Chugach, Cook Inlet, Doyon, Koniag, NANA, and Sealaska regions. The Alaska Native cultural groups represented include the Ahtna Athabascan, Aleut (Unangax), Inupiat, Inupiaq, Central Y'upik, Siberian Y'upik, Denaina, Alutiiq, Cupik, Athabaskan, Alutiiq (Sugpiaq), Eyak (Athabascan), Tlingit, and Southeast Indian. *The Twelve Regions*, ANCSA Regional Association, https://ancsaregional.com/the-twelve-regions.

[72] William H. Holley, *Starting from Scratch: Reasserting Indian Country in Alaska by Placing Alaska Native Land into Trust*, 11 FLA. A & M U. L. REV. 333, 334 (2016).

C. *Alaska v. Native Village of Venetie Tribal Government*

The Alaska Native village of Venetie had been granted one of the six IRA reservations established by the Secretary of the Interior, a 1.8 million-acre tract of land called the Chandalar Indian Reservation.[73] When ANCSA was enacted, this reservation was extinguished and the land was selected as a part of the 40 million acres to be granted to the state-chartered Native regional corporation overseeing Venetie.[74] The Alaska Native corporation then transferred the land title back to the Venetie tribal government.[75] The court case arose when the Venetie tribal government attempted to tax business conducted by non-Indians on their land.[76] The state of Alaska and a contractor had constructed a private school in Venetie, and the tribal government sought 161,000 dollars in taxes for conducting business on tribal land.[77] The state of Alaska and the contractor sought to enjoin.[78]

In a unanimous opinion, the Supreme Court sided with Alaska and held that ANCSA had served to extinguish not only aboriginal title in Alaska, but Indian country as a whole.[79] The Court considered the definition of Indian country, specifically its provision on "dependent Indian communities."[80] Rather than finding the term to generally encompass tribes with which the federal government has a trust responsibility, the Court created a two-factor analysis. In order to fall under the definition of a dependent Indian community, "first, [the Indian lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[81] The Court found that the village of Venetie and all other Alaska Native tribes did not meet this new definition due to the provisions of ANCSA extinguishing all lands "set aside" for Alaska Natives and the Alaska Native lands no longer operating under federal superintendence.[82] Thus, the Court held that Alaska Native lands could not be considered Indian country.[83]

The Court's decision in *Venetie* carried significant material consequences for Alaska Native tribal governments. By denying the characterization of Alaska Native land as Indian country, the Court effectively prohibited Alaska Native tribal governments from exercising any power of self-government tied to territorial reach,

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[73] Anderson, *supra* note 57, at 38.
[74] Alaska v. Native Vill. of Venetie Tribal Gov't, 552 U.S. 520, 524 (1998).
[75] *Id*.
[76] *Id*. at 525.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 532.
[80] *Id*. at 527.
[81] *Id*.
[82] *Id*. Notably, the Court compared and contrasted the Alaska Native villages with the Pueblos of New Mexico, which, despite holding the title to their own lands, have been recognized as constituting Indian country. The Court's largely insubstantial rationale for adopting a different conclusion with regards to the Alaska Native villages was that Congress had set aside additional public lands for the Pueblos.
[83] *Id*.

including criminal jurisdiction, civil jurisdiction, and the power to tax.[84] In limiting the Alaska Native tribal governments in this way, the Court has severely restricted the powers of self-government and self-determination of Alaska Native tribes in a manner not done to any other federally recognized Native American group in the United States.[85]

II. Alaska Native Land and Governance Today

Following the passage of ANCSA in 1971 and the Court's decision in *Venetie* in 1998, Alaska Native villages have adapted to function in a corporate structure while also grappling with issues of inherent sovereign authority; namely, how that authority was affected by the aforementioned actions of the federal government. While *Venetie* dealt a serious blow to Alaska Native powers of self-government, the Alaska Supreme Court recognized in *John v. Baker* that Alaska tribes continued to possess the inherent powers of sovereign entities.[86] This includes jurisdiction over members and others who consent to jurisdiction, even barring a lack of territorial jurisdiction.[87] Impressively, *Baker* represents "the first time in 200 years of American jurisprudence that any court has upheld tribal jurisdiction based solely on membership."[88]

While the recognition in *John v. Baker* is positive for Alaska Native sovereignty and tribal territorial jurisdiction, it does not come close to addressing the challenges faced by Alaska Native tribes in exercising inherent sovereign authority. For instance, the 2013 renewal of the Violence Against Women Act (VAWA 2013) allowed for some tribes to seek the authority to exercise criminal jurisdiction over non-Indians for domestic violence offenses.[89] Though the Act merely creates narrow exceptions to existing federal law on tribal jurisdiction, it has been heralded as a landmark recognition of tribal sovereign authority.[90] However, because tribal jurisdiction is predicated on the existence of Indian country, VAWA 2013 did not

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[84] Anderson, *supra* note 57, at 39.

[85] CANBY, *supra* note 8, at 458.

[86] John v. Baker, 982 P.2d 738 (Alaska 1999). This decision represents a notable departure from previous Alaska state policy, which opposed the recognition of Alaska Native villages as tribes with self-governance powers. *See* Jeffrey Aslan, *Building Alaska Native Village Resilience in a Post-Peak World*, 37 VT. L. Rev. 239, 248 (2012) ("Until the 1990s, the State of Alaska vehemently opposed recognizing tribal status and sovereignty. . . . [i]n the late 1980s the Alaska Supreme Court ruled that there were no "tribes" in Alaska, with only a few possible exceptions.") (citing Native Vill. of Stevens v. Alaska Mgmt. & Planning, 757 P.2d 32, 35-36 (Alaska 1988).

[87] Anderson, *supra* note 57, at 39.

[88] David Case, *Commentary on Sovereignty: The Other Alaska Native Claim*, 25 J. LAND, RESOURCES & ENVTL. L. 149, 153 (2005).

[89] Violence Against Women Reauthorization Act of 2013, S. Res. 47 113th Cong. (2013) (enacted) [hereinafter VAWA 2013]. A tribe seeking to exercise Special Domestic Violence Jurisdiction, as it is known under the Act, must meet numerous requirements, including, among other things, heightened due process rights for defendants and a representative jury pool.

[90] *Id.* Of course, Congress unequivocally has the power to recognize a far broader tribal jurisdiction, but thus far has chosen not to exercise that power. *See, e.g.*, U.S. v. Lara, 541 U.S. 193 (2004).

not afford this option to the 229 Alaska Native tribes.[91] The renewed 2022 VAWA finally expanded the eligibility for special jurisdiction to Alaska Natives, defining their area of jurisdiction as "Villages" rather than Indian Country.[92]

This patchwork of laws means that Alaska Native sovereign authority to exercise jurisdiction is not only restricted, it is also unclear as to precisely what extent it is restricted. It has been suggested that Alaska Native tribes do retain territorial jurisdiction over allotments and Native townsite lots.[93] Some have argued that tribal criminal jurisdiction can be exercised over tribal members even in the absence of Indian country.[94] This claim has found support in the recent VAWA 2022 update, though the exercise of special VAWA jurisdiction by Alaska Native tribes has not yet been tested. Inevitably, courts will be called upon to address these unanswered questions and claims.

Alongside questions of jurisdiction, the pursuit of justice for Alaska Natives is subject to tangible challenges. As noted earlier, Alaska Natives face disproportionately high rates of domestic violence[95] as well as alcohol and drug crimes.[96] Further, access to the criminal justice system itself can present a significant obstacle, as described by one author:

> State courts are often difficult for rural Alaskans to access. There are only thirteen cities with an Alaska Superior Court, with two other cities having a District Court but not a Superior Court. A substantial number of other locations have magistrate judges, but their jurisdiction is limited. Moreover, with most rural villages lacking road access to major population centers, accessing even a magistrate, let alone a larger court, can require substantial effort and resources.[97]

Access to justice is also hampered in law enforcement aspects, with Alaska State Troopers responsible for enormous areas of land and hundreds of rural communities, a significant number of which are inaccessible by road. The challenges posed by Alaska's relative lack of population and infrastructure are not insignificant: "[r]esponding to calls for service may take hours or even days, especially when frequent bad weather hampers air travel to the village from which

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[91] *Violence Against Women Act No Victory For Alaska's Tribes*, Native American Rights Fund, (Feb. 28, 2013) https://www.narf.org/cases/vawa/. Only one Alaska tribe is presently permitted to seek VAWA special jurisdiction—the Metlakatla Indian Community, occupying the only federally recognized reservation in the state.

[92] Violence Against Women Act Reauthorization Act of 2022, S. 3623 117th Cong. (2022) (enacted) at 182.

[93] Anderson, *supra* note 57, at 39–40.

[94] *See* Fortson, *supra* note 15, at 132. ("The notion that Alaska tribes do not have subject matter jurisdiction over criminal cases is based on the false premise that the tribes must affirmatively prove this jurisdiction."). Fortson argues that federal Indian law concerning criminal jurisdiction is based on membership, not land, as the deciding factor.

[95] A Roadmap for Making Native America Safer, Chapter Two: Reforming Justice for Alaska Natives: The Time is Now, INDIAN LAW & ORDER COMMISSION, at xiv (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/.

[96] Fortson, *supra* note 15. at 93, 99.

[97] *Id*. at 96–97.

the call initiated."[98] While Alaska state courts may not necessarily be compromised or overloaded with cases involving Alaska Natives, empowering Alaska Native governments and tribal courts to handle criminal matters would facilitate essential access to justice for rural populations.[99]

In order to evaluate how ANCSA has impacted the right to self-determination of Alaska Native tribes, it is important to first thoroughly analyze what makes them unique from tribal governments in the contiguous United States, beginning with the corporate structures created through ANCSA and how these structures affect the administration of Alaska Native affairs. Next, the subsistence rights of Alaska Natives will be discussed with regards to the absence of Indian country in Alaska and the present state and federal subsistence laws.

A. Alaska Native Corporations

The creation of Alaska Native Corporations (ANCs) under ANCSA has presented a novel alternative to the reservation system utilized in the contiguous United States. ANCSA divided Alaska into 12 geographic regions based upon "having a common heritage and sharing common interests" as well as a 13th corporation to represent nonresident Alaska Natives.[100] These "regional corporations," as they are known, were required under ANCSA to incorporate under Alaska law as for-profit businesses.[101] Eligible Alaska Native villages were required to do the same.[102] Land titles could be held by either regional or village corporations, but only regional corporations could claim the subsurface estate.[103] As described by Julie Kitka, President of the Alaskan Federation of Natives, "[u]nlike prior settlements with indigenous peoples, the lands and other assets conveyed to Alaska Natives under ANCSA were not held in trust or subject to any other form of permanent protection."[104] ANCSA did place alienability restrictions on the land titles for a 20-year implementation period, after which ANCs would have the power to convey land title.[105] ANCSA also implemented a complex

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[98] *Id*. at 97.

[99] In the absence of legal tribal jurisdiction, some Alaska Native villages have incorporated court systems that function alongside, but do not replace, the Alaska justice system. For instance, the Organized Village of Kake operates a Circle Peacemaking (CP) system, in which, following a minor incident or misdemeanor, the CP is contacted and the dispute is resolved through stages of pre-counseling, support groups, CP, and consensus agreement. In the event that the offender does not agree to the CP or abide by the consensus, they may be sent to state court. This tribal function can be seen as both an adaptation to a lack of exclusive jurisdiction and a method to promote traditional peacemaking, rather than adversarial, systems of justice for infractions within the community. *See* Tribal Court, Organized Village of Kake, http://www.kake-nsn.gov/tribal-court.html.

[100] 43 U.S.C. §§ 1606-1607.

[101] Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L. J. 1331, 1332 (1992).

[102] *Id*.

[103] *Id*.

[104] *See* Statement of Julie Kitka, *supra* note 68.

[105] Hirschfield, *supra* note 102, at 1332.

system of fund management through the regional corporations, including the $962.5 million monetary settlement for the cession of all lands not claimed by the villages.[106]

A mere two decades after ANCSA's passage, the shortcomings of this corporate system began to show. As noted by one author in 1992:

> [B]y most accounts, the vast majority of ANCSA corporations have never been economically secure, much less profitable. Several factors combined to diminish significantly the funds available for maintaining the corporations and for paying direct cash benefits to individual Natives. These include the high costs of corporate compliance with the Act's requirements, a period of high inflation in Alaska in the early 1970's, extensive litigation over ambiguous provisions in the Act, and long delays in the final conveyancing of land to the regions and villages. Many smaller village corporations, which received less cash and land because of their size, are insolvent.[107]

Issues have abounded within the complex system of Native corporations meant to serve the Alaska Native population. Several amendments to ANSCA were passed in 1988, representing years of efforts on the part of Alaska Native groups to ensure that Alaska Native control of ANSCA corporations was not lost once the 20-year implementation period expired in 1991.[108] The major concerns at issue were the protection of corporate assets and continuing Native control of corporate membership.[109] The amendments allowed for the extension of alienability requirements, for fear that the fledgling ANCs would not be able to withstand market forces and Alaska Native landholdings would be placed in jeopardy.[110]

The challenges presented by the system of ANCs include cultural concerns in addition to asset retention and Native Alaskan control over membership.[111] ANCSA's decidedly corporate structure is inarguably at odds with Alaska Native traditional lifestyles.[112] ANCSA's system for the transfer of shares is limited to inheritance, leading to divided ownership interests and resembling the fractionated interests in land which has resulted from the GAA.[113] ANCSA has also been compared to termination era policies which sought to extinguish the tribe as an entity. As one author warns, "[l]ike termination, ANCSA is directed as a specific

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[106] PEVAR, *supra* note 2, at 262.

[107] Hirschfield, *supra* note 100, at 1339 (internal footnotes omitted).

[108] *Id*. at 1340.

[109] *Id*.

[110] *Id*.

[111] *See* Work, *supra* note 63, at 211 ("ANCSA's 'shotgun initiation [of the Alaska Native] into the American mainstream' makes the preservation of cultural pluralism difficult, if not impossible, by blurring the once distinct line between corporate American and traditional Native Americans.") (quoting Monroe Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89 (1979)).

[112] *Id*. at 212.

[113] *Id*. at 213.

group of Native Americans, mandates a specific method of assimilation and possesses the potential for cultural destruction."[114]

The investment of landholdings in ANCs pursuant to ANCSA, rather than Alaska Native tribal governments, has generated mixed opinions. ANCs, unlike tribal governments, do not exercise jurisdiction over Alaska Native lands; they do, however, manage enterprises on Native lands.[115] In the contiguous United States, federally recognized tribal governments with reservations assume both of those responsibilities.[116] This system has divided the self-government powers of Alaska Native tribes to an extent not done to any other federally recognized tribe in the U.S.[117] Even barring the divestiture of jurisdiction in Alaska Native tribal governments, this decentralized system can be detrimental to Alaska Native interests when the interests of ANCs—for-profit businesses—collide with Alaska Native voices.[118] As described by Rosemary Ahtuangaruak, a former Nuisqut mayor and tribal council member, "Tribal voices and Native corporations do not always share the same goal . . . . [w]hen tribal leaders come to the table, they are speaking for the life, health, and safety of the tribe into the future. When we are left behind, the priorities of Alaska Native tribes can be left out of the decision-making process in favor of those whose primary focus is corporate profitability."[119]

B. Alaska Natives and Subsistence Rights

An examination of ANCSA and its impact on Alaska Natives over the past half-century would be incomplete without a discussion of subsistence rights. As noted earlier, ANCSA terminated all aboriginal rights, including aboriginal claims to hunting and fishing.[120] Subsistence hunting and fishing has been an essential lifeway for remote Alaska Native villages for millennia.[121] Many rural villages—often comprised of just a few dozen families—are still inaccessible by roads, and so subsistence remains an integral lifeway for Alaska Natives.[122] Thus, it must be considered whether the system implemented under ANCSA has sufficiently protected subsistence rights for Alaska Native villages.

Subsistence hunting and fishing is more essential to Alaskan identity than any other state's: "Alaska relies more heavily upon wild food than any other state in the nation, with the average rural resident harvesting 375 pounds of wild food per year,

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[114] *Id*.

[115] *See* Anderson, *supra* note 57, at 34–35.

[116] *See* CANBY, *supra* note 9, at 451–52.

[117] Aslan, *supra* note 87, at 249 ("Powers over lands, natural resources, and governmental programs are "fragmented and widely dispersed" among IRA governments, traditional councils, state-recognized cities and boroughs, and for-profit and non-profit regional corporations.").

[118] Rosemary Ahtuangaruak, *Broken Promises: the Future of Arctic Development and Elevating the Voices of Those Most Affected by It – Alaska Natives*, 3:4 POLITICS, GROUPS, AND IDENTITIES, 673, 673 (2015).

[119] *Id*. at 673-74.

[120] 43 U.S.C. § 1601.

[121] Ahtuangaruak, *supra* note 117, at 676.

[122] Aslan, *supra* note 87, at 242.

sixty percent of which is fish."[123] Subsistence hunting is also a core part of Alaska Native culture and identity.[124] Hunting and fishing traditions have been passed down through Alaska Native communities for centuries, such as the Inupiaq whaling tradition.[125] Unfortunately, "[w]here Native communities once independently managed wildlife populations using traditional principles of sustainability, management is now divided through a patchwork of state, federal, and international law."[126]

In the contiguous United States, state laws generally have limited force within Indian country, and subsistence as an aboriginal claim was historically protected through treaties.[127] That protection has been interpreted broadly by the Supreme Court; for instance, in 1938 the Court held that treaty-protected trust lands conferred beneficial rights to mineral and timber resources to tribes.[128] In Alaska, without Indian country, that is not the case; most subsistence rights are regulated through state and federal laws, and regional corporations own the rights to subsurface resources.[129] Native Alaska Tribes, as discussed, lack jurisdiction over lands, fish, and game, and so tribes cannot make or enforce subsistence laws for their people.[130]

The federal Alaska National Interest Lands Conservation Act of 1981 (ANILCA) prioritized subsistence use for rural communities and withdrew swaths of federal land from development.[131] However, ANILCA only applies to federal lands in Alaska, not state lands, and has been criticized for not prioritizing Alaska

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[123] *Id*. at 242–43.

[124] *Id*. at 242.

[125] Michael Engelhard, *Inupiaq Whaling: Life, Identity, and Survival*, ALASKA MAGAZINE, Sept. 5, 2021, https://alaskamagazine.com/authentic-alaska/culture/inupiaq-whaling-life-identity-and-survival/.

[126] Aslan, *supra* note 87, at 243. *See also* Statement of Julie Kitka, *supra* note 68, at 7 ("[t]he legal framework in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods. Native leaders sought protection of their hunting and fishing rights in the settlement of their aboriginal land claims, but instead the Alaska Native Claims Settlement Act (ANCSA) extinguished those rights. Instead of explicit protection of Native hunting and fishing rights, Congress expected the State of Alaska and the Secretary of the Interior 'to take any action necessary to protect the subsistence needs of Alaska Natives.'").

[127] *See, e.g*., Organized Village of Kake v. Egan, 369 U.S. 60 (1962). Though this Supreme Court case actually involved an Alaska Native Village pre-ANCSA, the holding of *Kake* has persisted and applies to tribes in the contiguous U.S. as well.

[128] United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938).

[129] 43 U.S.C. §§ 1601,1611(a)(1).

[130] E. Barrett Ristroph, *Still Melting: How Climate Change and Subsistence Laws Constrain Alaska Native Village Adaptation*, 30 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 245, 252 (2019).

[131] *Id*. at 255–56. The State of Alaska adopted laws consistent with ANILCA to provide for subsistence prioritization on state lands, and later for rural prioritization, but that law was determined by the Alaska Supreme Court to be in violation of the State Constitution. Presently, as a result, ANILCA only applies to federal lands. *See* McDowell v. State, 785 P.2d 1, 9 (Alaska 1989).

Native subsistence rights.[132] Presently, "[s]tate law governs subsistence on state and private lands, including those owned by Native corporations."[133]

Further, development, largely in the form of fossil fuel development, still affects subsistence hunting and fishing despite ANILCA's protections.[134] Fossil fuel extraction operations disrupt migratory patterns of caribou, exploratory oil drilling deters whales, and fuel development causes fish numbers to decrease.[135] Subsistence lifeways depend on the balance of nature as well as sustainable practices, and industrial development in the form of drilling, oil extraction, and pipeline construction is disruptive to that balance. Alaska Natives are the population most affected by these disruptions, but Alaska Native tribal governments are deprived of the authority to regulate the fossil fuel developments that border their lands. As stated by one author, "[m]ore often than not, Alaska Native tribes do not own the lands they depend on for subsistence and cultural survival. In these lands, they have little control over development and activities."[136]

One proposed solution aimed at mitigating the damage fossil fuel development wreaks on subsistence lifeways is to designate Alaska Native lands as Traditional Cultural Districts (TCDs).[137] If Alaska Native tribes initiate the process to have their lands designated as TCDs under the National Register of Historic Properties, federal decisions affecting cultural or historical aspects of the lands face additional restrictions.[138] While not a guaranteed protection of Alaska Native lands, a TCD designation requires federal agencies to go through a multi-step process, including communicating with tribes in order to have development approved on TCD lands.[139] For instance, "[i]f a Traditional Cultural District is designated in part because of its quiet, undeveloped setting, the development of nearby, offsite areas could be interpreted as adversely affecting the designation."[140] This proposed solution, however, places the burden on Alaska Natives to navigate the federal bureaucracy in order to protect the lands they depend on, while not necessarily empowering Alaska Native tribes to make decisions regarding the use and development of their lands. Further, its viability as a method of mitigating damage to Indigenous lands has not been tested.

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[132] E. Barrett Ristroph, supra note 130, at 256–37.

[133] *Id*. at 256.

[134] *See* Ahtuangaruak, *supra* note 117, at 676.

[135] *Id*. at 675 ("Our food sources have undergone great changes since oil development has surrounded us. Seismic activity and frequent helicopter flights have disturbed the caribou herds around Nuiqsut. The migration used to come right through Nuiqsut, but no longer, and most of our hunters have found it takes many trips to harvest caribou. Out people are seeing changes to out animals as well, showing signs of illness. Fish have been decreasing in numbers, and multiple species are being affected.").

[136] Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 229 (2014).

[137] *Id*.

[138] *Id*.

[139] *Id*.

[140] *Id*. at 227.

Another option to further protect Alaska Native lands is to place them into trust with the federal government, just as Indian country in the contiguous United States is held. Approximately one million acres of fee land in Alaska are owned by tribes or individual Alaska Natives, and "[t]hese fee lands in tribal or Native ownership lack even the basic protections afforded undeveloped ANCSA lands held by ANCSA village or regional corporations under the provisions of the automatic land bank established by ANCSA."[141] Unlike ANC-owned lands and Indian country, these fee lands in Alaska are subject to alienability. Reconsidering Alaska Native lands as trust lands, as discussed earlier, would have the effect of protecting Native lands from alienability and also re-establishing Indian country in Alaska.[142]

Until 2013, placing Alaska Native lands into trust was not possible.[143] ANCSA expressly terminated all aboriginal claims within Alaska, and it wasn't until a District Court held in 2013 that ANCSA did not absolutely prohibit placing Alaska Native lands into trust[144] that the U.S. Department of the Interior reversed its policy on the matter.[145] The Department of the Interior oversees the federal process of accepting tribal lands into trust[146] and the application process for Alaska Native tribes has undergone numerous changes in recent years due to changing administrations.[147] In January of 2017, just before the end of the Obama administration, an opinion by then-Solicitor of the Department Hilary Tompkins officially concluded that the Indian Reorganization Act authorized the Secretary to accept Alaska Native land into trust.[148] Later that year, marking an important moment for Alaska Native tribes, the United States accepted into trust a tiny parcel of land in Alaska.[149]

However, for all tribes, the process of placing land into trust has been far from straightforward. The opinion by Tompkins was temporarily withdrawn by the succeeding Solicitor Daniel Jorjani in 2018, and, in January 2021, in the final hours of the Trump administration, Jorjani withdrew the 2017 opinion permanently and replaced it with a new opinion that questioned the Department's ability to take lands into trust through the existing process.[150] That opinion ultimately delayed the Department's processing of tribes' pending applications.[151] In April 2021, in

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[141] *Id*.

[142] Holley, *supra* note 71, at 334.

[143] *Id.*

[144] Akiachak Native Cmty. v. Salazar (Akiachak *III*), 935 F. Supp. 2d 195 (D.D.C. 2013).

[145] Holley, *supra* note 71, at 334.

[146] *See id.* at 336 ("Under the Department of the Interior's land-into-trust regulations, the Secretary takes legal title to unrestricted fee land in the name of the United States to hold in trust for the benefit of the tribe.").

[147] Aliyah Chavez, *Interior Sets New Path Through Land Maze*, INDIAN COUNTRY TODAY (April 28, 2021) https://indiancountrytoday.com/news/interior-department-makes-land-into-trust-easier.

[148] *Id*.

[149] Kyle Scherer, *Alaska's Tribal Trust Lands: A Forgotten History*, 38 ALASKA L. REV. 37, 37–38. The parcel was just 1.08 acres, smaller than a football field, and accepted on behalf of the Craig Tribal Association on an island in Southeast Alaska.

[150] Chavez, *supra* note 147.

[151] *Id*.

conjunction with newly-issued opinions of present Solicitor Robert Anderson, Secretary of the Interior Deb Haaland issued a secretarial order providing that fee-to-trust applications will be reviewed by the Bureau of Indian Affairs—rather than the Interior's headquarters—in order to make the process easier to navigate for tribes.[152] One of Solicitor Anderson's opinions effectively reversed Jorjani's opinion, allowing the Secretary to again place Alaska lands into trust.[153]

The ability to place lands into trust may significantly impact the trajectory of Alaska Native governance. As stated by one author, "[t]he availability of trust status will allow tribal governments to take steps toward the ultimate goal of full tribal self-determination."[154] The financial benefits alone of tribal governance over trust land—including exemption from state taxation and the ability to obtain tax income—could place Alaska Native villages in a better position to address poverty, climate change, justice, and many other pressing issues.[155] As stated by the president of the Alaska Federation of Natives in 2013, "Alaska's tribes believe that the most secure means of ensuring these lands stay in Alaska Native ownership is through the federal land into trust process."[156] The efforts of tribal leaders to have Alaska Native lands instated as trust lands is ongoing.

III. Self-Determination and Alaska Natives

Thus far, the unique system established by ANCSA that Alaska Natives live under has been examined with regards to land tenure, governance and corporate structure, and subsistence. These topic areas are integral to Alaska Natives and Alaska Native villages, and each can be used to gauge the relative success of ANCSA insofar as it has preserved Alaska Native ways of life over the past half-century. However, a crucial question remains: what does self-determination look like for Alaska Native tribes, and has ANCSA fulfilled its duty to protect Alaska Natives' right to self-determination?

Self-determination, it should be noted, is distinct from sovereignty. Sovereignty is the unhindered exercise of self-government in all areas; self-determination is the ability to decide what powers of self-governance will be exercised, and, just as importantly, what that self-governance looks like. Tribes in the United States are often characterized as quasi-sovereign entities; they exercise many powers of self-government, including managing education, social services, courts, enterprises, elections, and innumerable other functions.[157] Tribes are not fully sovereign, however; they are limited by the federal government in broad areas such as jurisdiction and taxation.[158]

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[152] *Id*.
[153] *Id*.
[154] Holley, *supra* note 71, at 337.
[155] *Id*.
[156] Statement of Julie Kitka, *supra* note 68, at 3.
[157] PEVAR, *supra* note 2, at 84.
[158] *See* CANBY, *supra* note 6, at 79–92 for an overview of federal limitations on tribal sovereign authority.

As examined earlier, ANCSA created a decentralized form of Alaska Native governance in which "[p]owers over lands, natural resources, and governmental programs are 'fragmented and widely dispersed' among IRA governments, traditional councils, state-recognized cities and boroughs, and for-profit and non-profit regional corporations."[159] This decentralized form of Native governance in Alaska has severely limited the authority and scope of Alaska Native tribal governments, which often exist only in the form of tribal councils. The self-determination of Alaska Native tribes has been dramatically inhibited by ANCSA's creation of for-profit ANCs to manage Native lands, while permitting only state and federal laws to apply to those lands.

One author describes the context of ANCSA in the context of self-determination as such:

> Pure self-determination was impossible because the Alaska Native's decision-making process was tainted by prior federal activity that virtually forced the Natives to act. Certain that they would lose most if not all of their aboriginal lands and rights, the Natives bargained only for what they felt was attainable, willingly giving up much that they might have sought to retain under more favorable circumstances.[160]

The vast federally-created differences between Alaska Natives and other federally recognized tribes in the United States has also served to hinder prospects of Alaska Native self-determination. Legislation and judicial decisions promoting the inherent authority of tribal governments are often inapplicable to Alaska Native tribes.[161] While other tribes manage reservation resources and wildlife as a part of self-governance, Congress has neglected to pass legislation empowering Alaska Natives to play an equal role in the management of wildlife and natural resources that Alaska Natives rely on more than any other single group within the state.[162]

Though the ANCSA-created system of corporations has significant downsides that have been discussed, one positive aspect that should be mentioned is the relative independence from the federal government that ANCs offer. ANCs function as state-chartered corporations that do not operate or administer their lands under the purview or oversight of the federal government.[163] A common criticism of federal Indian policy is that policies are often overly paternalistic towards tribes.[164] This has been true since the federal-tribal relationship was first

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[159] Aslan, *supra* note 87, at 249.

[160] Work, *supra* note 62, at 216.

[161] *See, e.g.*, Letter from Association of Village Council Presidents to Alaska Senators and Congresspeople RE: Violence Against Women Re-authorization, (Feb. 8, 2013), http://www.narf.org/nill/documents/vawa/20130208-AVCP_letter.pdf.

[162] *See* Statement of Julie Kitka, *supra* note 68, at 8.

[163] Alaska v. Native Vill. of Venetie Tribal Gov't, 552 U.S. 520, 534 (1998). ("It is worth noting that Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations, hardly a choice that comports with a desire to retain *federal* superintendence over the land.").

[164] *See, e.g.*, Work, *supra* note 62, at 197.

characterized as that of a guardian and ward in *Cherokee Nation v. Georgia*.[165] Paternalistic policies lead to an excess of federal management—and oftentimes mismanagement—of tribal lands and resources.[166]

However, a rejection of paternalistic federal policies must contend with the importance of the trust responsibility of the federal government, which can also, in part, be traced back to *Cherokee Nation*.[167] The trust responsibility has been broadly used to require that legislation protects Indian interests when enacting federal Indian policy, and has been cited by the Supreme Court to decide integral cases in favor of Indian tribes.[168] As stated by one author with regards to ANCSA, "[o]ne of the more basic problems posed by ANCSA is the perceived tension that exists between the trust responsibility the federal government owes Native Americans and the self-determination policy under which ANCSA was enacted. The former seems to embrace the concept of paternalism, while the latter seems to demand its rejection."[169] In other words, the challenge of legislation such as ANCSA is that self-determination and the trust responsibility can appear to be inconsistent concepts. As the above author continues, "Self-determination and its companion objective of cultural plurality will survive only if this type of paternalistic restrictiveness is minimized and federal trust responsibilities are properly administered."[170] The proper administration of the trust responsibility must be an aspiration of the federal government that includes consulting with Alaska Native villages to reach equitable solutions, rather than enacting well-meaning but misguided legislation without equitable Native input. In the end, "[s]elf-determination cannot exist absent meaningful Native participation in the political processes."[171]

IV. Conclusion

By dividing Alaska villages into corporations and governments, and severely limiting the self-government powers of Alaska Native tribal governments, ANCSA destabilized the Alaska Native village as a quasi-sovereign entity. Lacking jurisdiction and a land base, and subject to state and federal subsistence laws, Alaska Native tribes cannot exercise self-determination to the extent that other federally recognized U.S. tribes can. The subsistence lifeways of Alaska Native villages are threatened by fossil fuel development and climate change that, to an increasing degree, disrupt hunting and fishing in remote regions of the state. Solutions have been proposed to alleviate the challenges faced by Alaska Natives,

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[165] Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) ("[The Indians'] relations to the United States resemble that of a ward to his guardian.").

[166] *See*, *e.g.*, Cobell v. Salazar, 573 F.3d 808, 809 (D.C. Cir. 2009).

[167] *Cherokee Nation*, 30 U.S. at 2. Chief Justice Marshall's terming of the tribes as "domestic dependent nations" has been long invoked to conceptualize the relationship between tribes and the United States.

[168] *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 541–42, 551–52 (1974).

[169] Work, *supra* note 62, at 214.

[170] *Id*. at 216.

[171] *Id*. at 217.

such as the designation of ANC-owned lands as TCDs or trust lands in an attempt to restore Indian country in Alaska; however, what is most needed for the survival and self-determination of Alaska Native villages is the restoration of quasi-sovereign authority to Alaska Native tribal governments. The present decentralized form of Alaska Native governance is not sufficient to meet the needs of Native communities, and the patchwork of authorities operating under ANCSA's system has failed to protect Alaska Native lifeways and subsistence. Whether through placing Alaska Native lands into trust, or by circumventing the Court's decision in *Venetie* to assert Indian country in Alaska, Alaska Native villages must regain the self-determination that has been denied to them.