
NOTE

“TRADITIONAL” RESOURCE USES AND ACTIVITIES: ARTICULATING VALUES AND EXAMINING CONFLICTS IN ALASKA

This Note examines the meaning of “tradition” in the Alaska National Interest Lands Conservation Act (“ANILCA”) and the Marine Mammal Protection Act (“MMPA”), two federal laws of particular importance in Alaska, and in Alaska state law relating to land and natural resource use. The Note draws upon a variety of sources, including the texts of those laws, judicial decisions and agency interpretative regulations. The Note argues that the term “tradition” should be defined and interpreted by paying attention to the potentially competing values associated with the term and raises the question of which institution or entity is best suited to interpret tradition in particular contexts.

I. INTRODUCTION

In Alaskan natural resource law, “tradition” is a powerful legal concept, appearing in a bewildering variety of contexts in Alaskan law and legal discourse relating to natural resource and public lands activities. The concept of tradition invokes a spectrum of underlying values, sometimes complementary, sometimes competing. Both state and federal natural resource and land use laws pertaining to Alaska assign privileges and exemptions for individuals engaging in “traditional activities” and “traditional uses” of land and resources. However, in spite of its prevalence in statutory law, the term “tradition” is rarely defined, and the underlying values to be protected are rarely identified explicitly. Instead, use of the word seems more often to be accompanied by an implicit assumption that both the meaning and the inherent worth of “tradition” are obvious. Failure to define the term in statutory law has given rise to problematic and inconsistent results as courts, administrators and other decision-makers attempt to strike appropriate balances between implicit, often competing, values.

This Note begins by examining a decision of the Alaska District Court, *Alaska State Snowmobile Association, Inc. v. Babbitt*,¹ as an example of the problems created by the failure to define “tradition” as applied to resource uses and activities. Next, it discusses use of the term in legal rules governing natural resource use in Alaska. Finally, the Note analyzes the values associated with the term in a natural resources context and discusses the problems that have arisen as decision-makers have attempted to strike proper balances among competing values. The Note closes by raising the question: which institution or entity should decide what tradition means? This Note does not assert that a single meaning for tradition in state and federal law is necessary or even desirable. Rather, it suggests that tradition should be defined and interpreted with deliberate attention to the full spectrum of potential values the term may represent and in light of the ends that may be attained by investing tradition with each of its possible meanings.

II. COMPETING VALUES INVOKED BY TRADITION:

ALASKA STATE SNOWMOBILE ASSOCIATION V. BABBITT

Although the issue of the proper interpretation of “tradition” and “traditional activities” is not new to Alaska courts, a recent decision by a federal district court illustrates the critical need for more definition. In *Alaska State Snowmobile Association, Inc. v. Babbitt*,² the Alaska State Snowmobile Association (“ASSA”) and individual plaintiffs brought suit against the Secretary of the U.S. Department of the Interior, the Director of the U.S. National Park Service (“NPS”) and other defendants³ responsible for managing Denali National Park after the NPS temporarily closed the wilderness core of Denali to snowmobiling activities. ASSA alleged that the temporary closure violated Section 1110(a) of the Alaska National Interest Lands Conservation Act (“ANILCA”), which allows access by snowmachines and other forms of transportation to

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1. 79 F. Supp. 2d 1116 (D. Alaska 1999), *vacated*, *Alaska State Snowmobile Ass'n, Inc. v. Babbitt*, No. 00-35113, 2001 WL 770442 (9th Cir. Jan. 10, 2001); *see infra* note 19.

2. *Id.*

3. For simplicity, in this Note the defendants are referred to collectively as the National Park Service (“NPS”).

otherwise restricted-access areas of conservation system units, including Denali, for "traditional activities . . . and for travel to and from villages and homesites."⁴ ASSA argued that its members' use of snowmachines for recreational purposes such as sightseeing and backcountry camping were traditional activities under Section 1110(a).⁵ NPS, on the basis of a previous administrative order defining traditional activities to be those "regularly practiced in the [wilderness core of Denali] before the 1980 passage of ANILCA,"⁶ argued that because snowmachines were not lawfully used for recreation in the area before 1980, such recreational uses were not traditional.⁷

Because ANILCA does not define what activities will be considered traditional,⁸ the district court had to determine whether ASSA had standing to sue. A frustrated Judge Sedwick answered that ASSA had standing after examining the "murky" history of NPS's treatment of the issue of snowmachine use in Denali.⁹ The court stated that "a review of the Administrative Record cannot but lead to the uncomfortable conclusion that [NPS] has no formally established position (and perhaps not even an informally established position that is both current and coherent) of what constitutes 'traditional activities' within the meaning of ANILCA."¹⁰ The court noted that "[NPS's] failure to define 'traditional activities' makes it impossible for the court to hold now that 'sightseeing, experiencing solitude, practicing photography, and enjoying backcountry camping, the wilderness experience, and other traditional activities'" as described by ASSA "do not embrace at least one 'traditional activity' within the meaning of ANILCA."¹¹ The court

4. Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, § 1110, 94 Stat. 2371, 2464-65 (1980), 16 U.S.C. § 3170(a) (2000). Privileged access under this section may be withheld where such uses would be detrimental to the area's resource values. *Id.*

5. *Alaska State Snowmobile Ass'n, Inc.*, 79 F. Supp. 2d at 1125 n.53.

6. *Id.* at 1121 (quoting from the administrative order).

7. Oral Argument on Pending Summary Judgment Motions at 14, *Alaska State Snowmobile Ass'n, Inc. v. Babbit*, 79 F. Supp. 2d 1116 (D. Alaska 1999) (No. A99-0059-CV) (statement of Dean Dunsmore for defendants).

8. Amendments to ANILCA in 1997, subsequently repealed (see *infra* note 71), defined "customary and traditional uses" of resources for subsistence purposes, but there is no indication that the definition was meant to clarify the meaning of "traditional activities" as used elsewhere in the statute. Pub. L. No. 105-83, § 316(b)(4), 111 Stat. 1543, 1592-93 (1997) (repealed 1998); see *Alaska State Snowmobile Ass'n, Inc.*, 79 F. Supp. 2d at 1141.

9. *Alaska State Snowmobile Ass'n, Inc.*, 79 F. Supp. 2d at 1133.

10. *Id.* at 1142.

11. *Id.* at 1125 n.53.

ultimately decided that the closure order was arbitrary and capricious and declared that it violated ANILCA.¹²

A proposed NPS rule defining traditional activities was issued in the wake of the *Snowmobile* decision and prompted a flood of public comment¹³ from interested parties. At the heart of this debate, still ongoing, is fundamental disagreement among regulatory authorities and stakeholders over the interests that invocation of tradition should address. The proposed rule defines a traditional activity as one that “generally” occurred in a conservation unit before ANILCA’s enactment “and that was typically associated with that region as an integral and established part of a utilitarian Alaska lifestyle or cultural pattern.”¹⁴ This definition suggested that for NPS, the values to be protected by invoking tradition are sociocultural; the definition did not appear to contemplate sport or recreational uses.¹⁵ ASSA, on the other hand, advocated a meaning for tradition in which the key element is simply some level of historical continuity: so long as activities were practiced before the “cutoff date” of ANILCA’s passage in 1980, their purpose or sociocultural significance is irrelevant.

In response to comments from the Alaska Legislature and Alaska’s Governor, NPS modified the proposed definition to remove the association of traditional activities with culture.¹⁶ The Final Rule defines a traditional activity as:

[a]n activity that generally and lawfully occurred in the Old Park [the wilderness portion of what is now Denali] contemporaneously with the enactment of ANILCA, and that was associated with the Old Park, or a discrete portion thereof, involving the consumptive use of one or more natural resources of the Old Park such as hunting, trapping, fishing, berry picking or similar activities.¹⁷

The Final Rule thus rejects a solely sociocultural rationale for exemptions to NPS’s access restrictions but imposes more than a simple “historical continuity” rationale. However, although the explicit reference to culture was deleted, an implicit sociocultural

12. *Id.* at 1146.

13. NPS received 6,039 timely comments, of which 39% were from Alaska residents. Of 3,176 comments regarding the proposed definition of traditional activities, 98% were “supporting.” National Park System Units in Alaska; Denali National Park and Preserve, Special Regulations, 65 Fed. Reg. 37,863, 37,868 (June 19, 2000) (codified at 36 C.F.R. pt. 13).

14. *Id.* at 37,866.

15. This Note uses the term “sociocultural” to refer to values relating to distinct ethnic groups and those groups’ senses of community and identity.

16. National Park System Units in Alaska, 65 Fed. Reg. at 37,869.

17. *Id.* at 37,866.

rationale still exists. Supplementary material accompanying the Final Rule states: "This consumptive use [referenced in the Final Rule's definition of traditional activities] is part of a life style or cultural pattern that remain [sic] practical and essential components of subarctic life."¹⁸ From NPS's perspective, recreational activities such as snowmobiling lack the sociocultural dimension that the agency seems to consider a necessary component of tradition.¹⁹

These fundamental conflicts between competing values associated with the idea of tradition continued for some time in litigation over the definition of traditional activities in NPS's Final Rule.²⁰ NPS limited the Final Rule's applicability to the wilderness portion of Denali National Park and stated that for other conservation units in Alaska, the meaning of traditional activities must be defined on an area-by-area basis.²¹ Yet this approach merely postpones the inevitable. Because neither Congress nor NPS has explicitly articulated the underlying *values* to be protected by invoking tradition, the controversy accompanying the closure order in the *Snowmobile* case will surely arise again as NPS makes traditional activity determinations for other conservation units.²²

Nor is the scope of controversy limited to traditional activity determinations under ANILCA. State law, for the most part, tracks the language of ANILCA but does not necessarily or even apparently intend to invest similar meaning in the idea of tradi-

18. *Id.* at 37,867.

19. The temporary closure order that initiated the *Snowmobile* case appears to justify its exclusion of snowmachine uses from the category of traditional activities solely on a historical continuity rationale:

The legal use of mechanized equipment for winter recreation by the general public never occurred in the core 2 million acres of Denali National Park and Preserve from 1917 to 1980. In fact, this portion of the park . . . was specifically closed to public recreational snowmachine use by a nationwide regulation in 1972.

79 F. Supp. 2d at 1122 (quoting from the temporary closure order).

20. After months of settlement negotiations, the ASSA and the other plaintiffs in the snowmobile litigation dismissed their lawsuit, opting instead to proffer legislation that would allow recreational use of snowmobiles in some portions of the Denali wilderness. See Trustees for Alaska updates at <http://www.trustees.org/DenaliNationalParkArticles.htm> (last visited Jan. 11, 2002); see also *Alaska State Snowmobile Ass'n, Inc. v. Babbitt*, No. 00-35113, 2001 WL 770442 (9th Cir. Jan. 10, 2001) (vacating district court's judgment and dismissing appeal as moot).

21. National Park System Units in Alaska, 65 Fed. Reg. at 37,866.

22. NPS has said that it "intends to define traditional activities and apply such definitions to other park areas." *Id.* at 37,867. In addition, U.S. Fish and Wildlife Service regulations governing public land in wildlife refuges generally track ANILCA's Section 1110(a) language. *Id.* at 37,865.

tional activities. The Marine Mammal Protection Act, aimed primarily at the conservation of threatened and endangered species, and other federal natural resource laws also invoke tradition but are so different in purpose from ANILCA that tradition under these laws may embody quite different values.

III. "TRADITION" IN ALASKA

This section provides an overview of the concept of tradition in state and federal law affecting Alaskan public lands and resources. Tradition appears both as an adjective describing a particular kind of resource activity or land use (*e.g.*, traditional activities) and as part of a phrase that defines a particular kind of activity (*e.g.*, subsistence activities defined as "customary and traditional uses" of land and resources). This overview is not exhaustive but illustrates the variety of contexts in which tradition appears and highlights the ways in which contextual differences suggest different underlying meanings for the term "tradition."

A. Tradition in Federal Laws Affecting Alaska: ANILCA and the Marine Mammal Protection Act ("MMPA")

The primary federal law affecting public lands and resources in Alaska is the Alaska National Interest Lands Conservation Act²³ ("ANILCA"), passed in 1980 to preserve from development certain lands of natural, historic, recreational or scientific value.²⁴ ANILCA was intended to guide the completion of federal land allocation within Alaska while satisfying Alaskans' economic and social needs.²⁵ The law established the Alaska national park system, creating thirteen of Alaska's fifteen national park units and designating other types of public land, such as national wildlife refuges and national forests.²⁶ ANILCA provided for state implementation of its provisions, giving Alaska the ability to control the regulation of fish and game on federal lands within the state (more than sixty percent of all public land), but it made this power contingent upon the consistency of state law with ANILCA's subsistence provisions.²⁷ ANILCA's influence over public land management in

23. 16 U.S.C. §§ 3101-3233, 410hh-410hh-5 (2000).

24. ANILCA, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-3233 (2000)).

25. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 549-51 (1987) (discussing ANILCA's purposes).

26. *Id.*

27. Mary Beth McLeod, *The Subsistence [sic] Debate in Alaska: Who Will Control Navigable Waters?*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 355, 358 (1996). Currently, state law does not conform to ANILCA's provisions regarding

Alaska is therefore especially broad because state laws regulating subsistence uses on state-owned land were written or modified to accord with ANILCA's provisions.²⁸

The concept of tradition appears in ANILCA in numerous provisions guaranteeing access for traditional activities to otherwise off-limits public lands. Such provisions include access for subsistence purposes,²⁹ for recreational uses,³⁰ for travel to villages and homesites³¹ and for travel to cabins to be used for "traditional and customary uses."³² The provision governing access to subsistence resources in park areas, for example, allows means of surface transportation "traditionally employed" for subsistence purposes; snowmobiles, motorboats and dog teams are expressly mentioned as permitted modes of transport.³³

Tradition is also incorporated throughout ANILCA in reference to subsistence activities themselves. ANILCA defines subsistence uses not in terms of activities necessary for survival but by reference to tradition, as the "customary and traditional uses by rural Alaska residents" of resources for personal or family consumption and use, for making and selling handicrafts, for barter or sharing for personal or family consumption and for "customary" trade.³⁴ ANILCA extends protections for such activities not only to Alaska Natives³⁵ but also to non-Natives.³⁶ Although many individuals depend upon subsistence activities for their livelihood or sustenance, Congress also recognized a sociocultural role for sub-

rural residency, and therefore the federal government has taken over management of fish and game on federal public lands and waters. Alaska Governor Tony Knowles and the state resource departments are attempting to pass ballot initiatives to amend the state constitution to conform to ANILCA, thereby returning management of resources on federal public lands to the state.

28. Ryan T. Peel, Comment, *Katie John v. United States: Balancing Alaskan State Sovereignty with a Native Grandmother's Right to Fish*, 15 *BYU J. PUB. L.* 263, 268-69 (2001).

29. 16 U.S.C. § 3121(a) (2000).

30. *Id.* § 3170(a).

31. *Id.* § 3170(b).

32. *Id.* § 3193(b)(2).

33. *Id.* § 3121(b).

34. *Id.* § 3113.

35. In this Note, "Native" is capitalized where it refers specifically to those peoples regarded as indigenous to Alaska: Eskimo, Aleut and American Indian.

36. 16 U.S.C. § 3111(1), (2) (2000). Currently, more than half of the people who qualify for subsistence are non-Natives. Robert Wolfe, Subsistence Division of Alaska Department of Fish and Game, *What Have You Heard?*, <http://www.state.ak.us/local/akpages/FISH.GAME/subsist/geninfo/about/subfaq.htm> (last visited Jan. 28, 2002).

sistence activities, finding that subsistence activities are essential to “economic, traditional, and cultural existence” for Natives and to “economic, traditional, and social existence” for non-Natives.³⁷

ANILCA provides a preference for subsistence uses whenever it becomes necessary to protect wild populations by restricting the taking of fish and wildlife on public lands; priority for subsistence uses is to be established by considering people’s dependency upon the resource, local residency and the availability of alternative resources.³⁸ Regulations implementing ANILCA’s subsistence provisions state that subsistence uses by local rural residents “shall be the priority consumptive uses of such resources over any other consumptive uses” permitted in park areas.³⁹ Amendments to ANILCA adopted in 1997 but subsequently repealed in 1998 were intended to clarify the meaning of “customary and traditional uses” and “customary trade” in the definition of subsistence activities. The amendments provided:

“customary and traditional uses” means the noncommercial, long-term, and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish and wildlife.⁴⁰

The amendments defined “customary trade” to mean “the limited noncommercial exchange for money of fish and wildlife or their parts in minimal quantities.”⁴¹

37. 16 U.S.C. § 3111(1) (2000).

38. *Id.* § 3114. A current proposed state constitutional amendment would raise the subsistence preference to the status of a constitutional right. The first sentence of the proposal inserts the familiar “customary and traditional” language into the “Sustained Yield” clause of the Alaska Constitution, declaring it to be the “policy of the State of Alaska . . . to recognize the subsistence tradition of the indigenous peoples of Alaska and to accord a priority to customary and traditional subsistence uses in the allocation of fish, game and other renewable resources.” Draft Resolution prepared by the Subsistence Working Group on December 15, 2001, available at <http://www.gov.state.ak.us/subsistencesummit/resolution.pdf> (last visited Feb. 2, 2002).

39. National Park System Units in Alaska, 36 C.F.R. § 13.40(c) (2001).

40. Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 105-83, § 316(b)(4)(C), 111 Stat. 1592, 1592-93 (1997) (repealed 1998). Section 316(d) of ANILCA provided that the amendments in subsection (b) would be effective only if Alaska adopted such laws by December 1, 1998; because Alaska did not do so, the amendments were repealed. They are discussed here because they provide additional insight into the ways in which tradition has been conceptualized in statutory law.

41. *Id.*

Like ANILCA, the Marine Mammal Protection Act⁴² ("MMPA") invokes tradition as a basis for special privileges, but unlike ANILCA, the MMPA extends those privileges only to Alaska Natives.⁴³ Under the MMPA, Alaska Natives may take protected marine mammals such as seals, whales, and sea otters for subsistence or for use in traditional native handicrafts.⁴⁴ The statute defines authentic native articles of handicrafts and clothing as:

items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.⁴⁵

The exemption for subsistence includes aboriginal subsistence whaling, defined by the International Whaling Commission as "whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales."⁴⁶ The law also provides for local aboriginal consumption, defined by the Commission as "the traditional uses of whale product by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence and cultural requirements."⁴⁷ By limiting these exemptions to Alaska Natives, the MMPA emphasizes cultural and community values, a discrete subset of the spectrum of values embodied in the concept of tradition.

42. 16 U.S.C. § 1361-1421h (2000).

43. *Id.* § 1371(b).

44. *Id.* § 1371. Such takings must be done pursuant to cooperative agreements with the Secretary of the Interior. *Id.* Similarly, the Endangered Species Act ("ESA") exempts Alaska Natives from the law's ban on the taking or importation of endangered or threatened species, using the same terminology as the MMPA. 16 U.S.C. § 1539(e) (2000).

45. *Id.* § 1371(b).

46. G.P. Donovan, *International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981, Special Issue 4*, International Whaling Commission, Cambridge, England (1981), available at <http://www.high-north.no/Library/Culture/de-of-ab.htm> (last visited Jan. 28, 2002). Report of the Ad Hoc Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples.

47. *Id.*

B. Tradition in Alaska State Law

Alaska state law also contains protections for traditional activities as well as access to public lands for those activities. Although there is still room for debate about the precise meaning of tradition in various contexts, state law generally provides more guidance than does ANILCA regarding what uses may be considered traditional. Alaska Statutes section 41.21.020(14) specifies that managers of state parks, recreational areas and preserves must maintain “traditional means of access” to those areas “for a traditional recreational activity.”⁴⁸ The provision defines traditional recreational activities as “those personal or commercial types of activities that people may use for sport, exercise, subsistence, or personal enjoyment, including hunting, fishing, trapping, or gathering, and that have historically been conducted as part of an individual, family, or community life pattern” on state lands or waters.⁴⁹ It specifies that the means of access considered traditional are “those types of transportation . . . for which a popular pattern of use has developed.” The provision gives a non-exclusive list of permissible means of transportation, including “general or commercial aviation, ballooning, motorized and nonmotorized boating, snowmachining, operation of all-terrain vehicles, mushing, use of pack animals, skiing, snowshoeing, and walking.”⁵⁰

Other state law provisions protect traditional uses and means of access specific to particular areas. For example, a provision relating to the Haines State Forest Resource Management Area declares that “an opportunity for continued traditional use . . . at levels and by traditional methods and means is guaranteed. The traditionally compatible uses include but are not limited to fishing, hunting, trapping, berry picking, subsistence, and recreational uses, operation of motorized vehicles, and the harvest of personal-use firewood.”⁵¹ In Wood-Tikchik State Park that “the current practice of traditional subsistence and recreational activities includes the use of small outboard motors and snow machines.”⁵²

These provisions demonstrate an intent to include a broad range of activities as traditional; analogous provisions of ANILCA are less clear about what the law contemplates. By adding the word traditional as a modifier to the phrase “means of access,” state law also makes clear, as ANILCA’s Section 1110(a) did not, that both the means of access *and* the activity itself must be tradi-

48. ALASKA STAT. § 41.21.020(14) (Michie 2000).

49. *Id.* § 41.21.020(14)(b). Section 38.04.200(a) contains a similar provision.

50. *Id.*

51. *Id.* § 41.15.315(b).

52. *Id.* § 41.21.167.

tional to be protected. Similarly, state law pertaining to parks in Alaska Statutes section 41.21.020 avoids at least one aspect of debate in the *Snowmobile* case, whether the meaning of tradition depends on the purpose of an activity, by specifying that its protections apply to traditional *recreational* activities. Thus, the state legislature clearly contemplated that recreational activities could be traditional on at least some public lands.

Elsewhere in state law, however, references to tradition are less illuminating. Activities such as aquatic farming must be compatible with "traditional uses" of the area⁵³ and management of public use areas must consider traditional uses.⁵⁴ Other provisions specify that those responsible for certain development plans or actions must consider the effect on traditional uses of the land.⁵⁵ These and similar provisions fail to define or even to imply what uses are to be considered traditional in each context.

Subsistence uses of resources provide a different framework within which to analyze the meaning of tradition. Because state law subsistence provisions largely mirror those of ANILCA,⁵⁶ state law defines subsistence by reference to tradition and extends exemptions for traditional activities to both Natives and non-Natives.⁵⁷ Subsistence uses in state law are defined as:

the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption.⁵⁸

The provision defines "customary and traditional" as "the non-commercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game," and "customary trade" as "limited noncommercial exchange, for minimal amounts of cash."⁵⁹ Whereas ANILCA de-

53. *Id.* § 38.05.083.

54. *See, e.g., id.* § 41.23.150; *id.* § 41.15.300.

55. *See, e.g., id.* § 38.05.830 (instructing that "the commissioner shall consider . . . [the] potential for conflicts with the traditional uses of the land that could result from the sale, lease, or disposal").

56. *See, e.g.,* McLeod, *supra* note 27, at 359.

57. 1992 Alaska Sess. Laws ch. 1, § 1(a)(3).

58. ALASKA STAT. § 16.05.940 (Michie 2000).

59. *Id.*

defines subsistence uses as “customary and traditional uses by rural Alaska residents,” state law adds the term “noncommercial” and describes permissible purposes for subsistence activities: personal or family consumption, making and selling of handicrafts, and trade, barter and sharing for personal or family consumption.

Regulations of the Alaska Joint Boards of Fisheries and Game (“Joint Boards” or “Boards”) go further than does ANILCA in defining customary and traditional subsistence uses of resources. To enable the identification of fish stocks and game populations “customarily and traditionally taken or used for subsistence,”⁶⁰ the Boards enacted detailed regulations specifying that customary and traditional subsistence uses shall be characterized by: (1) a long-term, consistent and recurring pattern of noncommercial taking and use; (2) methods of harvest characterized by efficiency and economy of effort and cost; (3) means of handling, preparation, preservation and storage of fish or game that have been traditionally used by past generations, not excluding appropriate technological advances; (4) handing down of knowledge, skills and values from generation to generation; (5) distribution or sharing of effort, catch or harvest, not including significant commercial enterprises; and (6) a use pattern including reliance for subsistence purposes upon a diversity of resources and which provides substantial economic, cultural, social and nutritional elements of the user’s life.⁶¹

IV. A MULTIPLICITY OF “TRADITIONAL” VALUES IN ALASKAN RESOURCE LAW

A multiplicity of dimensions is associated with the term “tradition” in statutory and case law. The phrases “traditional activities” and “traditional uses” incorporate one or more of (1) distance in and continuity over time; (2) association with a particular culture or community; or (3) a small scale. Each of these concepts promotes different underlying values and achieves different ends when vested in the concept of tradition. This section explores these meanings and asks: what do we accomplish when we protect tradition invested with a particular meaning?

Tradition is rarely, if ever, unidimensional; more often, it is a multifaceted concept with layers of actual and potential meanings and values. This section also examines conflicts among these meanings and values. Such conflicts arise frequently as population and development pressures engender increasingly stringent regula-

60. ALASKA STAT. § 16.05.258 (Michie 2000).

61. ALASKA ADMIN. CODE tit. 5, § 99.010(b) (1982) (paraphrased from the regulation).

tory measures with consequent changes in the nature of traditional activities for Natives and non-Natives alike.⁶² This section examines the tradeoffs inherent in the balancing of traditional values with each other and with other important values.

A. Tradition Defined by Distance In and Continuity Over Time

Of the concepts embodied in tradition, the idea that tradition is based on longstanding practices is perhaps the most prevalent. A "time" dimension for tradition is evident in the text or legislative history of most Alaska-related statutes and regulations and in several judicial opinions interpreting statutory language. For example, one criterion in the regulations of the Joint Boards defining "customary and traditional" subsistence uses is "a long-term . . . pattern of use."⁶³ Subsistence uses, as previously defined under ANILCA, similarly must be based on long-term patterns and practices of taking or relying upon fish and wildlife.⁶⁴

An unresolved question is the length of time necessary before a practice achieves the status of a tradition. The Joint Boards' definition of customary and traditional subsistence uses suggests a span of time covering many generations: the pattern of traditional use must include the passing of knowledge, skills and values "from generation to generation" and involve practices "traditionally used by past generations."⁶⁵ These regulations clearly do not contemplate that practices covering a timespan of a few years or even a few decades will qualify as traditional. Similarly, in the legislative history of the 1992 amendments to the state subsistence laws, the legislature stated that "customary and traditional uses of Alaska's fish and game originated with Alaska Natives,"⁶⁶ dating back to a far distant, pre-European settlement age. However, the position taken by ASSA in the *Snowmobile* litigation contemplated a much shorter timespan by including as traditional any activity that occurred in Denali's wilderness core before ANILCA's passage in

62. One member of an Alaska Native group explains: "Our lifestyle . . . has changed, even our way of life Our dads, they would just go out hunting and get however much our families need. But, today, . . . [the regulatory authorities] tell us . . . how many to get." David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. COLO. L. REV. 1009, 1013 (1989) (quoting Genevieve Norris from the village of Shungnak).

63. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(1) (1982).

64. Department of the Interior and Related Agencies Appropriation Act, Publ. L. No. 105-83, 316(b)(4), 111 Stat. 1543, 1593 (1997) (repealed 1998).

65. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(5)-(6) (1982).

66. 1992 Alaska Sess. Laws ch. 1, § 1(a)(3) (quoted in *Payton v. State*, 938 P.2d 1036, 1043 (Alaska 1997)).

1980. Subsistence uses under state law and formerly under ANILCA need only be based on patterns that have developed over “a reasonable period of time.”⁶⁷ State law referring to non-subsistence traditional activities gives very little guidance about the timeframe the legislature envisioned: traditional recreational activities in state parks and traditional outdoor activities on other state lands are those that have been done “historically” for long enough to have become “part of an individual, family, or community life pattern.”⁶⁸ The traditional means of access protected by these provisions are no more ancient than the most recently developed mode of transportation listed—all-terrain vehicles.⁶⁹

The time dimension of tradition typically requires not only the passage of time but also the continuity and regularity of a practice over time. A practice undertaken only sporadically, rather than as a regular response to recurring conditions, ordinarily will not be considered traditional. For example, the Joint Boards’ subsistence regulations specifically require a pattern of use, defined as a consistent repetition of uses of wild resources that recur in specific seasons every year.⁷⁰ Subsistence activities under state law and the temporary ANILCA amendments must be based on consistent patterns of use over time.⁷¹

In addition, both courts and legislatures seem to agree that practitioners may update their methods without forfeiting otherwise traditional status for those activities. For example, one criterion of the Joint Boards’ regulations defining “customary and traditional” subsistence uses is a “means of handling, preparing, preserving, and storing fish or game that has been traditionally used by past generations, but not excluding recent technological advances where appropriate.”⁷² The MMPA considers sewing and stitching of natural materials to be traditional ways of making Native handicrafts, but regulations implementing the Act specifically provide that sewing machines may be used.⁷³ Such tolerance for an updating of methods reflects a belief that some legitimate traditions may not necessarily satisfy a romanticized conception of what is traditional. In responding to a question whether subsistence

67. Department of the Interior and Related Agencies Appropriation Act § 316(b)(4)(C) (1997) (repealed 1998); ALASKA STAT. § 16.05.940(7) (Michie 2000).

68. ALASKA STAT. § 41.21.020 (Michie 2000).

69. *Id.*

70. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(1) (1982).

71. Department of the Interior and Related Agencies Appropriation Act § 316(b)(4)(C) (repealed 1998); ALASKA STAT. § 16.05.940(7) (Michie 2000).

72. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(5) (1982).

73. 50 C.F.R. § 18.3 (2001).

hunters were required to use a bow and arrow, the Subsistence Division of the Alaska Department of Fish and Game responded that the use of guns was also traditional because Natives in Alaska had hunted with guns since the 1860s in most areas, longer than America has been using automobiles for transportation.⁷⁴ ANILCA allows individuals to use snowmachines to reach sites for traditional activities and for transportation between villages and homesites,⁷⁵ even though dogsleds or pack animals more closely fit the popular image of traditional means of transportation.

Many decisions to permit "updates" of methods appear to recognize that a strictly enforced time dimension for tradition may place unrealistic expectations on those engaging in otherwise traditional activities. For example, some age-old practices are now prohibited by law. Both state and federal courts have determined that individuals should not be penalized for employing "modern" methods where some aspect of their otherwise traditional activity is now prohibited. A case examining the Alaska Native handicraft exemption to the Marine Mammal Protection Act, *Didrickson v. United States Department of the Interior*,⁷⁶ is the clearest illustration of this principle. The record in the case demonstrated that Alaska Natives had made many uses of sea otters before the occupation of the area by Russians in the late 1700s.⁷⁷ After the United States purchased Alaska following more than a century of intensive hunting of sea otters, the Fur Seal Treaty of 1910 prohibited all hunting of the animals.⁷⁸ The MMPA, passed in 1972, continued protections for the sea otter but included an Alaska Native exemption, which allowed takings of the animals by any local Indian, Aleut, or Eskimo to create authentic native articles "in the exercise of traditional native handicrafts."⁷⁹ The U.S. Fish and Wildlife Service ("FWS") subsequently issued regulations defining authentic native articles as those "commonly produced on or before December 21, 1972,"⁸⁰ the date the MMPA took effect, and providing that items created from sea otter pelts did not meet the exemption because "Alaskan natives have apparently not commonly sold handicrafts or clothing from sea otters within living memory."⁸¹

74. Wolfe, *supra* note 36.

75. 16 U.S.C. § 3170(a) (2000).

76. 796 F. Supp. 1281 (D. Alaska 1991).

77. *Id.* at 1289.

78. *Id.*

79. Marine Mammal Protection Act, Pub. L. No. 92-522 § 101(b)(2), 86 Stat. 1027 (1972) (codified at 16 U.S.C. § 1371(b)(2) (2000)).

80. 50 C.F.R. § 18.3 (2000).

81. 55 Fed. Reg. 14,973 (1990); 53 Fed. Reg. 45,788-90 (1988).

When FWS agents seized articles of clothing made from sea otter pelts from Marina Katelnikoff, an Aleut,⁸² she sued, but the district court upheld the regulation.⁸³ After this decision, FWS agents seized a parka and hat from Boyd Didrickson, a Tlingit, claiming that these items were not traditional because they included metal snaps and zippers.⁸⁴ In a suit brought by Didrickson and joined by Katelnikoff, the district court reconsidered what constituted a traditional item under the statute.⁸⁵ The court held that a finding that sea otter products were not traditional native handicrafts

is based upon a strained interpretation of the word “traditional” [T]he Government’s position is that . . . “traditional” native handicrafts are only those items commonly produced for commercial sale within “living memory” before 1972. Hence the regulation creates an artificial time period from roughly 1900 through 1972 within which the search for traditional Alaskan native articles is limited. This rationale turns on its head any ordinary conception of the word “traditional.”⁸⁶

The court pointed out the inherent unfairness in expecting Natives to conform to an essentially purist definition of tradition:

The fact that Alaskan natives were prevented, by circumstances beyond their control, from exercising a tradition for a given period of time does not mean that it has been lost forever or that it has become any less a “tradition.” It defies common sense to define “traditional” in such a way that only those traditions that were exercised during a comparatively short period in history could qualify as “traditional.”⁸⁷

What is gained when longstanding practices are protected as traditional simply because they are longstanding? Is there anything inherently valuable about the way things have always been done? The primary benefit appears to be the development of a shared sense of community and identity among adherents to the tradition, and the concomitant opportunity to perpetuate that shared sense over time. Protecting longstanding traditions ensures the maintenance of practices valuable either in themselves or because of the sense of belonging that they foster among individuals engaging in the same practices. Longstanding traditions promote pride in a heritage in part created by the existence of the tradition. In this

82. *Katelnikoff v. United States Dep’t of the Interior*, 657 F. Supp. 659, 661 (D. Alaska 1986).

83. *Id.* at 667.

84. *Didrickson v. United States Dep’t. of the Interior*, 796 F. Supp. 1281, 1284 (D. Alaska 1991).

85. *Id.* at 1289.

86. *Id.*

87. *Id.*

way, tradition's time dimension is often inextricably linked with a social or cultural dimension.

Engaging in a longstanding practice sometimes confers a sense of entitlement. The NPS referred to such an entitlement of Tlingit Indians who had long inhabited the area in and around Glacier Bay National Monument as a "moral claim . . . based on historical use and cultural ties."⁸⁸ Protecting such traditions benefits individuals in numerous ways, for example, by maintaining their sense of autonomy and personal pride, and the larger community gains when individual members' personal sense of value is sustained. Protecting longstanding traditions simply because they are longstanding, however, presents the risk of perpetuating exploitive, discriminatory or otherwise harmful practices. In addition, because the level of scientific understanding about the natural world is constantly increasing, longstanding traditions may conflict with new knowledge. For example, recent research suggests that longstanding traditional practices such as egg-collecting for subsistence or for religious ceremonies may have a detrimental effect on the resource if the birds' nesting and feeding patterns are disturbed.⁸⁹

B. Traditional Activities as Small in Scale

Legislative exemptions for participation in traditional activities also typically appear to contemplate a small scale. Courts have consistently refused to uphold special privileges for individuals, including Natives, who in effect have chosen to enter the modern economy by attempting to compete on a larger scale. The ANILCA amendments defined "customary trade" as the limited and noncommercial exchange of wildlife or wildlife parts in minimal quantities.⁹⁰ The amendments clearly did not contemplate a large-scale operation.⁹¹ Similarly, state subsistence regulations specify noncommercial enterprises.⁹²

88. THEODORE CATTON, *LAND REBORN: A HISTORY OF ADMINISTRATION AND VISITOR USE IN GLACIER BAY NATIONAL PARK AND PRESERVE* 124 (1995), available at <http://www.nps.gov/glba/adhi/adhi.htm> (last visited Feb. 20, 2002).

89. See, e.g., Stephani G. Zador & John F. Piatt, *Populations and Productivity of Seabirds at South Marble Island, Glacier Bay, Alaska, during May-July 1999*, U.S.G.S. Biological Div. (Sept. 1999) (introductory report for an upcoming study of the effects of Tlingit egg harvesting practices within Glacier Bay National Park) (on file with author).

90. Department of the Interior and Related Agencies Appropriation Act, Pub. L. No. 105-83, § 316(b)(4), 111 Stat. 1543, 1593 (1997) (repealed 1998).

91. Federal regulations permitting "customary trade" in subsistence-caught fish so long as the sale does not constitute a "significant commercial enterprise" are currently being clarified because ambiguity in terminology has led to confu-

Maintaining that traditional activities must be small in scale reduces pressures on limited resources. State and federal resource laws evidence concern for preserving the target resource, even to the detriment of other important values. For example, traditional activities privileges under ANILCA may be suspended if they are likely to have a negative impact on the natural resource.⁹³ Other benefits gained by limiting traditional practices to those performed by individuals or small groups include a greater ability of practitioners to transmit to others the skills associated with the traditional practice, as well as the ability to monitor the allocation of the benefits of group membership and to keep out interlopers.⁹⁴

However, limiting the scale of traditional activities may create a dilemma for at least some potential beneficiaries of traditional activities privileges. Longstanding practices of some Native cultural groups have never been strictly limited to small-scale activities. Harvesting resources on a large scale has as much cultural worth as small-scale harvesting—perhaps more, because large-scale harvesting often brings an entire community together, and the fruits of such labors are typically shared among entire social or kinship networks.⁹⁵ Similarly, the exchange of resources for cash should not automatically disqualify the transaction from being considered traditional. Refusal to recognize an exchange of resources for cash as appropriately “traditional” stems from romantic illusions about the nature of Native societies. Although barter was long the means of exchange among Natives, such groups moved to exchanges for cash early in their histories of contact with Europeans; it is nonsensical to hold that only non-cash exchange transactions can be traditional for Native cultures.

sion and possible abuses. A Task Force of the Federal Subsistence Board noted that “[t]he importance of clarifying the term ‘Customary Trade’ cannot be overstated. The Task Force feels that the retention of the current regulatory language would invite abuse from those who wish to use subsistence-harvested fish for monetary gain, to the detriment of subsistence uses and users.” *Proposed Regulations for Customary Trade, Briefing Prepared for Fall 2001 Regional Advisory Council Meetings, available at <http://www.subsistmginfo.org/ctd.htm>* (last visited Feb. 5, 2002). The Task Force hopes to adopt a Final Rule by June 2002. *Id.*

92. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(1), (4) (1982).

93. *See, e.g.*, 16 U.S.C. § 3170(a) (2000) (allowing access to be withheld where such uses would be detrimental to the area’s resource values).

94. *See, e.g.*, James M. Acheson, *The Lobster Gangs of Maine*, in PERSPECTIVES ON PROPERTY LAW 141, 142 (Robert C. Ellickson et al. eds., 2d ed. 1995).

95. Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 250 (1995).

The position that traditional activities must be small in scale also may unfairly bind the people engaging in them. As several commentators have noted, such a conception relegates Native communities to "museum piece" status, forcing them to stay locked in a static, no-growth pattern of activity.⁹⁶ A more realistic picture recognizes that culture is constantly changing and that Native groups both affect and are affected by the society around them. Attempting to identify the traditional activities of any particular culture is often to aim at a moving target. One scholar, examining the history of hill tribes in Bangladesh, criticizes a static conception of culture by demonstrating the dynamic nature of cultural change:

[T]he idea of unchangeable tribes frozen in time cannot stand the test of historical scrutiny [T]he present distribution of different groups in the hills is far from "traditional." Complex patterns of migration into and out of the area have been occurring for centuries. Almost all of these people have been highly mobile not just in the short term and over short distances . . . but also over long distances and over a long span of time⁹⁷

It is not clear that such a static conception of tradition is necessary for the preservation of what is unique about Native cultures, nor that it is necessary to justify according such cultures special privileges. A judicial decision in Canada regarding the rights of Natives to sell fish aptly expresses the view that traditional activities need not be synonymous with a static, changeless past: "The Indian right to trade his fish is not frozen in time [H]e is entitled . . . to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money."⁹⁸

The position that traditional Native activities are small in scale is also historically flawed because many Native cultures historically engaged in resource enterprises on a vast scale. In North America, numerous pre-colonization Indian societies developed vast trading networks that often stretched from one coast to the other.⁹⁹ In Alaska, long before the incursion of explorers and settlers of European descent, some Native tribes had developed systems for the taking and exchange of wild resources that were anything but small in scale. A Tlingit Indian prosecuted for violating the Lacey Act pointed to this history in appealing his conviction in *United States v.*

96. *Id.* at 247, 252-53.

97. Willem Van Schendel, *The Invention of the "Jummas": State Formation and Ethnicity in Southeastern Bangladesh*, in *INDIGENOUS PEOPLES OF ASIA* 121, 129-30 (R.H. Barnes et al. eds., 1995).

98. *Regina v. Van der Peet*, 83 C.C.C. 3d 289, 296 (1993).

99. See generally JACK WEATHERFORD, *NATIVE ROOTS: HOW THE INDIANS ENRICHED AMERICA* 6-10 (1991).

*Skinna*¹⁰⁰ under state law limiting subsistence uses to those that are noncommercial. *Skinna* argued that his crime, collecting and selling 32,000 pounds of herring spawn on kelp to a Canadian buyer, was on a scale comparable to that traditionally engaged in by Tlingit and Haida Indians and that state law conflicted with ANILCA's definition of customary trade.¹⁰¹ However, because *Skinna* presented no evidence to support this assertion, the court was not called upon to evaluate his tradition-based claim.¹⁰²

In a later case, *United States v. Alexander*,¹⁰³ the Ninth Circuit Court of Appeals decided that the "customary trade" protected by ANILCA includes sales for cash.¹⁰⁴ In *Alexander*, the resource use was arguably large-scale; the defendants had harvested a thousand pounds of herring roe on kelp, more than twice the amount for which they had permits, and they had crossed both state and international lines to sell the roe.¹⁰⁵ The *Alexander* court nonetheless decided that the defendants had shown that their activities fell within the scope of customary trade "as practiced by their ancestors," noting that a Haida elder had testified that for as long as he could remember, Haidas had traded herring roe with other tribes and with foreigners, going as far south as California to do so, and that as early as 1913, this trade had included cash transactions.¹⁰⁶

An examination of the cases reveals unanswered questions. First, while there is a dramatic difference in scale between the activities of *Skinna* (32,000 pounds of herring roe sold for \$91,000) and those of the *Alexander* defendants (1,000 pounds of roe that were seized before they could be sold), neither court attempted to set boundaries for the permissible scale of customary trade. How small in scale must an operation be to qualify as traditional? The dissenting judge expressed the opinion that the *Alexander* defendants' activity should *not* be considered small-scale:

Let it first be said that we are not dealing with a person who simply sought to subsist on a fishery closed to all but subsistence users. We deal with individuals who sought to make a great deal of money by taking an enormous quantity of herring spawn on kelp, and who only failed in their goal because they were as in-

100. 931 F.2d 530 (9th Cir. 1991). At the time of *Skinna*'s conviction, ANILCA had not yet been amended to include the word "noncommercial" in its definition of subsistence use.

101. *Id.* at 532.

102. *Id.*

103. 938 F.2d 942 (9th Cir. 1991).

104. *Id.* at 946.

105. *Id.* at 944-45.

106. *Id.* at 948-49.

ept as they were greedy.¹⁰⁷

Second, Skinna did not defend his assertion that the very large scale of his activity was traditional among his people. Given evidence of large-scale resource harvesting and vast trading networks among native peoples throughout the history of North America, it seems well within the realm of possibility that very large resource harvests may have been practiced historically among Tlingits and Haidas in Alaska. If Skinna had presented evidence sufficient to support this assertion, would the courts have been prepared to recognize similar harvests today as traditional activities?¹⁰⁸

C. Tradition as Associated with Culture and Community

In the laws governing resource use in Alaska, tradition is frequently associated with the concept of Native culture or with an identifiable social community. The rhetoric of tradition is often employed to advocate preserving a unique culture or community and allowing its members to continue doing what makes them unique—engaging in traditional activities that differentiate their group from more recent dominant cultures or groups.

Traditional practices as defining features of a culture are frequently maintained through a passing down from generation to generation of skills and values. For example, the Joint Boards’ regulations identifying customary and traditional subsistence uses require “a pattern of taking or use that includes the handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation.”¹⁰⁹ The Alaska Supreme Court clarified that this intergenerational transfer need not be intrafamilial or even occur within a settled community. In *Payton v. State*,¹¹⁰ the court reviewed the Board of Fisheries’ rejection of a proposal for a subsistence fishery in part because the Board determined that the area had not been the site of customary and traditional uses of fish for subsistence purposes.¹¹¹ The explanation of the Board Chair for his vote suggested a common perception that traditional uses occur among interrelated members of a settled community:

I note that many [communities at the site] . . . aren’t even the same communities that people lived in prior to the 1950’s. I note

107. *Id.* at 949 (Fernandez, J., dissenting).

108. The *Alexander* court appeared to consider *Skinna* as a possible example of an operation too large in scale to be considered traditional regardless of the evidence Skinna might have presented, because ANILCA specifies a subsistence purpose for permissible customary trade activities. *Id.* at 948.

109. ALASKA ADMIN. CODE tit. 5, § 99.010(b)(6) (2001).

110. 938 P.2d 1036 (Alaska 1997).

111. *Id.* at 1040-41.

. . . a transient population that comes and goes I can't find . . . that there's any sort of large proportion of people who've lived here for long enough to even have established a generation to generation customary and traditional use.¹¹²

Similarly, the Board noted in support of its decision that

[a]lthough the area has been continuously populated by a small number of year-round residents since the 1920's, there is no evidence that families remained in the area for more than one generation The board believes that the current subsistence law was designed to protect ongoing uses of fish and fishing practices—practices that existed in the the [sic] distant past and have been carried on through successive generations.¹¹³

The supreme court, however, decided that the continuity of the *practice*, rather than the continuity of the people, was what counted: “We conclude that the Board did not err in considering the presence of ‘successive generations,’ but that it did err when it required the current users of salmon to be related to past generations of users [W]e consistently have interpreted ‘customary and traditional’ to refer to ‘uses’ rather than ‘users.’”¹¹⁴ The court considered it sufficient that the residents who proposed the fishery learned subsistence skills and values from long-time residents of the area, even though they were not related to those residents.¹¹⁵

Another Alaska Supreme Court case illustrates a dilemma faced by individuals practicing a traditional activity characterized in part by the intergenerational transfer of knowledge. *State v. Kluti Kaah Native Village of Copper Center*¹¹⁶ was a suit brought by Alaska Native villagers when the Board of Game eliminated their extended moose hunting season in favor of a seven-day general sport hunt in which the villagers could participate. The Natives argued in part that the shortened general hunt would not afford them the opportunity to pass their heritage on to their children. The supreme court vacated an injunction suspending the general hunt, holding that the harm to competing interests, such as those of the State (in its capacity as steward of the resource), sport hunters and other subsistence hunters could be significant if Native village residents were allowed to hunt for a longer period than were others.¹¹⁷ In dissent, Chief Justice Rabinowitz maintained that in establishing the length of the hunt, the Board was obligated to consider the village's historical hunting period, which had in the past extended as

112. *Id.* at 1039 (quoting Gary Slaven, Chair of the Board of Fisheries).

113. *Id.* at 1039-42.

114. *Id.* at 1042.

115. *Id.* at 1044.

116. 831 P.2d 1270 (Alaska 1992).

117. *Id.* at 1274.

long as fifty days. Justice Rabinowitz argued that a refusal to consider fully this tradition amounted to a failure to protect subsistence uses, as the Board was obligated to do by statute:

There is no question that the traditional Ahtna method of hunting this game population encompassed much more protracted opportunities to engage in this activity with the younger generation. To compress the long standing custom into a sport hunter's seven-day "vacation" is to legislate a substantial departure from the historical subsistence hunting experience.¹¹⁸

This case seems to undermine the idea that the handing down of knowledge from generation to generation is an important cultural aspect of tradition. If intergenerational knowledge transfer is indeed a requirement for some traditional activities, then individuals wishing to engage in traditional activities must not be foreclosed from fulfilling one of the essential requirements of such activities.

The concept of traditional activities is also frequently associated with indigenesness. The MMPA extends protections for traditional activities to Alaska Natives only. The subsistence provisions of ANILCA were originally intended solely for Alaska Natives, but this stipulation changed after the State objected that such a provision would violate the state constitution, which extended a right to a subsistence lifestyle to all Alaskans.¹¹⁹ The Alaska legislature noted that "customary and traditional uses of Alaska's fish and game originated with Alaska Natives."¹²⁰ A senator from Alaska alluded to the association of tradition and Native culture in explaining the exemption for Alaska Natives in the bill that became the MMPA: "Native Alaskans are proud. They do not ask for special treatment But, nonetheless, they, too, have the right to be let alone, to follow their traditional way of life. It is this way of life I seek to protect in this bill."¹²¹ This rhetorically powerful association has proven difficult to implement consistently.

Outside Alaska, the concept of indigenesness is problematic. Groups are defined as "indigenous" or "Native" by reference to amorphous criteria that do not necessarily apply even to groups commonly recognized as Native. Although progress in developing legally and politically acceptable criteria is slow, the U.N. Working Group on Indigenous Populations described the relevant factors in understanding the term "indigenous" as the following: (1) priority

118. *Id.* at 1275 (Rabinowitz, C.J., dissenting).

119. Jane Langley McConnell, *1990 Ninth Circuit Environmental Review: Alaska Natives*, 21 ENVTL. L. 1275, 1286 n.58 (1991).

120. Act of July 14, 1992, 1992 Alaska Sess. Laws ch.1 § 1(a)(3) (legislative history of the 1992 amendments to the subsistence laws).

121. Case, *supra* note 62, at 1014.

in time; (2) voluntary perpetuation of cultural distinctiveness by group members; (3) self-identification of members with the group; and (4) experience of marginalization of the group by the now-dominant culture or cultures.¹²² While such criteria certainly help, they are not self-explanatory. For example, who decides when a group has been “marginalized,” and what does “marginalization” look like? How does one measure the value of a behavior or outlook to a group’s self-identity?

In Alaska, problems may arise in determining whether a particular individual belongs to a statutorily recognized Native group. Although federal law defines a “Native” of Alaska as “a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, . . . Eskimo, or Aleut blood, or combination thereof,”¹²³ this categorization also includes “any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town.”¹²⁴ Thus the question of membership is a subjective as well as an objective determination.

If identifying the contours of membership in a Native culture is difficult, determining what kinds of activities are characteristic of that culture is even more problematic. This determination implicates tradition’s time dimension—how far back in a group’s history must we look for traditional activities?—and its scale dimension—how involved may a Native become in systems and economies beyond the Native group and still have his or her activities considered traditional? The example of the Tlingit Indians who have historically occupied the village of Hoonah near what was then Glacier Bay National Monument¹²⁵ illustrates the difficulty in deciding whether activities may appropriately be attributed to a Native culture. In developing management plans and policies for the monument over the years following its designation, NPS had attempted to protect the traditional activities of the Tlingit, but the agency found that its concept of the Tlingits’ traditional activities was not the same as that of the Tlingits themselves.¹²⁶ In the 1930s and 1940s, for example, Hoonah villagers made their living both by

122. *Report of the Working Group on Indigenous Populations on its Eleventh Session*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, at 50, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993).

123. 50 C.F.R. § 18.3 (2000).

124. *Id.*

125. The Monument has now become part of Glacier Bay National Park.

126. *See generally* CATTON, *supra* note 88, at 100-32.

harvesting wild foods and by earning cash.¹²⁷ During this period and through World War II, Tlingits earned cash through seasonal employment as fishermen and cannery workers; aided by federal loans, many Tlingit men bought their own commercial fishing boats.¹²⁸ Tlingits also engaged in seal kills for bounty payments, and many, if not most, of the animals killed were simply returned for the bounty rather than consumed or used by the Native hunter.¹²⁹ In these and other ways, "the Tlingits' traditional subsistence activities became intertwined with the cash sector of their economy [T]heir identity as indigenous hunters and gatherers coalesced with their identity as industrial workers."¹³⁰ To outsiders looking in, commercial and industrial activities and cash sales of animals conflicted with traditional practices of a Native culture. The Natives themselves, however,

did not view their mixed economy as a juxtaposition of old and new elements, but rather as a synthesis of the two [W]hen whites observed Tlingits hunting with rifles and taking only the scalp of the seal for the bounty, they saw a corruption of aboriginal Indian culture, a grafting of the artificial onto the natural in the Indians' relationship to his [sic] environment. Hoonah Tlingits had no such conception of their seal hunting.¹³¹

An NPS staff biologist who studied Tlingit seal hunting practices in Glacier Bay during 1945-46 concluded that because the Natives no longer traveled in canoes or hunted with bow and arrow but instead used gasoline-powered fishing boats and rifles, they could no longer validly exercise their traditional use rights in the Monument area.¹³² This conclusion "ignored the historical continuity that underlay Tlingit cultural change. Few Tlingits would have agreed . . . that they had 'forsaken their ancestral way of life.'"¹³³ When a small number of Hoonah Natives began taking one hundred or more seals every season between 1963 and 1965, NPS saw them as different from other local Tlingits because they were engaging in the market economy.¹³⁴ The Park Superintendent claimed that these "hide hunters" in large fishing boats "were not real Indians," even though Tlingits in the area had been market hunting as well as subsistence hunting for generations.¹³⁵ Com-

127. *Id.* at 104

128. *Id.* at 104-05.

129. *Id.* at 109-11.

130. *Id.* at 111-12.

131. *Id.* at 113-14.

132. *Id.* at 127-28.

133. *Id.* at 128.

134. *Id.* at 199.

135. *Id.*

pounding the difficulty of reconciling these competing conceptions of what is traditional was the fact that, particularly for past practices, the NPS's records of the scale, frequency and relative importance of particular resource uses by the Tlingits differed from the Tlingits' own recollections. During the 1950s and 1960s, for example, NPS assumed that Native uses of Glacier Bay were minimal and of negligible importance to the Hoonah economy because of the low number of Natives requesting seal hunting permits and the small percentage of local Natives (ten percent) who responded to NPS's threatened termination of their privileges in the Bay in 1964.¹³⁶ However, respondents to a 1986 survey of Hoonah households by the Alaska Department of Fish and Game estimated that fifty-five percent of their households' annual subsistence take during that period had come from the Monument area.¹³⁷ These figures demonstrate "a huge disparity . . . in the perceptions of Natives and NPS personnel over the extent of past Native use of the resources—that will probably never be reconciled."¹³⁸ This example calls into question other traditional activity determinations that may be based on similarly erroneous or conflicting data.

Subsistence activities, defined by reference to tradition in numerous provisions of Alaskan resource law, are also frequently associated with the concept of indigenous or Native culture. Protecting traditional practices in the form of subsistence activities supports and perpetuates the structures of entire cultures. For example, subsistence policy under ANILCA is premised primarily upon cultural assumptions,¹³⁹ including the roles that subsistence activities play in group bonding, self-identification and social structure. That subsistence activities among Alaska Natives represent more than simply a means of survival is aptly illustrated in one author's explanation of why the term "subsistence" has "come to stand for the traditional Alaska Native way of life":

The traditional economy is based on subsistence activities that require special skills and a complex understanding of the local environment that enables people to live directly from the land. It also involves cultural values and attitudes: mutual respect, sharing, resourcefulness, and an understanding that is both conscious and mystical of the intricate interrelationships that link humans, animals, and the environment.¹⁴⁰

136. *Id.* at 198.

137. *Id.*

138. *Id.* at 199.

139. Sacks, *supra* note 95, at 265.

140. Case, *supra* note 62, at 1009.

Similarly, the Alaska Supreme Court noted the central cultural role of subsistence activities for many Alaskan Natives: "Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of these people. It has been claimed that their very lifestyle is threatened if they are deprived of this traditional method of obtaining the wherewithal for existence."¹⁴¹

Among Native groups in Alaska, subsistence activities frequently define communities and social and economic units, typically linked on the basis of kinship. The distribution and exchange of resources take place within community networks involving nearly every person in every village.¹⁴² The membership of political institutions is often determined by membership in subsistence groups, and the organization of these groups shapes marriage and residence patterns for members.¹⁴³ Subsistence is a way of life for such groups and encompasses values and modes of living and relating to other people and the natural world. Therefore, subsistence is part of the collection of group values and practices that define the group and that may be perpetuated generation by generation. This larger sociocultural role for subsistence activities was recognized in *Bobby v. State*,¹⁴⁴ where the court examined Alaska's subsistence laws and asserted that in determining whether subsistence activities should be given priority in a particular area, "[n]eed is not the standard [I]t matters not that other food sources may be available at any given time or place."¹⁴⁵

One of the primary factors confusing the interpretations of tradition in Alaskan resource law, however, is that subsistence has a dual meaning. The plain meaning of subsistence is simply the direct dependence on land and water resources for the necessities of life. This is the meaning associated with subsistence activities as practiced by many Alaskans for whom the resources they harvest provide a significant portion of their income or household and sustenance needs. In contrast, for Alaska Natives harvesting resources in accordance with patterns, skills and methods passed

141. *State v. Tanana Valley Sportsmen's Ass'n, Inc.*, 583 P.2d 854, 859 n.18 (Alaska 1978).

142. M. Lynne Bruzzese, Comment, *U.S. v. Alexander: Defining and Regulating "Subsistence Use" of Resources Among Alaska Natives*, 33 NAT. RESOURCES J. 461, 486 (1993).

143. Christopher V. Panoff, Chapter, In re *The Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENV'T'L L. 701, 724 (1998).

144. 718 F. Supp. 764 (D. Alaska 1989).

145. *Id.* at 778.

from generation to generation (typically surrounded with ceremonial or social significance), subsistence activities are incorporated within the action, and the actions themselves help to define an entire cultural framework. Both federal law and Alaska law blur the distinctions between these two meanings of subsistence. Some provisions protect subsistence activities out of an apparent concern for the welfare of those who depend on them for sustenance, while others elevate subsistence activities to privileged status simply because those activities are traditional. One commentator criticizes the culture-based aspects of subsistence privileges as applied to Alaska Natives, claiming that such laws “may not be compatible with either Native needs or rational resource use At one extreme, such laws may allow Native subsistence rights to thwart sensible resource management, while at the other, they may artificially arrest Native culture in a mythical past.”¹⁴⁶

Another cultural aspect of tradition emerges in Native practices associated with religious or spiritual ceremonies. For example, Natives are permitted to kill moose in limited numbers for use in funeral potlatches, a sacred ritual of ancient origin that takes place within a Native community after a member’s death.¹⁴⁷ Such practices, like subsistence activities, support and perpetuate a cultural group’s shared values, social relations and identity.

Traditional activities with a religious purpose may conflict with other values, such as the protection of a scarce resource. Recent controversies in two national monuments illustrate such conflicts. For centuries, Wupatki National Monument in Arizona was tribal territory of the Hopi Indians.¹⁴⁸ The Hopi, who believe that the eaglets are messengers between the physical and spiritual worlds, recently became the center of controversy when the Department of the Interior decided that they should be allowed to continue their traditional practice of gathering protected golden eagle hatchlings for ritual sacrifice.¹⁴⁹ Decision-makers had to balance respect for Hopi culture and the Natives’ interest in religious freedom with the public’s interest in protecting rare creatures and maintaining the national monument as a natural system free from human depredations.¹⁵⁰

At Devils Tower National Monument in Wyoming, Native American tribes perform traditional religious and cultural ceremo-

146. Sacks, *supra* note 95, at 252.

147. *See, e.g.*, Frank v. State, 604 P.2d 1068, 1069-70 (Alaska 1979).

148. Andrew C. Revkin, *U.S. Plan Would Sacrifice Baby Eagles to Hopi Ritual*, N.Y. TIMES, Oct. 29, 2000, at 14.

149. *Id.*

150. *Id.*

nies.¹⁵¹ Devils Tower has also become a popular rock climbing site, drawing more than 6,000 climbers each year.¹⁵² The sheer number of climbers and their actions—fixing bolts and pitons in the rock, shouting to one another and even taking pictures of ongoing Native ceremonies—has caused Native people to complain “that the presence of rock climbers has adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.”¹⁵³

The imposition by the NPS of a voluntary ban on climbing during June, the most culturally significant month for Natives, gave rise to a lawsuit brought by the affected climbers.¹⁵⁴ The climbers also referenced tradition by pointing to the history of rock climbing on the Tower, beginning as far back as 1893.¹⁵⁵ Although the suit was dismissed because the voluntary nature of the ban meant that the climbers had not suffered injury in fact,¹⁵⁶ the case demonstrates powerfully the kind of interests that may compete with the values embodied in traditional activities.

Much of the impetus for protecting traditional activities with a cultural dimension stems from the value in cultural diversity. Associating tradition exclusively with indigenoussness seems consistent with the intent of many federal laws to preserve or restore rights for Native peoples so that their cultures will not be completely lost through assimilation by the dominant surrounding cultures.¹⁵⁷ Such goals are based upon an understanding that unique cultures are valuable both independently and as part of our shared national heritage, and that their existence promotes important societal values such as tolerance of diverse views and lifestyles.¹⁵⁸

Associating tradition with culture also stems from a realization that Native groups often possess special knowledge and under-

151. Kelly Latimer, *Tenth Circuit Denies Rock Climbers Standing to Sue Over Devils Tower Voluntary Ban on Climbing*, 20 J. LAND RESOURCES & ENVTL. L. 114, 115 (2000).

152. *Id.*

153. *Id.*

154. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999).

155. Latimer, *supra* note 151, at 116; *Bear Lodge Multiple Use Ass'n*, 175 F.3d at 818.

156. *Bear Lodge Multiple Use Ass'n*, 175 F.3d at 822.

157. An example of this intention is the decision by the International Whaling Commission to restore traditional whaling opportunities for Makah Natives living in coastal Washington, leading to the tribe's first gray whale kill in 1999. The Commission's decision has not been universally applauded. Sam Howe Verhovek, *Reviving Tradition, Tribe Kills a Whale*, N.Y. TIMES, May 18, 1999, at A18.

158. See A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 556 (1999).

standing, particularly of the natural environment around them. This knowledge, developed through the experience of many generations, is based upon intimate familiarity with and reliance upon the land and its resources. Their accumulated knowledge allows Native groups to survive in often harsh environments. For example, Yupik Eskimos living in central Alaska developed an immense variety of words to describe the snow and ice around them and an elaborate set of tools for manipulating, trimming and shaping the snow blocks used for shelter.¹⁵⁹

Traditional practices within indigenous communities have often developed as the means of transmitting these kinds of understandings. Taboos based upon sustainable ecological principles, such as prohibitions on the killing of pregnant or nursing female game animals or spatial restrictions limiting fishing to certain areas, were woven into traditional resource harvesting practices.¹⁶⁰ Protecting traditional activities that embody such knowledge ensures the continued availability of this knowledge both within and outside the cultural group. Maintaining these values is often consistent with maintaining the continued viability of wildlife populations and other natural resources.

Associating tradition solely with indigenoussness fails to account for the fact that the values of cultural diversity, cultural heritage and specialized cultural knowledge are not exclusively associated with indigenous groups. Unique social groups are sometimes created by distinctive local or regional practices.¹⁶¹ History is replete with examples in which a common practice creates a “subculture” of shared identity and group norms, a subculture that is threatened when its traditional practices are not protected.¹⁶² Loggers in the Pacific Northwest and cattle ranchers in the Southwest are examples of this phenomenon. Nostalgia for the skills, practices and community atmosphere that may be lost if these subcultures were to disappear is a manifestation of the value of tradition even where indigenoussness is not a factor.¹⁶³ In Alaska, commercial fishermen in Glacier Bay see themselves as just such a threatened

159. See Joel Sherzer, *A Richness of Voices, in AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS* 251, 255 (Alvin M. Josephy, Jr., ed., 1993).

160. See generally Johan Colding & Carl Folke, *The Taboo System: Lessons About Informal Institutions for Nature Management*, 12 *GEO. INT'L ENVTL. L. REV.* 413 (2000).

161. See generally Tarlock, *supra* note 158, at 550-58 (discussing the cultural claims of “at-risk” communities of western ranchers and western irrigators).

162. See generally *id.*

163. See *id.*

subculture if regulations prevent them from continuing their traditional practices of fishing in the Bay.¹⁶⁴ In addition, Natives are not the exclusive purveyors of the desirable values that accompany tradition's sociocultural dimension. In considering revisions to the state's subsistence laws, the Alaska state legislature noted:

there are Alaskans, both Native and non-Native, who have a traditional, social, or cultural relationship to and dependence upon wild renewable resources Although customs, traditions, and beliefs vary, these Alaskans share ideals of respect for nature, the importance of using resources wisely, and the value and dignity of a way of life in which they use Alaska's fish and game for a substantial portion of their sustenance.¹⁶⁵

Nevertheless, there still seems to be room for debate about whether the cultural dimension of tradition, at least when associated with subsistence activities, ought to embody indigeneness because the role of traditional subsistence activities for Natives is somehow special. This claim was made by the Alaska Native plaintiffs in *The Exxon Valdez Alaska Native Class v. Exxon Corporation*.¹⁶⁶ The class, made up of 3,455 Alaska Natives, sued Exxon Shipping Company and Exxon Corporation for damage to their subsistence way of life when the oil tanker *The Exxon Valdez* ran aground in Prince William Sound. The accident spilled eleven million gallons of oil and caused ecological and economic devastation.¹⁶⁷ The Native class claimed that the oil spill harmed "an integrated system of communal subsistence . . . inextricably bound up not only with the harvesting of natural resources damaged by the spill but also with the exchange, sharing and processing of those resources as the foundation of an established economic, social and religious structure."¹⁶⁸ The plaintiffs asked the Ninth Circuit to decide that damage to the subsistence way of life of Alaska Natives was a "special injury," distinct from injuries suffered by other Alaskans engaging in subsistence activities.¹⁶⁹ The court of appeals refused, holding that the difference was only in the degree of injury.¹⁷⁰

164. See generally CATTON, *supra* note 88, at 273-90.

165. Act of July 14, 1992, ch. 1, § (a)(1)-(2), 1992 Alaska Laws 2d Sp. Sess., H.B. No. 601.

166. 104 F.3d 1196 (9th Cir. 1997).

167. Panoff, *supra* note 143, at 703.

168. *Exxon Valdez Alaska Native Class*, 104 F.3d at 1198.

169. *Id.* at 1197.

170. *Id.*

V. WHO WILL INTERPRET TRADITION IN ALASKA?

Who should be the final arbiter in Alaska of what tradition means? What institution or entity should be given the primary responsibility for ensuring appropriate consideration for and balancing of the spectrum of values embodied in the concept of tradition? Will the answer vary, depending on whether the statutory law in question is state or federal? Whose perspective matters in deciding what is and what is not traditional?

Looking to the affected individuals or group for their conceptions of their traditions is an option, but the affected parties will almost certainly be guided by self-interest in making those determinations. As the example of the Tlingits in Glacier Bay suggests,¹⁷¹ however, an agency such as the NPS may not be a more “neutral” arbiter and may be influenced by its own assumptions and priorities. The considerable overlap in terminology and purpose between state and federal laws governing resource uses in Alaska complicates the question of whose interpretation should be given deference. This is especially so in the area of traditional subsistence uses, where the State has in the past and may again implement federal law on federal lands in Alaska. Under the *Chevron* standard, a court should defer to an administrative agency’s construction of a statute where the agency is entrusted with administration of that statute.¹⁷² In the *Snowmobile* litigation, however, the snowmobiling interests argued that NPS’s interpretation of traditional activities should be given *no* deference because it was based on “political as opposed to factual decision-making.”¹⁷³

State agencies, boards, and local councils have the advantage over courts and legislatures of being “on the ground” with the resources and therefore are perhaps best able to ensure that in assigning traditional access and use privileges, the health and values of the underlying resources are maintained. These may be the best entities to represent local interests.

The disadvantage of such state and local entities is that they may be more subject to undue pressures from local interest groups. Such was the Ninth Circuit’s suspicion in a pre-*McDowell* suit brought by residents of the increasingly urbanized Kenai Peninsula who argued that the Joint Boards’ definition of “rural” in prefer-

171. See *infra* p. 189.

172. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

173. Oral Argument on Pending Summ. J. Mots. at 4, *Alaska State Snowmobile Ass’n, Inc. v. Babbitt*, 79 F. Supp. 2d 1116 (D. Alaska 1999) (No. A99-0059-CV) (statement of William P. Horn for plaintiff Alaska State Snowmobile Association, Inc.).

encing rural subsistence uses excluded them from engaging in legitimate subsistence activities.¹⁷⁴ The court concluded that the principal effect of the Joint Boards' definition of "rural" as an area other than a community with a population of 7,000 or more "was to deny the subsistence fishing priority to residents of areas dominated by a cash economy."¹⁷⁵

As a result, the Kenaitze tribe could not continue the subsistence fishing and hunting they had engaged in for hundreds of years because the Kenai Peninsula, located near Anchorage, had become a prime area of commercial and sport fishing, with an economy now dominated by cash.¹⁷⁶ This was an unfair result in an area whose 25,000 inhabitants are spread over 16,000 square miles, said the court, which then declared that "[t]he state has attempted to take away what Congress has given, adopting a creative redefinition of the word rural, a redefinition whose transparent purpose is to protect commercial and sport fishing interests."¹⁷⁷

In determining the appropriate definition, the *Kenaitze* court refused to defer either to the interpretation of the statute offered by the Secretary of the Interior or to that of the State. The court considered the State's argument for deference on the ground that with regard to ANILCA, the State "performs functions not unlike those of a federal agency charged with implementing an Act of Congress."¹⁷⁸ The court rejected the argument, however, noting that "[w]hile Alaska has a long history of managing large wilderness areas, it lacks the expertise in implementing federal laws and policies and the nationwide perspective characteristic of a federal agency."¹⁷⁹ The court noted that state regulatory activity is not subject to congressional oversight and that the State is not delegated any authority under ANILCA.¹⁸⁰ The court considered the Interior Secretary's familiarity with the statutory scheme but nevertheless determined that deference to the Secretary's views was not necessary.¹⁸¹ After the state regulatory scheme is in place, the Secretary is authorized only to monitor and not to evaluate the

174. See *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314-15 (9th Cir. 1988).

175. *Id.* at 314.

176. *Id.* at 313.

177. *Id.* at 318. A decision in June 2001 returned the Kenai Peninsula to "rural" status, with the result that only about 9,000 residents qualify for federal subsistence privileges. See *Federal Board Says Kenai Peninsula is Nonrural*, ALASKA, Nov. 2001, at 58.

178. *Kenaitze*, 860 F.2d at 315-16.

179. *Id.* at 316.

180. *Id.*

181. *Id.* at 315.

State's compliance with ANILCA's provisions.¹⁸² The court's reasoning in deciding that state interpretations merited no deference is questionable. Unlike most federal statutes, ANILCA is state-specific; its provisions address only public lands in Alaska and no attempt is made or needed to harmonize the statute's approach in Alaska with approaches taken elsewhere. While ANILCA is a federal statute, and the interests the law protects are not state-specific, it nevertheless seems that decision-makers ought at least to be guided to some extent by the State's interpretations of a statute directed at lands wholly within that state.

VI. CONCLUSION

The lack of a definition or definitions for tradition as the term is used to refer to traditional activities, resource uses and access to resources has created difficulties for decision-makers who must balance the competing values the concept invokes. These difficulties can be expected to recur because of the prevalence of the concept in state and federal law. Complicating the task of interpretation are the conflicts among competing values invoked by tradition as well as the inability of any single definition of tradition to encompass adequately the full range of interests that deserve protection. Two steps should aid decision-makers in the process of developing workable solutions to the problems of interpreting tradition: (1) identifying and articulating the full range of underlying and potentially competing values that a given invocation of tradition seeks to protect; and (2) deciding what institution or entity is best suited to interpret tradition in particular contexts and giving appropriate deference to the judgment of that institution or entity in its interpretation.

Jennifer L. Tomsen

182. *Id.*