

# ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT COMPLIANCE & NONSUBSISTENCE AREAS: HOW CAN ALASKA THAW OUT RURAL & ALASKA NATIVE SUBSISTENCE RIGHTS?

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## ABSTRACT

*The Alaska Constitution prevents the Alaska National Interest Lands Conservation Act's (ANILCA)<sup>1</sup> rural subsistence<sup>2</sup> priority from being enforced.<sup>3</sup> The Federal Government currently manages subsistence on federal lands in Alaska and Alaska can only resume management if it becomes ANILCA compliant. The current federal management system does not sufficiently protect rural and Alaska Natives' subsistence rights. Alaska's Legislature must overcome the rural-urban divide to amend its constitution to become ANILCA compliant again by providing a modified rural priority*

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1. 16 U.S.C. § 3101 (2012).

2. Subsistence uses are defined as “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicrafts out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; and for customary trade.” 16 U.S.C. § 3113 (2012).

3. Alaska Natives have the same right to self-governance as Native American tribes, though the Alaska Native Claims Settlement Act (ANCSA) does not reference their sovereignty. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07(3)(a) (Nell Jessup Newton ed., 2005) [hereinafter, COHEN'S HANDBOOK]). Because sovereignty and Alaska Native subsistence rights are not stated in ANCSA or ANILCA, Alaska Natives have had to litigate issues of sovereignty and subsistence access. *See id.* (discussing judicial setbacks brought on due to the Alaska's definition of the term “rural”).

that includes urban<sup>4</sup> Alaska Natives. The Alaska Legislature should repeal the nonsubsistence zones statute because it denies federally defined rural areas the state's subsistence priority.

## INTRODUCTION

Though caribou outnumber people in Alaska,<sup>5</sup> competition is still fierce for Alaska's wild game and fish. The Alaska Department of Fish and Game (ADFG) may constitutionally cap fish and wildlife harvests to protect fish and wildlife populations.<sup>6</sup> After the ADFG sets these conservation limits, only a fixed amount of "harvestable surplus of a fish or game population" is available for subsistence and sport harvests.<sup>7</sup> Subsistence users compete with powerful commercial-fishing and sport-hunting-and-fishing interests for this "harvestable surplus" of fish and wildlife.<sup>8</sup>

Conflicts over fish and wildlife emerged in western Alaska where villagers and commercial boats fished for the same salmon and in the Nelchina Basin where hunters' demand for caribou exceeded supply.<sup>9</sup> A rural priority would increase access to subsistence foods through measures like longer seasons and increased limits.<sup>10</sup> In contrast, the State of Alaska's current subsistence priority only provides a "reasonable opportunity" for subsistence use before sport hunters and fishers may harvest the available fish and wildlife.<sup>11</sup> With no rural priority in place, a

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4. This Article acknowledges that the term "urban" might seem inappropriate for most areas of Alaska. However, this Article will refer to urban areas instead of the government's term "nonrural" in an effort to be clear. This Article will also refer to Alaska Natives who live in the areas the government classifies as "nonrural" as urban Alaska Natives.

5. Alaska has approximately 950,000 caribou, *Caribou Hunting in Alaska*, ALASKA DEPARTMENT OF FISH AND GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=caribouhunting.main>, (last visited February 3, 2013), but only 731,449 people, *State and County Quick Facts*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Feb. 3, 2013).

6. See *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989) (implying that the Alaska Constitution does not bar all forms of exclusion required for species protection purposes).

7. *Subsistence Regulations*, ALASKA DEPT. OF FISH & GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=subsistenceregulations.main> (last visited Feb. 3, 2013) (citing to ALASKA STAT. § 16.05.258(b) (2012)).

8. Tom Kizzia & David Hulen, *Subsistence Questions and Answers: When a Decision Thousands of Miles Away Can Take the Food Off Your Table, You Pay Attention*, ANCHORAGE DAILY NEWS, Apr. 9, 1995, at M1.

9. *Id.*

10. Emmett O'Connell, *Alaskan Natives Fight for Hunting and Fishing*, INDIAN COUNTRY, July 30, 1998, available at 1998 WLNR 5147677.

11. ALASKA STAT. § 16.05.258(b); *State v. Morry*, 836 P.2d 358, 365 (Alaska 1992).

weak subsistence priority, and nonsubsistence zones barring subsistence access, rural Alaskans face diminished subsistence access while commercial and sport interests continue to harvest fish and wildlife in nonsubsistence zones.<sup>12</sup>

Congress determined that subsistence is essential for rural Alaskans—specifically Alaska Natives—to maintain physical, economic, traditional, and cultural existence.<sup>13</sup> Congress has noted that there is no substitute for subsistence foods in rural Alaska.<sup>14</sup> Food costs twenty-five percent more in rural communities than the already-expensive food in Anchorage, and the average rural Alaskan’s income is much lower than that of the average Anchorage resident.<sup>15</sup> Further, more than serving as a means for survival, Alaska Natives and rural Alaskans traditionally view subsistence as a “collective right based on sharing.”<sup>16</sup> Thus, protecting subsistence traditions protects Alaska Native culture and rural Alaskans’ social existence.<sup>17</sup>

The Alaska Legislature should pass a bill putting a modified-rural-priority constitutional amendment before voters and it should repeal the nonsubsistence zones section of the subsistence statute. Only through such measures can Alaska comply with federal law and preserve subsistence traditions.

## I. THE ALASKA CONSTITUTION AND ANILCA CONFLICT

### A. ANILCA Requires a Rural Priority

The Alaska National Interest Lands Conservation Act’s (ANILCA)<sup>18</sup> preserves Alaskan wilderness for future generations by adding land to

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12. See generally Kizzia & Hulen, *supra* note 8, at M1 (mentioning the continued presence of sport hunters and fishers in nonsubsistence zones).

13. 16 U.S.C. § 3111(1) (2012).

14. *Id.* § 3111(2).

15. Don Callaway, *Striking a Balance: Preserving Nature, Conserving Culture in the Alaska Ecosystem*, COMMON GROUND: ARCHEOLOGY ETHNOGRAPHY PUB. INTEREST 42, 44 (1998).

16. Matthew Kurtz, *Ruptures and Recuperations of a Language of Racism in Alaska’s Rural/Urban Divide*, 96 ANNALS ASS’N AM. GEOGRAPHERS 601, 613 (2006) (citing Molly Lee, *The Cooler Ring: Urban Alaska Native Women and the Subsistence Debate*, 39 ARCTIC ANTHROPOLOGY 3, 5 (2002)).

17. See 16 U.S.C. § 3111(1) (“[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.”).

18. *Id.* at § 3101.

the national conservation systems.<sup>19</sup> ANILCA gives rural Alaskans an exclusive right to subsistence hunt and fish on federal lands.<sup>20</sup> Alaska should administer and enforce ANILCA's exclusive-rural-subsistence priority on federal land and create and administer a modified-rural-subsistence priority on private and state land.<sup>21</sup> A modified-rural-priority is necessary to ensure rural Alaskans and Alaska Natives have the most subsistence access while permitting other Alaskans to participate in subsistence harvesting.<sup>22</sup>

In addition to increasing the national conservation systems' acreage, ANILCA regulates subsistence hunting and fishing on federal lands in Alaska.<sup>23</sup> These federal lands compose almost sixty-eight percent of Alaska.<sup>24</sup> State law regulates subsistence on state and private lands—including land owned by Native corporations—composing the remaining thirty-two percent of land in Alaska.<sup>25</sup> There is a rural

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19. See *id.* § 3101(a) (“In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.”); see also ANILCA *Introduction*, U.S. FISH & WILDLIFE SERV., <http://alaska.fws.gov/asm/nilca/intro.html> (last visited Feb. 3, 2013) (“In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.”).

20. 50 C.F.R. § 100.5(a) (2012).

21. The regulations effectuating the federal government's rural subsistence priority still exclude urban Alaska Natives. This gap in coverage should be addressed by amending the federal regulations to create a modified-rural priority that includes urban Alaska Natives. However, this Article does not address this: it examines Alaska's duty to administer ANILCA's rural priority and create its own modified-rural priority.

22. All Alaskans' subsistence uses are second to the government's management of these subsistence resources to ensure they are preserved for future generations. See generally 16 U.S.C. § 3114 (providing subsistence priorities when it is necessary to restrict taking of fish and game to protect wildlife).

23. Jack B. McGee, *Subsistence Hunting and Fishing in Alaska: Does ANILCA's Rural Subsistence Priority Really Conflict with the Alaska Constitution?*, 27 ALASKA L. REV. 221, 230 (2010) (citing 16 U.S.C. §§ 3113–3115).

24. *Federal Land in the West*, WESTERN STATES TOURISM POLICY COUNCIL, <http://www.commerce.state.ak.us/wstpc/Publications/FedLandWest.htm> (last visited February 22, 2013).

25. See Elizabeth Barrett Ristorph, *Alaska Tribes Melting Subsistence Rights*, 1 ARIZ. J. ENVTL. LAW & POL'Y 47, 69 (2010) (citing DAVID S. CASE & DAVID AVRAHAM VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 301 (2d ed. 2002)) (“ANILCA has been applied only to federal public lands (about 67 percent of the State.”).

subsistence priority on federal lands, but not on private lands.<sup>26</sup>

In drafting ANILCA, Congress found subsistence essential to rural Alaskans' and Alaska Natives' physical, economic, traditional, and cultural/social existence.<sup>27</sup> The Department of the Interior's regulations interpreting ANILCA only allow rural Alaskans to subsistence hunt and fish on federal lands.<sup>28</sup> ANILCA also prioritizes subsistence above other uses.<sup>29</sup> Further, ANILCA requires that if subsistence must be restricted for conservation, the rural priority should be administered by applying "Tier II" criteria: "customary and direct dependence, local residency, and availability of alternative resources."<sup>30</sup>

### 1. *Origin of the Rural Priority*

In the past, the Federal Government settled battles over resources in favor of rural Alaskans.<sup>31</sup> For instance, early statutes granted Alaska Natives and food-needy travelers prioritized access to game.<sup>32</sup> One fishing statute allowed all Alaska Natives and the non-Alaska Native residents who lived within fifty miles of certain rivers to fish out of season using different methods.<sup>33</sup> In addition, the Endangered Species Act exempts the subsistence uses of Alaska Natives and non-Alaska Native permanent residents of Alaska Native villages.<sup>34</sup>

The Alaska Native Claims Settlement Act ("ANCSA")<sup>35</sup> influenced ANILCA's attention to a rural priority.<sup>36</sup> Congress extinguished

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26. CASE & VOLUCK, *supra* note 25, 301-02.

27. 16 U.S.C. § 3111.

28. 50 C.F.R. § 100.5(a) (2012).

29. 16 U.S.C. § 3114 (requiring "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes").

30. *Id.*

31. McGee, *supra* note 23, at 224 (citing Frank Norris, *Alaska Subsistence: A National Park Service Management History*, U.S. DEPARTMENT OF THE INTERIOR (2002), available at [http://www.cr.nps.gov/history/online\\_books/norris1/chap9b.htm](http://www.cr.nps.gov/history/online_books/norris1/chap9b.htm)).

32. See, e.g., COHEN'S HANDBOOK, *supra* note 3, § 4.07 (citing Act of June 7, 1902, 32 Stat. 327, amended by, Act of May 11, 1908, 35 Stat. 102) (exempting Alaska Natives and those traveling who needed food from Alaska's first game law); Alaska Game Commission Act, 43 Stat. 739, 744 (1925), amended by Act of Oct. 10, 1940, 54 Stat. 1103, 1104 and Act of July 1, 1943, 57 Stat. 301, 306 (exempting Alaska Natives, prospectors, and travelers who needed food from hunting seasons)). These protections are focused on not just rural domicile but the need for food that accompanies living in rural areas. Rural Alaskans still benefit from subsistence as nonsubsistence foods are expensive in rural Alaska.

33. COHEN'S HANDBOOK, *supra* note 3, § 4.07 (citing Act of Apr. 16, 1934, § 3, 48 Stat. 594, 595).

34. COHEN'S HANDBOOK, *supra* note 3, § 4.07 (citing 16 U.S.C. § 1539(e)(1)).

35. 43 U.S.C. § 1601 (2012).

36. "Section 17(d)(2) of ANCSA directed the Secretary to withdraw up to 80

aboriginal hunting and fishing rights in ANCSA.<sup>37</sup> Paradoxically, Congress expected the Secretary of the Interior and the State to protect Alaska Native subsistence uses by “closing appropriate lands to entry by non-residents when the subsistence resources of [those] lands are in short supply. . . .”<sup>38</sup> and “exercis[ing] [the Secretary’s] existing withdrawal authority.”<sup>39</sup> Congress could not agree on how to protect Alaska Natives’ subsistence rights, but the ANCSA Conference Committee expected that the Secretary of the Interior and Alaska would “take any action necessary to protect the subsistence needs of the Natives.”<sup>40</sup> Thus, the statute itself did nothing to protect Alaska Native subsistence hunting and fishing.<sup>41</sup>

Despite Congress’ expectation that the State and the Secretary of the Interior would intercede, neither the State nor the Federal Government adequately protected Alaska Natives’ fishing and hunting rights.<sup>42</sup> So Congress decided to intervene through ANILCA: ANILCA’s rural priority grew out of Congress’s attempt to protect Alaska Natives’ subsistence practices.<sup>43</sup> The initial bill for ANILCA suggested an Alaska Native subsistence priority to protect Alaska Natives’ subsistence access.<sup>44</sup> The State of Alaska balked at the proposed Alaska Native priority and successfully appealed to Congress to establish a rural

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million acres of public lands for conservation purposes. This directive set in motion the sequence of events culminating in adoption of [ANILCA].” COHEN’S HANDBOOK, *supra* note 3, § 4.07 (citing 43 U.S.C. § 1616(d)(2)).

37. COHEN’S HANDBOOK, *supra* note 3, § 4.07 (citing 43 U.S.C. § 1603(b) (2012)).

38. H.R. REP. NO. 92-746, at 24 (1971) (Conf. Rep.), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

39. COHEN’S HANDBOOK, *supra* note 3, § 4.07 (citing H.R. REP. NO. 92-746, at 37).

40. *Id.*

41. *Id.* (citing 43 U.S.C. § 1603(b)).

42. Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17, 37 (2007) (citing Alaska Natl. Interest Lands Conserv. Act, Pub. L. No. 96-487, Title VIII, 94 Stat. 2422, codified at 16 U.S.C. §§ 3111-3126; *see generally* COHEN’S HANDBOOK, *supra* note 3, § 4.07(3)(a)(ii) (“At the same time, ANCSA did not even mention the governmental powers exercised by Native tribes in Alaska. Moreover, ANCSA did not provide for Native hunting and fishing rights in any way. Congress merely expressed an expectation that the State of Alaska and the Secretary of the Interior would somehow protect traditional Native hunting and fishing practices.”).

43. *See* 16 U.S.C. § 3114(4) (“[T]he taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”).

44. *Vill. of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984), *rev’d on other grounds sub. nom.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987); Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 UMKC L. REV. 645, 657-58 (1991).

priority<sup>45</sup> instead.<sup>46</sup> The rural priority includes rural non-Alaska Natives, but it was intended to protect Alaska Natives' subsistence use<sup>47</sup> and attempted to replace Alaska Natives' aboriginal hunting and fishing rights.<sup>48</sup>

2. *The Rural Priority Should Be Liberally Interpreted Under the Indian Law Canons*

Indian Law canons should apply to interpreting ANILCA's Title VIII because this legislation protects Alaska Native subsistence rights.<sup>49</sup> While ANILCA is not entirely Indian legislation, Title VIII references Indian legislation because it derives from ANCSA, which was Indian legislation.<sup>50</sup> The rural priority should be liberally interpreted when administering the subsistence priority. If ambiguities exist, they should be resolved in favor of Alaska Natives.<sup>51</sup>

However, the Ninth Circuit held that ANILCA's Title VIII is not Indian legislation and the Ninth Circuit did not resolve the vagueness in Section 810 of ANILCA in favor of Alaska Natives.<sup>52</sup> Similarly, the Supreme Court refused to apply the Indian law canon resolving vagueness in favor of Alaska Natives in a decision, but only because the Court did not believe there was any vagueness to resolve in that matter.<sup>53</sup>

## **B. The Alaska Constitution's Equal Access Clauses Prohibit a Rural Priority**

The Alaska Constitution contains three equal access provisions that conflict with a rural priority.<sup>54</sup> These three clauses are the no-exclusive-

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45. This Article will refer to the rural-subsistence priority as a "rural priority."

46. COHEN'S HANDBOOK, *supra* note 3, § 4.07 (citing 125 CONG. REC. 9904 (1979); 126 CONG. REC. 29,278-79 (1980)); *see also* Kancewick & Smith *supra* note 44, at 645, n.5 (citing 126 CONG. REC. 29,278-79 (1980) (statement of Rep. Udall) (attributing the rural priority to Alaska's governor's influence).

47. Kancewick & Smith, *supra* note 44, at 645-46, n.6 (citing 126 CONG. REC. 29,278-79 (1980) (statement of Rep. Udall)).

48. *See* CASE & VOLUCK, *supra* note 25, at 289 ("[I]t is in some sense a settlement of the Alaska Native aboriginal hunting and fishing claims, seemingly extinguished in ANCSA.").

49. *Vill. of Gambell*, 746 F.2d at 581.

50. Kancewick & Smith, *supra* note 44, at 645, n.5 (citing 126 CONG. REC. 29,278-79 (1980) (statement of Rep. Udall)).

51. *Vill. of Gambell*, 746 F.2d at 580-81; *see also* 125 CONG. REC. 9904 (1979) (describing Congress's intent to protect Alaska Natives' rights).

52. *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1228-29 (9th Cir. 1999).

53. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 555 (1987).

54. *McDowell v. State*, 785 P.2d 1, 5-6 (Alaska 1989).

right-of-fishery, common-use, and uniform-application clauses.<sup>55</sup> The Alaska Supreme Court held that the no-exclusive-right-of-fishery clause's prohibition of privileged access to fisheries<sup>56</sup> expressly conflicts with ANILCA's rural priority.<sup>57</sup> Furthermore, the Court held that the common-use clause's reservation of fish and wildlife to Alaskans for common use,<sup>58</sup> and the uniform-application clause's requirement that Alaska's natural-resource laws apply equally to similarly situated people<sup>59</sup> indirectly conflicts with ANILCA's rural priority.<sup>60</sup>

The court interpreted all three clauses to prohibit any special hunting or fishing privileges.<sup>61</sup> The court also noted that all three sections of the Alaska Constitution give the public expansive access to wildlife.<sup>62</sup> The court refused to prioritize rural Alaskans' subsistence use because it held that to do so would impinge upon the Alaska Constitution's broad access to fish and wildlife.<sup>63</sup> Alaska cannot manage subsistence on federal lands because the rural priority violates the equal-access provisions of the Alaska Constitution in its current form.<sup>64</sup>

## II. ALASKA FAILED TO MAINTAIN A RURAL SUBSISTENCE PRIORITY SO THE FEDERAL GOVERNMENT CURRENTLY MANAGES SUBSISTENCE ON FEDERAL LANDS

One commentator aptly characterized Alaska's journey into and out of compliance with ANILCA as "the tortured course of Alaska's attempt to maintain its end of the bargain to provide a rural priority on state lands and waters."<sup>65</sup> The State of Alaska could manage subsistence on federal lands where ANILCA's rural priority exists, so long as it makes laws consistent with ANILCA's definition, priority, and participation.<sup>66</sup> The Federal Government hoped that managing

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55. *Id.*

56. ALASKA CONST. art. VIII, § 15.

57. *See McDowell*, 785 P.2d at 9 ("We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons.").

58. ALASKA CONST. art. VIII, § 3.

59. *Id.* § 17.

60. *McDowell*, 785 P.2d at 9.

61. *Id.*

62. *Id.* at 6 (citing *Owsichuk v. State*, 763 P.2d 488, 492 (Alaska 1988)).

63. *See id.* at 10 (expressing concern about the rural subsistence use and its effects on Title VII's open access values).

64. *Id.* at 11.

65. Robert T. Anderson, *Alaska Natives and American Laws Second Edition* by David S. Case & David Avraham Voluck, 18 ALASKA L. REV. 317, 320 (2001) (book review).

66. Anderson, *supra* note 42, at 37 (citing 16 U.S.C. § 3115(d) (2012)) (any



subsistence on federal land would incentivize Alaska to create a rural priority that applies to state land.<sup>67</sup> However, as Alaska managed subsistence on federal lands after ANILCA, Alaska wavered in and out of compliance with ANILCA between 1982 and 1990.

The Alaska Legislature drafted subsistence laws in 1978 in order to manage subsistence on federal lands while Congress finalized ANILCA.<sup>68</sup> The 1978 subsistence laws did not mention a rural priority nor did it mention Alaska Natives' access to subsistence. Once ANILCA was enacted in 1980, its statutory language did not mention Alaska Natives' access to subsistence either. But as discussed above, the rural priority replaced the proposed Alaska Native priority.<sup>69</sup>

The Joint Boards of Fish and Game believed that the 1978 Alaska subsistence laws gave them authority to issue regulations creating a rural subsistence priority.<sup>70</sup> These regulations brought Alaska into compliance with ANILCA.<sup>71</sup> The 1982 Alaska subsistence regulations provided subsistence hunting and fishing rights for rural Alaskans.<sup>72</sup> The U.S. Secretary of the Interior determined that Alaska was compliant with ANILCA's rural preference again after the Alaska Boards of Fisheries and Game adopted this regulation in 1982.<sup>73</sup>

Alaska fell out of compliance again when the Alaska Supreme Court rejected the rural priority in *Madison v. State Dep't. of Fish & Game*.<sup>74</sup> The court held that the 1978 subsistence law did not authorize the State to create an exclusive rural priority.<sup>75</sup> After the decision, the Assistant Secretary of the Interior notified Alaska's governor that if Alaska's subsistence program was not consistent with ANILCA by June 1, 1986, then the Federal Government would take over management of ANILCA.<sup>76</sup>

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laws regulating subsistence uses had to be formulated with the advice and participation of regional councils and local advisory committees, which had the authority to evaluate and make recommendations on laws regulating such uses).

67. COHEN'S HANDBOOK, *supra* note 3, at § 4.07.

68. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

69. *Vill. of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984), *rev'd on other grounds sub. nom.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987); *Kancewick & Smith*, *supra* note 44, at 645-46, n.6.

70. *Kenaitze Indian Tribe*, 860 F.2d at 314.

71. *See id.* (the Secretary of the Interior confirmed that the legislation was ANILCA-compliant).

72. *Bobby v. Alaska*, 718 F. Supp. 764, 767 (D. Alaska 1989).

73. *Id.*

74. 696 P.2d 170, 174, 177-78 (Alaska 1985).

75. *See id.* at 178 (explaining that the board's regulation disenfranchised many subsistence users that were supposed to be protected by the statute).

76. *Bobby*, 718 F. Supp. at 813-15.

In response, the Alaska Legislature amended the 1978 subsistence law to add an exclusive rural priority<sup>77</sup> in 1986 to prevent the federal government from taking over management of federal lands.<sup>78</sup> The Legislature passed the law before the June 1, 1986 deadline, forestalling federal subsistence management on federal lands.<sup>79</sup> As a result, the Assistant Secretary of the Interior for Fish and Wildlife and Parks wrote a letter to the Governor of Alaska stating that Alaska was compliant again.<sup>80</sup> Nevertheless, this compliance would last less than three years.

The Ninth Circuit Court of Appeals ruled in 1989 that the State's definition of rural was inconsistent with ANILCA's intent.<sup>81</sup> The State's rural classification system did not focus on how many people live in an area nor on how far removed it is from a highly populated area. Instead, the State classified an area as rural based upon an area's reliance on a non-cash economy.<sup>82</sup> The socio-economic definition of rural impedes subsistence access in communities commonly regarded as rural. For example, the Kenai Peninsula where the Kenaitze lived for hundreds of years<sup>83</sup> was classified as rural until the State changed the rural definition.<sup>84</sup> The new, socio-economic definition of rural reclassified the Kenai Peninsula as urban.<sup>85</sup> Under this new classification, the rural priority no longer protected the Kenaitze's subsistence practices.<sup>86</sup> The Kenaitze sued the State of Alaska, attempting to force it to issue regulations that defined rural consistent with ANILCA's rural priority.<sup>87</sup>

After the Ninth Circuit decided that the socioeconomic definition of rural was inconsistent with ANILCA, the Alaska Supreme Court held in *McDowell v. State*<sup>88</sup> that the Alaska Constitution prevented the State from implementing ANILCA's exclusive rural priority.<sup>89</sup> *Kenaitze's* holding that the definition of rural should not be based on the economy barely took effect before *McDowell* took Alaska back out of ANILCA

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77. An exclusive rural priority only allows rural Alaskans to subsistence hunt and fish.

78. McGee, *supra* note 23, at 234-35 (citing Act of May 30, 1986, ch. 52, 1986 Alaska Sess. Laws 1).

79. *Id.* at 235.

80. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

81. *Id.* at 317.

82. *Id.* at 314.

83. *Id.* at 313.

84. *Id.* at 314.

85. *Id.*

86. *Id.*

87. *Id.* at 315.

88. 785 P.2d 1 (Alaska 1989).

89. *Id.* at 9.

compliance.<sup>90</sup>

In *McDowell*, the court held that the State's exclusive rural priority<sup>91</sup> contravenes the Alaska Constitution's guarantee that all Alaskans have equal access to fish and wildlife.<sup>92</sup> The decision that the State could no longer administer ANILCA's rural priority<sup>93</sup> brought Alaska out of compliance with ANILCA again. After *McDowell*, all Alaskans, in both rural and urban communities, were able to hunt and fish on state and private lands;<sup>94</sup> the State could not administer an exclusive rural priority.<sup>95</sup>

The Alaska Supreme Court postponed the effective date of its *McDowell* decision until July 1, 1990,<sup>96</sup> allowing the State to respond to the decision.<sup>97</sup> Despite this extra time, the Alaska Legislature did not make Alaska ANILCA compliant.<sup>98</sup> As a result of the noncompliance, the Federal Government terminated the State's subsistence management on federal lands and began managing subsistence on federal lands in Alaska in 1990.<sup>99</sup>

In 1995, the Alaska Supreme Court addressed the subsistence alterations that the Alaska Legislature made after *McDowell* that did not make Alaska ANILCA compliant. The State of Alaska had altered its subsistence laws to only prioritize subsistence users based on how close they live to a fish or game population.<sup>100</sup> In *State v. Kenaitze Indian Tribe*,<sup>101</sup> the Alaska Supreme Court held:

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90. COHEN'S HANDBOOK, *supra* note 3, § 4.07 (citing *McDowell*, 785 P.2d at 9).

91. The 1986 subsistence legislation included in the exclusive rural priority "that one must reside in a rural area in order to participate in subsistence hunting and fishing . . ." *McDowell*, 785 P.2d at 9.

92. *Id.* at 5-6 (citing to ALASKA CONST. art. VIII, §§ 3, 15, 17).

93. *See McDowell*, 785 P.2d at 9 (holding "that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional" and thus not allowing the state to administer ANILCA's rural priority).

94. *State v. Morry*, 836 P.2d 358, 368 (Alaska 1992).

95. *Id.* at 367.

96. This date was the federal government's deadline for ANILCA compliance.

97. McGee, *supra* note 23, at 236 (citing Norris, *supra* note 31).

98. *See* Part IV(A) *infra* (discussing the Alaska Legislature's ineffective attempts to amend the Alaska Constitution to allow for a rural priority and comply with ANILCA).

99. CASE & VOLUCK, *supra* note 25, at 296. While the federal government terminated the State's subsistence management on federal lands, the State still manages subsistence in almost all of Alaska's fisheries, *id.*, the source of most of the subsistence harvest, *id.* at 297 (citing Native Vill. of Quinhagak v. United States, 35 F.3d 388, 390 n.4 (9th Cir. 1994)).

100. *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 639 (Alaska 1995).

101. *Id.*

Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in . . . subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population.<sup>102</sup>

Reasoning that the Alaska Constitution reserves fish and wildlife “wherever occurring” to all Alaskans, not just rural Alaskans, subsistence hunting and fishing could not be prioritized based on how close subsistence users live to fish and game.<sup>103</sup>

As discussed earlier, the State’s rural-residency requirement originally prioritized rural Alaskans’ subsistence uses even when fish and wildlife were plentiful.<sup>104</sup> However, ANILCA’s rural priority regulates nonsubsistence uses to not interfere with subsistence uses.<sup>105</sup> As a result, Alaska can now only prioritize subsistence uses above nonsubsistence uses (like sport hunting and fishing) when resources are too scarce to meet all Alaskans’ needs.<sup>106</sup> Therefore the State cannot prioritize subsistence access based on any kind of rural priority.<sup>107</sup>

Since 1990, the Federal Government has continued to reluctantly administer ANILCA’s rural preference on federal lands in Alaska.<sup>108</sup> A Department of the Interior representative commented, “There’s not a single person in the Department of the Interior, to my knowledge, that wants to [draft regulations on managing subsistence on federal lands in Alaska]. But everyone realizes that in the absence of state action, we’re required by law to do it.”<sup>109</sup> The Secretaries of the Interior and Agriculture later created the Federal Subsistence Management Program

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102. *Id.* at 638.

103. *Id.* at 638–39 (citing ALASKA CONST. art. VIII, §§ 3, 15, 17).

104. *See State v. Morry*, 836 P.2d 358, 365 (Alaska 1992) (“The State asserts that under the original 1978 subsistence law, when there was enough fish and game for all subsistence uses, i.e., at the ‘first tier’ of abundance, there was no authority for the boards of fish and game to decide that some Alaskans could be subsistence harvesters, but others could not. Only at the second tier level, when resources declined below a level where all subsistence uses could be satisfied, did the board have authority to establish criteria for differentiating between users.”).

105. *See CASE & VOLUCK*, *supra* note 25, at 292 (“Under the federal scheme, . . . customary and traditional (i.e. subsistence) uses [are] provided first . . .”).

106. Now all Alaskans are able to participate in first-tier subsistence. There is no priority for subsistence unless the wildlife must be restricted. *Morry*, 836 P.2d at 368. All Alaskans have equal access to subsistence hunting and fishing even on Native Corporations’ land. *Id.*

107. *See Kenaitze Indian Tribe*, 894 P.2d at 642 (“[Alaskan law] bars no Alaskan from participating in any fish or game user class.”).

108. *Norris*, *supra* note 31.

109. *Id.*

to support the Federal Subsistence Board and the Federal Subsistence Regional Advisory Councils as the Federal Government assumed management responsibility after Alaska dropped management.<sup>110</sup>

While the Federal Government may be required to manage subsistence on federal lands in Alaska, it does not adequately protect Alaska Native hunting and fishing rights.<sup>111</sup> Because of this, the State should accept the carrot the Federal Government is dangling<sup>112</sup> and resume management of subsistence to better protect Alaska Natives and rural Alaskans' hunting and fishing rights.

### III. ANILCA'S RURAL PRIORITY DOES NOT ADEQUATELY PROTECT ALASKA NATIVES & RURAL ALASKANS

The application of ANILCA's rural priority on federal lands offers more subsistence opportunities to rural subsistence users than the State of Alaska's subsistence system on state and private lands. However, even these protections are not enough to ensure Alaska Natives and rural Alaskans' access to subsistence. The federal regulations define rural as everything that is not in the urban areas.<sup>113</sup> This classification can yield some strange results. For example, Saxman, a Tlinget Alaska Native village with 400 residents, is classified as urban.<sup>114</sup> Another strange aspect of ANILCA is that its rural-priority protections exclude Native corporation lands.<sup>115</sup> These lands serve as some of the most important subsistence hunting and fishing areas, often encompassing villages.<sup>116</sup> Thus, not only does ANILCA inadequately protect subsistence, but it also currently provides for an inconsistent rural-classification system that is both under and over inclusive.

The vacillating classification of the Kenai Peninsula illustrates this inconsistency. According to 2011 population estimates, the Kenai Peninsula Borough has approximately 56,293 people spread out over 16,075.33 square miles.<sup>117</sup> That averages out to 3.5 people per square

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110. *Federal Subsistence Management Program*, U.S. FISH & WILDLIFE SERV., <http://alaska.fws.gov/asm/about.cfml> (last visited Feb. 1, 2013).

111. Anderson, *supra* note 42, at 17.

112. ANILCA would fund fifty percent of the costs of "advisory committee/council administrative structure" if Alaska became compliant. CASE & VOLUCK, *supra* note 25, at 289.

113. 50 C.F.R. § 100.23 (2012).

114. McGee, *supra* note 23, at 241.

115. 16 U.S.C. § 3102(3)(B) (2012).

116. COHEN'S HANDBOOK, *supra* note 3, § 4.07(ii)(C).

117. *State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02/02122.html> (last visited Jan. 28, 2013).

mile.<sup>118</sup> While sparsely populated, it is a popular destination for sport hunters and fishers from nearby Anchorage and the Matanuska-Susitna Valley (Mat-Su Valley). When Alaska administered the rural-subsistence priority, it prohibited subsistence hunting and fishing on most parts of the Kenai Peninsula by declaring it to be urban.<sup>119</sup> “When the Federal Government assumed authority for regulating ANILCA, it adopted the State’s rural regulatory scheme and initially continued to prohibit subsistence hunting” on the Kenai.<sup>120</sup> In 1990 the Federal Subsistence Board (FSB)<sup>121</sup> defined most of the Kenai (including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifornsky, Kasilof, Clam Gulch, Homer, Anchor Point, Kachemak City, Fritz Creek, and Seward) as urban.<sup>122</sup> Then it determined that the Kenai was all rural in 2000.<sup>123</sup> In 2001, the FSB changed its mind again, reclassifying the Kenai Peninsula as urban.<sup>124</sup> Amending the Alaska Constitution to allow a modified rural priority<sup>125</sup> and drafting legislation explicitly creating a rural priority and defining rural by population instead of by the economy would yield better results for subsistence users.

#### IV. RECOMMENDATIONS

##### A. The Alaska Legislature Should Pass a Bill Allowing Voters to Amend the Alaska Constitution with a Rural Priority

After *McDowell*, rural and Alaska Native interests attempted to amend the Alaska Constitution with a rural or Alaska Native subsistence priority to make Alaska compliant with ANILCA and resume management of subsistence on federal lands again.<sup>126</sup> The Alaska

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118. *See id.* (listing population estimates for 2011).

119. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1189 (9th Cir. 2000).

120. *Id.*

121. The Secretary of the Interior created the FSB to administer the subsistence priority. *Id.*

122. COHEN’S HANDBOOK, *supra* note 3, § 4.07(ii)(c) (citation omitted).

123. *Id.* (citation omitted).

124. *Id.* Perhaps in an effort to address the subsistence needs on the Kenai that remained after the flip-flopping, the FSB attempted to create a separate subsistence region for the Kenai Peninsula, but the Advisory Council recommended that this not happen without more public input. So the FSB withdrew the rule.

125. *See* Part IV(A)(3) *infra* (discussing what a hypothetical modified rural priority could look like, what it could accomplish, and likely resistance to a hypothetical modified rural priority).

126. *See* James A. Fall, *The Division of Subsistence of the Alaska Department of Fish and Game: An Overview of Its Research Program and Findings: 1980-1990*, 27 ARCTIC ANTHROPOLOGY 68, 89 (1990) (“Numerous solutions to this problem had

Legislature would have to pass a bill with a two-thirds majority to put an amendment allowing a rural priority before voters.<sup>127</sup> Many attempts have been made to amend the Alaska Constitution to allow a rural priority, but none have succeeded.

1. *Sport Hunting and Fishing Interests and the Rural/Urban Divide Apparently Stymied Attempts to Amend the Alaska Constitution to Allow a Rural Priority*

After *McDowell*, in 1990, Governor Steve Cowper submitted a rural-priority amendment to both houses of the Alaska Legislature to avoid federal management of subsistence on federal lands.<sup>128</sup> Sport hunting and fishing organizations pushed back immediately against the first amendment attempt in 1990.<sup>129</sup> The Alaska Outdoor Council (AOC) worked especially hard to prevent the vote.<sup>130</sup> The AOC was founded in 1955 by sport hunting clubs in three relatively well-populated areas: Fairbanks, Juneau, and the Matanuska-Susitna Valley.<sup>131</sup> The AOC now has forty-seven outdoor clubs and over ten thousand members in its ranks.<sup>132</sup> The locations of the governing board, Fairbanks, Juneau, and Anchorage<sup>133</sup> reveal its urban bias: These regions are among the most populated areas of Alaska.<sup>134</sup>

The AOC's vision is "to unite the voices of [their] membership and

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been proposed in the months following the Supreme Court's ruling. Rural and Native interests called for an amendment to the Alaska Constitution establishing a rural or Native subsistence preference.").

127. McGee, *supra* note 23, at 230.

128. Fall, *supra* note 126, at 89.

129. *Id.*

130. See Kizzia & Hulen, *supra* note 8, at M1 ("The other side, led by the Alaska Outdoor Council, generally supports stripping the rural preference from federal law. Many say they are not opposed to subsistence, but prefer a system that gives people with a strong history of hunting and fishing increased access to fish and wildlife no matter where they live. They support aggressive wildlife-management practices to boost wildlife populations and provide more hunting and fishing opportunities for everyone."); Kurtz, *supra* note 16, at 614 ("With a lobby called the Alaska Outdoor Council (or AOC), this new suburban fringe population became the target of a neoconservative political project. In campaigns for equal access regardless of 'race' or place, AOC members cited, recited, and re-situated Matthews's text across the state.").

131. *About AOC, ALASKA OUTDOOR COUNCIL*, <http://www.alaskaoutdoorcouncil.org/about-aoc> (last visited Jan. 28, 2013).

132. *Id.*

133. *Id.*

134. See *Population Division, Subcounty Resident Population Estimates: April 1, 2010 to July 1, 2011*, U.S. CENSUS BUREAU, [http://www.census.gov/popest/data/cities/totals/2011/files/SUB-EST2011\\_AL\\_MO.csv](http://www.census.gov/popest/data/cities/totals/2011/files/SUB-EST2011_AL_MO.csv) (last visited Jan. 30, 2013) (listing resident population estimates for cities in the United States including Fairbanks, Juneau, and Anchorage).

member clubs to effectively represent their outdoor interests in all facets of public policy.”<sup>135</sup> One of its interests is “equality among users of public resources.”<sup>136</sup> It could easily be inferred from this interest that the AOC is opposed to a rural priority. The AOC claims it is not opposed to subsistence, but that it prefers prioritizing Alaskans with a strong history of hunting and fishing instead of rural Alaskans or Alaska Natives.<sup>137</sup> The AOC wants the State of Alaska to manage subsistence because the State will try to preserve sport fishing and hunting opportunities, but the federal system is not concerned with sporting opportunities.<sup>138</sup>

In fact, AOC members have filed successful suits alleging the rural subsistence priority discriminates against urban hunters and fishers in *McDowell*.<sup>139</sup> Furthermore, the AOC has successfully lobbied against a rural/Alaska Native priority on “equal access” grounds.<sup>140</sup> The AOC wielded its substantial media influence to oppose the rural priority, labeling the priority as “reverse racism.”<sup>141</sup> The AOC’s tactics apparently influenced Fairbanks and Anchorage legislators.<sup>142</sup> The AOC also exerted its influence to mire down an Alaska-administered rural priority.<sup>143</sup> Some accused the AOC and other urban hunters who undermined the rural priority in the 1980s of racism.<sup>144</sup>

Recreational hunters and fishers were not the only ones called racists in this subsistence controversy. Legislators on both side of the aisle hurled accusations of racism at each other during the 1999 debates over the rural-priority amendment.<sup>145</sup> Alaskan conservatives aligned with the AOC, also characterizing the rural priority as “reverse racism” in the 1980s.<sup>146</sup> The other side perceived the refusal to let Alaskans vote

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135. *About AOC, supra* note 131.

136. *Id.*

137. Kizzia & Hulen, *supra* note 8, at M1.

138. *Id.*

139. *McDowell v. State*, 785 P.2d 1 (Alaska 1989); Fall, *supra* note 126, at 88 (stating urban hunting group members were the plaintiffs in *McDowell* alleging that the rural preference is discrimination).

140. Kurtz, *supra* note 16, at 614.

141. *Id.*

142. *Id.*

143. *See id.* (“The power of the AOC was most visible in Alaska’s legislature. Strong vocal support came from representatives elected by voters in two areas around Fairbanks and Anchorage.”).

144. *Id.*

145. Kurtz, *supra* note 16, at 614.

146. *See id.* at 602 (“The first and third episodes sketch the transformation of a language of equality for Alaska Natives in the 1940s into a conservative discourse in the 1980s about the ‘reverse racism’ of the state’s rural subsistence priority.”).



on a constitutional rural-subsistence preference amendment as discriminatory to Alaska Natives.<sup>147</sup>

The advisory committee to the United States Commission on Civil Rights characterized the Alaska Legislature's tenacious opposition to a rural priority as "systematic efforts to undermine federal protections" of rural Alaskans' subsistence use.<sup>148</sup> Allegations of racism aside, one could interpret a rural/urban divide in the Legislature's actions. The Alaska Senate had twenty legislators and thirteen hailed from Anchorage and Fairbanks. Seven legislators voted against the rural priority in 1999. One scholar characterized these votes as representing "the group rights of a whitened and oppositional suburban constituency within the new State of Alaska."<sup>149</sup>

When Governor Cowper called the Legislature back into a special session because his resolution had not passed, the Legislature failed to pass the resolution again.<sup>150</sup> The House amended it, only to reject it. In September during Governor Cowper's special session, the House passed a bill putting the rural-priority amendment before the voters.<sup>151</sup> The bill died after it did not receive the required two-thirds majority in the Senate.<sup>152</sup> If the Legislature had passed the amendment, polls indicated Alaskans would have voted to amend the constitution to add a rural-subsistence priority.<sup>153</sup>

## 2. *Arguments Against Amending the Alaska Constitution to Permit a Rural Priority*

Urban sport hunters and fishers argue that rural priority yields unjust results, heats up racial tensions, and violates equal access. For example, an "\$80,000-a-year school superintendent in a Kuskokwim River village who had no fishing or hunting experience . . . g[ets] subsistence rights while a Native in Anchorage or Mat-Su making much less money [i]s denied."<sup>154</sup> However, the modified rural priority<sup>155</sup> includes urban Alaska Natives, rendering this objection moot.

The AOC also argues that Canada's provision of First Nations'

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147. ALASKA STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA* 10 (2002) (citation omitted).

148. *Id.*

149. Kurtz, *supra* note 16, at 614.

150. *Id.*

151. *Id.*

152. *Id.*

153. Martha Bellisle, *Survey Finds Alaskans Want Vote on Rural Subsistence Priority*, ANCHORAGE DAILY NEWS, Sept. 16, 2001, at B1.

154. Kizzia & Hulen, *supra* note 8, at M1.

155. Section IV(A)(3) discusses the modified rural priority.

unlimited access to hunting and fishing has increased racial conflicts.<sup>156</sup> Such an argument confuses apples for oranges. The Alaskan rural priority operates in a confined amount of available harvest: there is no unlimited access. The limited amount of fish and game available to all Alaskans will still be regulated and should not prohibit sport hunting and fishing and commercial fishing access, as the AOC intimates. Furthermore, the poll results that predicted that Alaskans would vote to approve a rural-subsistence amendment<sup>157</sup> suggest that there would be less racial strife than what the AOC forecasts. The amendment would not happen without a popular vote, so the majority of Alaskans would have to support amending the Alaska Constitution to allow a rural priority.

The urban sportspeople's most successful argument—which carried the day in *McDowell*—is that the rural priority violates the Alaska Constitution's equal-access provisions.<sup>158</sup> The rural-priority amendment would obviously address this concern.

The AOC and opponents of the rural-subsistence priority could still argue that equal access should prevail normatively. This could be countered by a fairness argument: people who rely more on the resources, have more connection to the resources, and have a closer proximity to the resources should have the first opportunity to access them. Furthermore, commercial and sport users take ninety-seven to ninety-eight percent of fish and game reaped in Alaska.<sup>159</sup> Shifting more fish and game to subsistence users is not likely to exclude these other juggernaut users. Further, Alaska's Constitution was already amended to grant three thousand permit holders access to ninety-seven percent of Alaska's fisheries.<sup>160</sup> So the Alaska Legislature has already amended the constitution to allow some individuals more access to resources than others. Additionally, the and the prior amendment's apparent goal of commercial gain was arguably less compelling than the rural priority's goal of protecting rural Alaskans and Alaska Natives' cultural and physical nourishment.

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156. Patrick Valkenburg, *Subsistence – Lessons from Canada*, ALASKA OUTDOOR COUNCIL, <http://www.alaskaoutdoorcouncil.org/pdfs/SubsistenceCanadaPat.pdf> (last visited Jan. 28, 2013).

157. Bellisle, *supra* note 153, at B1.

158. *McDowell v. State*, 785 P.2d 1, 1 (Alaska 1989).

159. Rosita Worl, *A Panel Discussion of People, Politics and Subsistence in Alaska*, PUBLIC BROADCASTING SERVICE, [http://www.pbs.org/harriman/explog/lectures/people\\_panel.html](http://www.pbs.org/harriman/explog/lectures/people_panel.html) (last visited Jan. 28, 2013).

160. *Id.*

3. *A Modified Rural Priority<sup>161</sup> Would Effectively Include Urban Alaska Natives*

The amendment could be a modified rural subsistence priority similar to Governor Knowles's compromise that extends the rural priority to urban residents who demonstrate traditional and customary subsistence use.<sup>162</sup> The 1995 "rural plus" plan of Knowles and his Lt. Gov. Fran Ulmer would grant subsistence privileges to rural users and users with rural roots.<sup>163</sup>

But instead of Knowles's hierarchical amendment, which would place the rural priority first and the customary priority second, rural and customary subsistence users should have equal footing.<sup>164</sup> Some believe Knowles's type of amendment without a Native preference might endanger urban Alaska Natives' access to subsistence.<sup>165</sup> However, keeping urban Alaska Native's access equal to rural Alaskans' access should alleviate these concerns. This modified rural priority would give more subsistence access to urban Alaska Natives than ANILCA's rural priority.

Still, the Alaska Legislature will not necessarily pass a bill allowing Alaskans to vote on amending the Alaska Constitution with a modified rural priority. The chief difficulty in the past has been the AOC, but this difficulty could be overcome. First, rural Alaskans and Alaska Natives could organize more effectively. Urban Alaska Native constituents should especially appeal to their urban legislators about the importance of a modified rural priority. Second, media attention and public discourse could highlight the current reality of sport hunting and fishing interests crowding out subsistence traditions. In the past, public opinion polls indicated support for a rural subsistence priority.<sup>166</sup> Better organization and public discourse efforts could help popular opinion overtake special interests to finally persuade legislators into uniting behind the rural priority.

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161. ALASKA FEDERATION OF NATIVES, 2011 FEDERAL PRIORITIES (PINCITE) (2011), available at <http://www.nativefederation.org/wp-content/uploads/2012/09/2011-afn-federal-priorities.pdf>. This Article recommends that Alaska creates a modified-rural-priority that will include urban Alaska Natives but also include non-Natives in rural areas. A modified rural priority appears to be more politically palatable than a Native priority. Also, the rural priority offsets the high cost of food in rural areas for Alaska Natives and non-Alaska Natives.

162. Lee, *supra* note 16, at 6.

163. Norris, *supra* note 31.

164. Lee, *supra* note 16, at 6.

165. *Id.*

166. Worl, *supra* note 159.

**B. The Legislature Should Repeal the Portion of the Subsistence Statute that Creates Nonsubsistence Zones Because It Will Contravene the Rural Priority if Alaska Administers the Rural Priority**

1. *The Origin of the Nonsubsistence Zones*

Influenced by sport and commercial fishing interests,<sup>167</sup> the Alaska Legislature created a nonsubsistence-zones law in 1986.<sup>168</sup> A nonsubsistence zone is an area the State of Alaska identifies as “an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.”<sup>169</sup> No Alaskan may subsistence hunt or fish on state or private land in these zones, but Alaskans and out-of-staters may conduct commercial and sport fishing and sport hunting in nonsubsistence zones. Thus, nonsubsistence zones mean more fish for commercial and sport fishing interests and more game for sport hunters. As discussed, only a set amount of fish and wildlife are available to harvest because of conservation regulations. Nonsubsistence zones knock subsistence users out of the competition for wild game and fish on state and private land while commercial fishing and hunting interests may harvest fish and wildlife in these zones.<sup>170</sup> Nonsubsistence zones also manage resources so that all Alaskans’ subsistence use would not overtax Alaska’s resources.<sup>171</sup>

2. *Current State Law*

The joint Boards of Fish and Game designated Fairbanks, Anchorage-Mat-Su-Kenai, Juneau, Ketchikan, and Valdez as nonsubsistence zones in 1992.<sup>172</sup> The joint boards formed nonsubsistence

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167. David D. Hulen, *Judge Throws Out Subsistence Law*, ANCHORAGE DAILY NEWS, Oct. 27, 1993, at B1. These fishing interests sought to prevent large subsistence fisheries on the Kenai Peninsula, as well as other areas. *Id.*

168. See generally ALASKA STAT. § 16.05.258 (2012) (“The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.”).

169. *Id.*

170. Kizzia & Hulen, *supra* note 8, at M1.

171. See CASE & VOLUCK, *supra* note 25, at 300 (“[J]oint boards of fish and game [were authorized] to identify nonsubsistence areas where subsistence hunting or fishing is not permitted in order to relieve some of the pressure on wildlife resources created by the treatment of all Alaskans as subsistence harvesters.”) (citation omitted).

172. State v. Kenaitze Indian Tribe, 83 P.3d 1060, 1062–63 (Alaska 2004)

areas' boundaries from the boundaries of the former "non-rural" areas in the 1986 subsistence law that limited subsistence use to residents domiciled in "rural areas" of the state.<sup>173</sup>

When identifying these nonsubsistence areas, the joint boards must consider the "relative importance of subsistence in the context of the totality of the following socio-economic characteristics . . ." <sup>174</sup> This nonsubsistence zones definition mimics the cash-economy definition that the Ninth Circuit held as an incorrect interpretation of rural.<sup>175</sup> According to the Ninth Circuit, rural should instead be defined by population.<sup>176</sup>

### 3. *Nonsubsistence Zones Survived Legal Challenges*

Nonsubsistence zones survived a decade-long legal challenge that went back and forth between the Alaska Superior Court and Alaska Supreme Court.<sup>177</sup> The Kenaitze tribe and Alaska Natives from Ninilchik, Eklutna, and Knik sued, and the Alaska Supreme Court ultimately upheld nonsubsistence zones as constitutional.<sup>178</sup>

The Kenaitze tribe argued that nonsubsistence zones violated the Kenaitzes' constitutional rights, specifically the Alaska Constitution's equal-access clauses<sup>179</sup> and equal protection clause,<sup>180</sup> by discriminating against residents of nonsubsistence zones.<sup>181</sup>

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(citation omitted).

173. *Id.* at 1066 (citation omitted). Nonsubsistence use areas were marked in Anchorage, Fairbanks, Juneau, Ketchikan, and Valdez. *Nonsubsistence Areas*, ALASKA DEPT. OF FISH & GAME, <http://www.adfg.alaska.gov/index.cfm?adfg=subsistence.nonsubsistence>, (last visited Jan. 28, 2013). This provision of the subsistence law was struck down in *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

174. ALASKA STAT. § 16.05.258(c) (2012).

175. *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989) ("As Alaska defines the word, an area is rural only if its economy is dominated by subsistence fishing and hunting; it excludes areas characterized primarily by a cash economy, even though a substantial portion of the residents may engage in subsistence activities. The state's definition would exclude practically all areas of the United States that we think of as rural, including virtually the entirety of such farming and ranching states as Iowa and Wyoming.").

176. *See id.* at 316-17 ("The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to areas of the country that are sparsely populated, where the economy centers on agriculture or ranching.").

177. *See generally Kenaitze Indian Tribe*, 83 P.3d at 1062-64 (stating the background and procedure for the case).

178. *Id.* at 1071-72.

179. ALASKA CONST. art. VIII, §§ 3, 15, 17.

180. *Id.* art. I, § 1.

181. *See State v. Kenaitze Indian Tribe*, 83 P.3d at 1063 ("The tribe . . . sought an injunction barring the state from restricting the tribe's ability to engage in

Superior Court Judge Dana Fabe (now the Chief Justice of the Alaska Supreme Court) declared the nonsubsistence zones portion of the 1992 subsistence law unconstitutional under the equal-access clauses of the Alaska Constitution.<sup>182</sup> The State of Alaska appealed to the Alaska Supreme Court.<sup>183</sup> The Alaska Supreme Court reversed and remanded, holding that the nonsubsistence zones law is constitutional.<sup>184</sup> The Superior Court then ruled that the procedure the joint boards used to include Knik, Eklutna, and Ninilchik in the Anchorage-MatSu-Kenai Nonsubsistence Area contravened the subsistence law because the boards did not correctly use the socio-economic criteria.<sup>185</sup>

The Alaska Supreme Court reversed this decision, holding that the joint boards did not have to first apply the socio-economic criteria to individual communities like Knik, Eklutna, and Ninilchik before they draw the boundaries of a large nonsubsistence zone.<sup>186</sup> So the boards were able to draw the boundaries of a large nonsubsistence zone, the Anchorage-MatSu-Kenai Nonsubsistence Area, and lump the tiny Alaska Native village of Eklutna, for example, in with Anchorage, the biggest city in Alaska. Then the board could determine if the zone as a whole met the criteria.<sup>187</sup> This results in a poor outcome for smaller areas that might be arbitrarily grouped with more populated areas in a zone.

The Alaska Supreme Court also held that the Kenai Peninsula may be included in the Anchorage-MatSu-Kenai Nonsubsistence Area.<sup>188</sup> The Fish and Game Boards have broad discretion to determine boundaries of nonsubsistence zones under state law.<sup>189</sup> Thus, nonsubsistence areas are constitutional per the Alaska Constitution because they do not prevent any Alaskans from participating in any fish-or-game-user class.<sup>190</sup>

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subsistence uses of those fish . . . . [T]he tribe . . . claim[ed] that the nonsubsistence area violated its members' constitutional rights under the Alaska Constitution's equal access clauses (article VIII, sections 3, 15, 17) and equal protection clause (article I, section 1).").

182. *Id.*

183. *Id.*

184. *Id.* at 1071.

185. *Id.* at 1064.

186. *Id.* at 1066.

187. *See id.* (stating that the joint board boundaries generally must only be reasonably related to the criteria as outlined by the legislature).

188. *Id.* at 1071.

189. *See id.* ("[T]he joint boards had difficulty attempting to identify a discrete, geographical area in which the Kenaitze Indian Tribe was located for the purposes of applying the statutory criteria . . . . Based on our review of the record, we conclude that the joint boards gave a hard look at the evidence presented and that the regulation is not invalid for failing to designate the Kenai Peninsula as a subsistence area.").

190. *Id.* at 1063 (citation omitted).

However, nonsubsistence zones do not fulfill ANILCA's rural priority requirement.<sup>191</sup> Therefore, Alaska must repeal the nonsubsistence-zones portion of the Alaska subsistence statute, which denies federally defined "rural" areas the state's subsistence preference in order to comply with ANILCA. ANILCA's rural priority conflicts with nonsubsistence zones' exclusive prioritization of sport and commercial fishing and hunting over subsistence fishing and hunting. The Alaska Legislature could repeal this section of the statute before an amendment to the Alaska Constitution is passed. This would be a step towards compliance and towards amending the constitution.

If Alaska's constitution is amended to properly support ANILCA's rural preference, current nonsubsistence zones will be unconstitutional. The remainder of the subsistence statute could stand; the Legislature could eliminate only the provision establishing nonsubsistence areas.<sup>192</sup> The Legislature could repeal this section of the statute before an amendment to the Constitution is passed. This would be a step towards both compliance and amendment. Alternatively, the Legislature could repeal the nonsubsistence zone statute effective on the voter's approval of the rural preference amendment to the Alaska Constitution.

## CONCLUSION

The Alaska Constitution's equal-access clauses prevent it from administering the rural priority that ANILCA requires. ANILCA's rural priority has roots dating back to Alaska's territorial days. Congress created the rural priority to protect Alaska Native subsistence rights so it should be construed liberally under the Indian Law Canons. Since Alaska failed to maintain a rural priority, the Federal Government currently manages subsistence on federal lands.

Efforts to amend the constitution with a rural priority have failed in the past due to the urban/rural divide: this is notably illustrated by powerful urban sport hunting and fishing groups' opposition to prioritizing rural subsistence practices. Despite these powerful special-interest groups, the Alaska Legislature should finally pass a bill that puts a rural-priority amendment before Alaskan voters. If Alaskan voters support the rural-priority amendment then the Legislature should pass a modified-rural-subsistence priority that includes urban Alaska Natives and defines rural based on population, not the economy.

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191. See *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 640 (Alaska 1995) (noting that the residents of nonsubsistence areas are "[i]nconvenience[d]" but are still "eligib[le] for participation in subsistence hunting and fishing . . .").

192. ALASKA STAT. § 16.05.258 (2012).

Alaska Native and rural Alaskans' subsistence practices are threatened without a modified rural priority that includes truly rural and traditional subsistence communities on state and federal land. Nonsubsistence zones bar subsistence use on state and private land in vast areas. The Alaska Constitution should be amended to allow a modified rural priority and the Legislature should repeal the nonsubsistence zones statute in order to protect Alaska Native and rural Alaskans' subsistence rights.