This Article examines the cultural basis for subsistence laws in Alaska and argues that it is inappropriate. After describing two conflicting definitions of the term "subsistence," the Article then provides an overview of the history of the federal government's treatment of Alaska Natives. Next, the Article analyzes provisions of both federal and state subsistence law and criticizes their emphasis on the vague, undefinable concept of culture. Then, the Article demonstrates the weakness of such an approach in federal wildlife laws. Finally, the Article concludes by proposing a subsistence rights trading system among Alaska Native groups that would avoid the problems associated with culture-based subsistence laws.

I. INTRODUCTION

Culture is not static. If it is, then what you have to do is treat us as museum pieces.

—Ralph Eluska, president, Akhiok-Kaguyak, Inc.1
I think the times and conditions are changing in the Arctic and I think the Eskimo and the people who live there are going to use every means they have available to increase the efficiency of their operations still within the bounds of the uses that they have applied to the animals. It's very difficult now to determine what native really means as far as their utilization of these animals and the way they go about harvesting them.

—Ben Hilliker, former Alaska Deputy Commissioner for Sportfish and Game

When compared to the legal regimes governing Native Americans in the lower forty-eight United States, Alaska Natives' subsistence hunting and fishing rights appear to be an equitable response to a difficult political issue: balancing Natives' subsistence needs with the need to preserve natural resources. Rather than living on reservations like their counterparts in other states, most Alaska Natives continue to live their chosen lifestyle. For a number of reasons, including the abundance of wildlife resources and the high ratio of Natives to non-Natives in Alaska's population, both federal and Alaska laws allow subsistence hunting and fishing. Responding to guilt stemming from historically harsh federal Indian policies, commentators and legislators have

in LEXIS, News Library, Arcnw File.


3. See Monroe E. Price, A Moment in History: The Alaska Native Claims Settlement Act, 8 UCLA-ALASKA L. REV. 89, 89-95 (1979) (examining the Alaska Native Claims Settlement Act in the context of the history of federal Indian policy and determining that Indian policy reflects dominant cultural beliefs or ethics throughout American history).

4. James M. Boardman, Casenote, McDowell v. State of Alaska: Is a Limited Entry Subsistence System on the Horizon?, 26 WILLAMETTE L. REV. 999, 1001 (1990). The author notes that "subsistence is a crucial part of the rural Alaska economy and the native Alaska culture. Congress recognized the significance of subsistence rights to both the economy and the culture by enacting ANILCA."

Id.


6. See generally Price, supra note 3, at 90-95 (recounting the troubled treatment of Native Americans in the American experience in light of the dominant cultural assumptions of the day).

embraced subsistence rights as a mechanism that allows Natives to live a "traditional" lifestyle, untouched by capitalist greed.

However, guilt is an unreliable mortar with which to build a legal edifice. Basing Alaska Native subsistence laws on guilt-driven "cultural" reasons produces a variety of critical flaws, ranging from false assumptions about cultural continuity to practical problems with applying a non-rational legal standard. A better approach grounds subsistence laws in a non-cultural, need-based motive tempered by an understanding of Natives' desire to conserve adaptable traditions. An examination of Alaska Natives' current subsistence rights and an inquiry into the policies behind Native exemptions to wildlife protection laws demonstrate the problems inherent in culturally based subsistence rights.

This Article dissectes and critiques the current cultural justification for Native subsistence uses and argues that a non-culturally based rationale strikes a better balance between the twin goals of meeting tangible Native needs and practicing rational resource management. Part II provides a background to the problem, both by analyzing various meanings of "subsistence" and by offering a history of federal policy toward Alaska Natives. Part III outlines and analyzes current federal and Alaska law governing the right to use subsistence resources in Alaska. Part IV criticizes the basis for the Alaska Native exemption in federal wildlife protection laws, and Part V concludes by proposing an alternate means of regulating Native subsistence rights in Alaska.

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8. Lobbying for a Native exception to the Marine Mammal Protection Act, Senator Ted Stevens played the guilt card. He argued that "if Congress enacts provisions outlawing all but subsistence hunting by Alaskan Natives, not only will this proud group of Americans have their economic livelihood stripped from them, but they will face the certain fate of cultural extinction." 118 CONG. REC. 8400 (1972).

9. Subsistence hunting and fishing is necessary for many Natives' survival, and it links them to their history by binding them to their traditional lands. See generally DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 275-76 (1984) (explaining different notions of subsistence and their importance to Alaska Natives).
II. THE LAST FRONTIER: BACKGROUND TO ALASKA’S CURRENT SUBSISTENCE USE PROBLEM

A. Defining Terms: Subsistence and a Necessity-Based Model

Before examining cultural justifications for a legal subsistence regime, one must first understand what is meant by subsistence. David Case argues that the term has two principal meanings, one rooted in a European mindset, and the other stemming from Native experience. 10 The “Western” meaning of subsistence “connotes the bare eking out of an existence, a marginal ... way of life.” 11 This definition implicates both necessity and the economics of scarcity. Case describes this activity as “sustenance,” necessary for the individual and for the community, albeit for purely physical reasons. 12 According to Case, “[t]his is not only a matter of choice but of necessity imposed by a combination of factors, including great distance from other food sources, chronic regional unemployment, and resulting lack of cash to exchange for imported food.” 13 Consequently, “nutrition, location, and a weak position in the cash economy combine to make rural communities physically and economically reliant on subsistence uses of resources.” 14

However, as understood by Alaska Natives, subsistence has a larger meaning. It is tied to their culture and helps define their self-identity; the hunt itself perpetuates group identity and survival. As Mary Kancewick and Eric Smith note, “Alaska Natives speak of subsistence not just as a way to feed their families, but as a way to be themselves—a way to be land-linked tribal peoples.” 15 Under Case’s rubric, this definition encompasses both cultural and social values in addition to traditions and customs. “For Natives engaged in subsistence uses, the very acts of hunting, fishing, and gathering, coupled with the seasonal cycle of these activities and the sharing and celebrations which accompany them are intricately

10. Case, supra note 7, at 1009-12.
11. Id. at 1009.
12. Case, supra note 9, at 275. Throughout this article, the term “sustenance” will refer to this need-based model of subsistence uses.
13. Id.
14. Id. This conception of subsistence is often misunderstood. See Kancewick & Smith, supra note 7, at 648 (explaining that non-Native critiques of Native sustenance hunting are often driven by misconception).
15. Kancewick & Smith, supra note 7, at 649.
woven into the fabric of their social, psychological, and religious life. 16

In balancing Native needs and desires with rational wildlife management, both state and federal authorities should recognize that there are two competing understandings of subsistence taking. If the main goal of wildlife management legislation is to preserve wildlife resources for future use, 17 and if abundant wildlife stocks in Alaska allow Native subsistence taking without a harmful impact on those stocks, the Western definition of subsistence is the more sensible. That definition is centered around need and scarcity, eminently quantifiable factors that provide the bases for coherent regulatory decision making. However, both Case and Kancewick and Smith argue that the cultural meaning of the hunt to Natives encompasses more than mere survival; it is tightly bound up in their self-identity. 18 Thus, legislators face the difficult task of maintaining wildlife resources while allowing Natives to hunt for their own survival as well as the survival of the hunt in Native culture.

At first glance, many Alaska Native subsistence provisions appear reasonable, at least in terms of physical necessity and democratic theory. These laws allow Alaska Natives to choose how to live their lives, as long as they participate in the American political system. Under such conditions, justifying subsistence in terms of “necessity” is consistent with Natives’ desire to maintain cultural traditions. Under a necessity-based system, wildlife resource uses that are central to Native traditions may be maintained as long as the resource can bear the use. Such an approach permits Native Alaskans to continue their chosen activities on an equal footing with other political actors. 19 In addition, a law based on non-cultural justifications can be reconciled more easily with the eventual need to curtail hunting or fishing so that a particular resource may be sustained. Thus, a legal framework

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16. Case, supra note 9, at 276.
17. For example, the House report on the Marine Mammal Protection Act explained that “it seems elementary common sense to the Committee that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known.” H.R. Rep. No. 707, 92d Cong., 1st Sess. 15 (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4148.
18. Case, supra note 7, at 1009; Kancewick & Smith, supra note 7, at 649-51.
19. This theory assumes that Natives enjoy both full access to information and an ability to participate in meaningful rulemaking and legislation, presumptions that may be open to debate.
based on a “necessity” justification strikes a critical balance between the two competing interests underlying the subsistence laws: Native needs and rational resource use.

However, the body of federal and Alaskan subsistence law is based largely on cultural justifications, which may not be compatible with either Native needs or rational resource use. As a result, policy justifications grounded in cultural language can cause abuse on two fronts. 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.

B. Problems with the Cultural Approach

Culture is not a monolith. It is comprised of individual identities driven by individual and group experiences. As historian E.P. Thompson explains:

Culture is a pool of diverse resources, in which traffic passes between the literate and the oral, the superordinate and the subordinate, the village and the metropolis; it is an arena of conflictual elements, which requires some compelling pressure—as, for example, nationalism or prevalent religious orthodoxy or class consciousness—to take from as a “system.” And, indeed, the very term “culture,” with its cozy invocation of consensus, may serve to distract attention from social and cultural contradictions, from the fractures and oppositions within the whole.

Thus, no Native culture remains absolutely primeval or sacrosanct; all are affected by contact with the “other” in a continu-

20. Applying a blanket cultural justification does not sufficiently account for localized resource concerns, which, in some instances, may be unquestionably more important than cultural protection. For example, some argue that Alaska Native subsistence exceptions to the Endangered Species Act should be applicable to Native Americans throughout the United States. This logic makes sense only under a cultural justification, as it would be inappropriate for non-Natives to distinguish between the cultures of Native Alaskans and Native Floridians. However, from a need-based perspective, the larger population of endangered animals in Alaska justifies the Native Alaskan exemption, whereas taking one of the few remaining Florida panthers would seriously threaten the species. See United States v. Billie, 667 F. Supp. 1485, 1496 (S.D. Fla. 1987); infra notes 154-213 and accompanying text (discussing the Alaska Native exception to the Marine Mammal Protection Act).

21. See infra notes 26-31 and accompanying text.

ing cycle of action and reaction.\textsuperscript{23} Culture is not static; group cohesion grows over time and ultimately defines group consciousness in a reaction to material surroundings.\textsuperscript{24} In this important respect, it is folly to base legal policy on purely cultural expectations, leaving material conditions unexamined.\textsuperscript{25}

Consequently, a cultural justification for legal policy is difficult to apply. It generates problematic results, ranging from the dominant social group setting cultural expectations for a minority\textsuperscript{26} to the legal institutionalization of a standard that seeks to freeze an evolving culture in defining a material entitlement. On a theoretical level, anthropologist Clifford Geertz has explained the difficulty of understanding the cultural meanings of a different group or society. Expanding on Thompson's ideas, Geertz explains that it is difficult for an outsider, such as a regulator or legislator, to comprehend the real meaning of the hunt as a cultural touchstone, by the very nature of his or her being an outsider.\textsuperscript{27} While

\textsuperscript{23} For example, Thompson proclaims in an earlier work that "we cannot understand class unless we see it as a social and cultural formation, arising from processes which can only be studied as they work themselves out over a considerable historical period." E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1966).

\textsuperscript{24} Rather than toe the Marxist line that class is part of the superstructure in the historical dialectic, Thompson reasons that class is an event, something that happens in human relationships as a result of temporal experiences. \textit{Id.} at 9.

\textsuperscript{25} \textit{See generally CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES} (1973). Geertz argues that culture is most properly characterized as shared meaning given to certain activities or actions. "Culture is public because meaning is." \textit{Id.} at 12. Culture is not simply cerebral, existing in the thoughts of individuals. In seeking out the knowledge that opens up a culture to outsiders, one must keep an eye on the material conditions that drive cultural meaning and change. After relating the famous East Indian tale about the world balancing on the back of an elephant resting on an infinite stack of turtles, Geertz addresses this point: "The danger that cultural analysis, in search of all-too-deep-lying turtles, will lose touch with the hard surfaces of life—with the political, economic, stratificatory realities within which men are everywhere contained—and with the biological and physical necessities on which those surfaces rest, is an ever-present one." \textit{Id.} at 30. One must "train such analysis on such realities and such necessities in the first place." \textit{Id.}

\textsuperscript{26} \textit{See Price, supra} note 3, at 89 ("[S]tatutes relating to Indians can be analyzed . . . because of the way in which they portray, or, more subtly, objectify [the dominant] community's sense of its goals and ideals.").

\textsuperscript{27} \textit{See GEERTZ, supra} note 25, at 13 ("What . . . most prevents those of us who grew up winking other winks or attending other sheep from grasping what people are up to is not ignorance as to how cognition works . . . [but] a lack of
the outsider may be able to partially understand the contextual meaning of the subsistence hunt in the Native culture, his or her interpretation of the hunt is different from that of the Natives. The outsider brings his or her own cultural accretions to bear in viewing a foreign ritual, at least partially interpreting the Native meaning in light of a meaning with which he or she is familiar.  

Thus, culturally driven subsistence laws assume a legislative intimacy with Native culture that is impossible to ascribe to non-Natives. Culturally based laws establish rights that Western judges and lawyers cannot fully understand, yet these participants shape their interpretation. This result is dangerous for two reasons. On one hand, it creates the potential for Native groups to manipulate the laws in their favor by claiming an exclusively correct interpretation, upsetting the balance between resource preservation and Native needs. If rule makers and legal interpreters cannot understand the basis for the laws, they may find it difficult to challenge Native interpretations. On the other hand, culturally based laws permit legal decision making to reflect majority cultural values that may harm Native interests. Put simply, Western judges may heed their own cultural biases when weighing Native subsistence uses against competing non-Native claims. If there is no ostensibly “neutral” standard to which a court may look, legal decisions might merely reflect a court’s own value choices, which are more likely to be driven by a non-Native cultural understanding.

familiarity with the imaginative universe within which their acts are signs.

28. Id. at 14-15. Geertz argues that even anthropological tracts “are themselves interpretations, and second and third order ones to boot. (By definition, only a ‘native’ makes first order ones; it’s his culture.) They are, thus, fictions; fictions, in the sense that they are ‘something made,’ ‘something fashioned.’” Id. at 15.

29. See Didrickson v. United States Dep’t of the Interior, 796 F. Supp 1281, 1289-90 (D. Alaska 1991) (noting that the Native plaintiff implied that “traditional” Native crafts are best defined by Natives themselves).


31. As one commentator explains:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as, of course, it is) one might as well let one’s sentiments run loose. . . . Nor, on the other hand, have I been impressed with claims that structural linguistics, computer engineering, or some other advanced form of thought is going to enable us to understand men without knowing them. Nothing will discredit a semiotic approach to culture more quickly than allowing it to drift into a combination of intuitionism and alchemy, no matter how elegantly the intuitions are expressed or how modern the alchemy is made to look.
Geertz's paradigm points to more flaws in the cultural justification. Creating legal rights from cultural meaning is similar to building a house on a fault line; the base beneath the superstructure is constantly shifting. For example, Case, a proponent of culturally based subsistence laws, concedes that "[i]t is unrealistic to require cultural or social values to remain forever fixed; indeed change is common to all societies." Yet at the same time, Case states that changing cultural expectations should not justify the sale of subsistence resources by Natives in commercial markets. Case refuses to understand that a culturally based subsistence regime necessarily implicates legal rights as cultural values change. If culture is always changing, and if legal rights are set by evolving cultural uses, then there can be no cultural justification for prohibiting Natives from depleting resources by entering commercial markets when the Natives themselves view these sales as culturally desirable. Thus, Case's own arguments demonstrate that a culturally based subsistence policy undermines the rational management of natural resources.

Like Thompson, Geertz asserts that cultural meaning shifts constantly to respond to changing material circumstances and the group's understanding of that change. It is impossible to preserve a culture by legislative fiat; cultural preservation assumes static material surroundings and static contextual meaning, and, therefore, it can be achieved only in a museum. Federal and Alaska lawmakers must understand that culture is not "a self-contained 'super-organic' reality with forces and purposes of its

GEERTZ, supra note 25, at 30.
32. CASE, supra note 9, at 276.
33. Id.
34. Case's attempts to reconcile these conflicting views are not convincing: "[W]hen it comes to resource preservation, it is important that resources which are harvested for subsistence do not become commercially exploited. Thus, while concepts of tradition or custom do not prohibit evolution of subsistence cultural or social values, they allow only limited transformation into commercial enterprise." Id.
35. In the eighteenth century setting about which he wrote, Thompson asserts that "custom ... was in a continual flux. ... [F]ar from having the steady permanence suggested by the word 'tradition,' custom was a field of change and contest, an arena in which opposing interests made conflicting claims." THOMPSON, supra note 23, at 6.
36. GEERTZ, supra note 25, at 28-30.
37. Id. at 10-11.
Rather, culture adapts itself to surroundings, including legal rights and obligations that are placed on a group.

Legislation that strives to preserve a culture often exposes that culture's dynamic nature instead. For example, although the Alaska Native Claims Settlement Act ("ANCSA") was designed to protect Alaska Native culture, it did so by providing Natives with shares in corporate landholding structures. Unwittingly, the introduction of Western forms of governance to preserve Native culture irrevocably altered it.

A final flaw in the cultural approach is its pernicious effects on the cultures that it seeks to "preserve." Not only does instituting Native culture within a Western legal framework inherently change that culture, but a blanket cultural justification also ignores contemporary differences between Native Alaskan cultures. After ANCSA, some tribes have become rich with oil wealth; while others still hunt wildlife for their basic survival. The sustenance needs of these tribes vary greatly, but a cultural model homogenizes all Native cultures by assuming their material needs, and hence their cultures, are identical.

All of these flaws reveal themselves in culturally based federal and Alaskan subsistence laws. Before examining these laws, their justifications, and their applications, a closer look at the history of

38. Id. at 11. At the same time, culture is neither a "brute pattern of behavioral events we observe in fact to occur in some identifiable community," nor is it simply resident in the human mind. Id.
40. See Price, supra note 3, at 95-96.
41. As Geertz would argue, institutionalizing a version of "Native" culture must change the culture itself, since it changes the material, real-world bases for the culture. See Geertz, supra note 25. For a full discussion of ANCSA and its effects on Native culture, see infra notes 87-95 and accompanying text.
42. See Timothy Egan, The Great Alaska Debate, N.Y. TIMES, Aug. 4, 1991 (Magazine), at 21, available in LEXIS, News Library, Majpap File (describing the Gwich'in tribe's desire to bar development of the Arctic National Wildlife Refuge in order to protect the Caribou upon which they rely for food and contrasting that desire with the pro-development position of the Inupiats, who stand to gain millions of dollars if the refuge is opened to development by oil companies).
43. Id.
44. GEERTZ, supra note 25, at 28-30.
federal Indian policy is necessary to understand better the roots of modern subsistence policy.

C. A History of Federal Policy Toward Alaska Natives

At various periods in American history, the federal trust relationship with Native Americans has embraced separatism, assimilation and a recognition of an ethnic identity. Federal policy has influenced Native culture throughout American history through its physical effects on Natives' opportunities and lifestyles. Seeking to break the cycle of dependence endemic to the reservation system, the federal government, and later the state of Alaska, implemented a variety of subsistence policies in Alaska. Legislators designed these policies to avoid the lackluster treatment that had resulted in the mass destruction of Native cultures in the lower forty-eight United States. In enacting subsistence policies based on cultural reasoning, federal and state legislators failed to see that both rational resource management and the needs of Alaska Natives could be served by a necessity-based subsistence approach.

Although they are ostensibly subject to the same trust relationship as Native Americans in the continental United States, Alaska Natives initially were not treated as dependent peoples by the federal government. Alaska came under U.S. jurisdiction after the 1867 U.S.-Russia Treaty of Cession, a time when "much of the body of Indian Law had already developed in response to the

45. For an explanation of the federal trust relationship, see Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
46. Price, supra note 3, at 89-95.
47. GEERTZ, supra note 25, at 30.
50. CASE, supra note 9, at 6.
circumstances of Natives in the lower forty-eight states."\textsuperscript{52} Prior to the cession, most Natives had little contact with their Russian rulers,\textsuperscript{53} although a number of coast-dwelling Natives today have Russian surnames and follow the Russian Orthodox religion.\textsuperscript{54} "The resulting absence of a history of past hostilities apparently minimized any immediate attempts to control Native behavior when the Alaskan Territory came under American jurisdiction."\textsuperscript{55} While conflicts over natural resources characterized the American westward expansion, Alaska's abundant resources and small settler population obviated the need for such skirmishes.\textsuperscript{56}

However, the U.S.-Russian treaty hinted at second-class citizen status for the Natives. The treaty stated that:

inhabitants of the ceded territory [shall enjoy] all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion, [but] . . . uncivilized tribes [will be] subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.\textsuperscript{57}

\textsuperscript{52} Moster, \textit{supra} note 49, at 185.

\textsuperscript{53} \textit{Id.} at 186. According to David H. Getches and Charles F. Wilkinson, Russian "settlements were always small and scattered. The average Russian population of Alaska was only about 550 persons and the only substantial permanent settlements were at Kodiak and Sitka." DAVID H. GETCHES & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 775 (1986).

\textsuperscript{54} National Geographic Special: Island of the Giant Bears (PBS television broadcast, Jan. 12, 1994). This broadcast presented a prime example of mixed cultures in Alaska, a Russian Orthodox priest blessing a Native diesel-powered fishing fleet.

\textsuperscript{55} Moster, \textit{supra} note 49, at 186.

\textsuperscript{56} As one commentator explains:

Until the 1960s there was no need to settle Native claims because there was little conflict between Natives and non-Natives over Alaska's land and resources. Natives were never at war with the United States, they were never conquered, and few reservations were created. Unlike the lower forty-eight states, there were never any treaties between the United States and Native groups designating lands which Natives were entitled to occupy or defining their hunting and fishing rights. The federal government ended formal treaty-making with tribes in 1871, a century before the federal government undertook to resolve [Alaska] Native . . . claims.

Atkinson, \textit{supra} note 7, at 423.

Moreover, from the Organic Act of 1884 until 1900, congressional treatment of Alaska Natives implied that, unlike other Native Americans, Alaska Natives did not have an aboriginal group property right to the vast lands that they inhabited. Rather, these laws equated Native and non-Native possession, entitling "Alaska Natives only to land . . . in their individual and actual use and occupancy."

Thus, as early as 1884, federal policy toward Alaska Natives diverged drastically from policy toward Natives in other states. No federal treaties were made with Native groups, so no treaty clearly established a federal trust relationship in Alaska. The Allotment Act did not apply because there were no reservations in Alaska. In addition, since they were not technically U.S. citizens until 1924, Alaska Natives could not retain land under the Homestead Act.

*United States v. Berrigan* first recognized a trust relationship between the federal government and Alaska Natives, marking the start of the federal government's attempt to rationalize its Alaska

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59. CASE, *supra* note 9, at 6.
60. Id.
61. In addition, there was no distinction between Natives and non-Natives for federal educational services until 1905. These services were administered by the Bureau of Education, not the Bureau of Indian Affairs. *Id.* at 6-7.
63. Ch. 119, 24 Stat. 388 (1887) (authorizing the President to allot land to Natives in reservations).
64. Arnott, *supra* note 62, at 141.
66. 2 Alaska 442 (D. Alaska 1905) (holding that the federal government had the right and duty to sue to prevent non-Natives from acquiring lands occupied by Native Alaskans). According to Case, "it is most significant that the United States brought this suit in the first place; it indicates an executive determination that the federal government had an obligation to protect Native aboriginal possession from non-Native encroachment." CASE, *supra* note 9, at 7.
and continental Native policies. Congress subsequently passed the Alaska Native Allotment Act, allowing individual Alaska Natives to retain up to 160 acres of non-taxable, inalienable "homestead" land. Although this policy shadowed the Dawes Act, which set up a similar allotment system in the continental United States, only eighty allotments were granted before Alaska's statehood. Other federal initiatives included the 1926 Townsite Act, allowing Natives to hold title to townsite lots, and the 1936 extension of the Wheeler-Howard Act to Alaska, authorizing an Alaskan reservation system. However, only one reservation was established in Alaska, and according to one commentator, "[t]he lack of reservations is the single most significant factor distinguishing Alaska Natives from their counterparts in the south."

While the federal government officially applied continental Native policies to Alaska Natives, the laws implementing those policies were not vigorously enforced. Consequently, Alaska Natives' material conditions were different from those of their southern counterparts. Though efforts of the Bureau of Indian

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67. In a much later case, North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C.), aff'd in part and rev'd in part, 642 F.2d 589 (D.C. Cir. 1980), the court outlined the current federal trust responsibility to Alaska Natives: 

A trust responsibility can only arise from a statute, treaty, or executive order. . . . Every statute and treaty designed to protect animals or birds has a specific exemption for Native Alaskans who hunt the species for subsistence purposes. These statutes have been construed as specifically imposing on the Federal government a trust responsibility to protect the Alaskan Natives' rights of subsistence hunting.

Id. at 344. By grounding the trust relationship in statutes and treaties, the North Slope Borough court relied on a distinctly different justification than that chosen by the Berrigan court.


70. Arnott, supra note 62, at 142.

71. Ch. 379, 44 Stat. 629 (1926).


73. Moster, supra note 49, at 186. One reservation was established in 1891 for the Metlakatla tribe on Annette Island. Id. at 186 n.21.
Affairs (the "BIA") to marry Native subsistence needs with federal trust obligations often were inconsistent," 
subsistence resources remained abundant in federally held Alaskan lands, and Natives were not stigmatized by a wrenching reservation experience. International treaties, such as the Migratory Bird Treaty and the North Pacific Fur Seal Convention, protected Native subsistence uses, as did federal and territorial game laws. By 1958, when Alaska achieved statehood, "[n]o major entries on the public domain had occurred to create the conflicts that prevailed in colonial and early U.S. history when prospective landowners moved progressively westward through Indian territory." In sum, abundant resources and a benign neglect of official policy left Native lifestyles remarkably intact in comparison with Native experiences in the lower forty-eight states.

This balance was threatened when a land crisis developed after Alaska's statehood. While the state was allowed to select 102.5 million acres from the public domain, the Statehood Act made no mention of Native claims, "stating only that public lands that might belong to [N]atives should remain under the jurisdiction of the United States until disposal was made." This crisis evolved into an impasse, and the federal government announced a land

74. The BIA is the branch of the Department of the Interior that implements federal policy toward Native Americans. It gained responsibility for administering Alaska Native affairs in 1931. CASE, supra note 9, at 9.
75. Id. at 12-13.
76. Arnott, supra note 62, at 143.
81. Arnott, supra note 62, at 143-44.
82. Atkinson, supra note 7, at 423.
84. Arnott, supra note 62, at 144.
freeze,\textsuperscript{85} delaying settlement of state land claims until Congress approved ANCSA.\textsuperscript{86}

Thus, ANCSA and the crisis that spawned it helped to establish the parameters of modern Alaska Native subsistence rights. Since ANCSA's disposition of state claims and Native land uses came when many national and state fish and game laws were being written, its resolution of the land freeze dramatically affected subsequent federal and Alaska natural resource legislation.

III. SUBSISTENCE RIGHTS UNDER ANCSA, THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT AND ALASKA LAW

A. ANCSA

Enacted on December 18, 1971, ANCSA\textsuperscript{87} extinguishes Alaska Native land claims, although it does not establish a Native subsistence right. Unlike claim extinguishment legislation in the lower forty-eight states, ANCSA does not herd Natives onto reservations. Rather, ANCSA sets up Native corporations and divides federally held Alaskan lands among these new entities.\textsuperscript{88} In an attempt to avoid the squalor and neglect characteristic of the reservation system, ANSCA seeks to turn individual Natives into capitalists by making them shareholders of Native corporations.\textsuperscript{89} While culturally based Native subsistence statutes place too much

\textsuperscript{86} Arnott, \textit{supra} note 62, at 144-46.
\textsuperscript{89} Congressional findings in ANCSA are specifically based on a rationale of economic need, rather than on the desire to maintain Natives' traditional lifestyle. Although an economic necessity justification for subsistence allows the Natives to choose their own cultural path, it begs the following question: what type of future do Natives desire? If culture changes in response to material alterations in the environment, then ANCSA sets a powerful cultural precedent, perhaps undercutting any cultural justifications for a subsistence lifestyle. \textit{See} 43 U.S.C. § 1601(b) (1988 & Supp. V 1993) ("[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of [the] Natives."). The use of the word "social" in the statute is in juxtaposition with the use of the word "cultural" in Alaska law; under Alaska law, the term "social needs" justifies non-Native subsistence rights as well. \textit{See} Atkinson, \textit{supra} note 7, at 426-27.
emphasis on claims of cultural distinctiveness, ANCSA ignores Native culture altogether. Although it provides Natives with a form of control over their future, ANCSA abandons remote Native communities to the corporate boardroom with little training, and often at the expense of their historically chosen lifestyle. Since ANCSA's corporate structure rewards the development of land resources, it undercuts a choice to continue with traditional ways, and its intent runs counter to the culture-based subsistence justifications in subsequent federal laws.

While use of the corporate model to organize Native property claims and interests was a landmark in the trust relationship and is probably preferable to the reservation system, the introduction of distinctly modern Western forms of government changed the material conditions driving Native culture. All Natives now have an interest in protecting their corporate portfolios in addition to hunting and fishing. Indeed, after ANCSA, the Natives became proficient at pressing their claims in Washington, D.C. The Natives' successful lobbying efforts defeat the logic of grounding subsistence entitlements solely in the need to preserve culture by demonstrating the ease with which cultures can adapt to altered material conditions.

As Monroe Price argues, ANCSA will continue to change Native culture dramatically:

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90. As Price writes, "Congress converted all Alaska Natives into members of the corporate world, receivers of annual reports, proxy statements, solicitations and balance sheets. The Native received a shotgun initiation into the American mainstream." Price, supra note 3, at 95 (footnote omitted).


92. Arthur Lazarus, Jr. & W. Richard West, Jr., The Alaska Native Claims Settlement Act: A Flawed Victory, 40 LAW & CONTEMP. PROBS., Winter 1976, at 132, 133-34 ("ANCSA . . . reflects a new departure in government dealings with Indians—a policy which places on the natives alone the crucial task of translating the immediate benefits of the settlement into permanent, socially and economically productive enterprises.").


94. During the debates on the Marine Mammal Protection Act, numerous letters and telegrams were introduced from Native communities lobbying for a broad Native subsistence exception to the Act. See Ocean Mammal Protection, 1972: Hearings on the Marine Mammal Protection Act of 1972 Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 212 (1972).
The construct of values that were respected in the historic Native village will change. The corporate executives will be those who are willing to forego subsistence activities, to place a higher priority on board meetings than on salmon fishing, and to spend time talking to lawyers and financiers and bankers rather than the people of the villages.

In a sense, the gospel of capitalism has gripped the leadership of the regional corporations just as in another day, another kind of gospel was introduced for its educative and assimilative influence. The profitmaking mandate has become a powerful vision, a powerful driving force. Thus, among other problems with a cultural model, basing Native subsistence on a desire to arrest cultural change or to harken back to a pre-colonial Eden runs counter to the intent of ANCSA, the law that established post-statehood property relationships in Alaska.

B. The Alaska National Interest Lands Conservation Act

Although ANCSA does not create a Native subsistence right, a joint Senate and House conference committee intended for the Secretary of the Interior to protect Native subsistence rights once the ANCSA regime was in place. The Department of the Interior failed to act by 1980, prompting Congress to address the subsistence issue in the Alaska National Interest Lands Conservation Act ("ANILCA"), Title VIII of which also influences Alaska subsistence policy. As Case explains:

ANILCA did not require the State to adopt a subsistence preference or establish advisory councils and committees for regulation of fish and game on state or even Native lands. But the price of not doing so was that the State would not be able to regulate fish and game on the more than one-half of the lands in the state still in federal ownership.

95. Price, supra note 3, at 100 (footnote omitted).
96. S. REP. NO. 581, 92d Cong., 1st Sess. 37 (1971) ("The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority.... The conference committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."); see Case, supra note 7, at 1016.
98. Case, supra note 7, at 1017.
Like other modern experiments in cooperative federalism, "Title VIII did not compel the State of Alaska to do anything, but it made the State an offer it couldn't refuse."99

Consequently, ANILCA establishes a Native subsistence right on federal lands, including those administered by the state of Alaska, and forms the basis for Alaska subsistence laws and regulations.100 In doing so, ANILCA's subsistence policy is premised largely on cultural assumptions,101 although the statute involves some economic motivations as well.102 However, in defining the term "subsistence" as "customary and traditional uses" of wildlife resources by rural dwellers,103 ANILCA's intent and policy justifications conflict with those of ANCSA, which strive to make Natives conform to a new, wealth-maximizing corporate identity. This tension, as well as the congressional unwillingness to reconcile the Native and Western meanings of "subsistence," forms a soft foundation for subsequent subsistence laws.

Unfortunately, many commentators fail to recognize this conflict. For example, Karen Atkinson acknowledges that subsistence hunting and fishing "is not only a matter of choice, but of necessity imposed by a number of factors"104 and that "[t]he traditional subsistence economy of the Native villages has been altered by contact with the outside."105 However, she asserts that since "[i]t is a system for distribution and exchange of subsistence products which operates according to complex codes of participation, partnership, and obligation," subsistence is properly defined as the "customary and traditional" uses of resources.106

By conceding that Native subsistence culture is evolving, while at the same time advocating subsistence rights grounded in a cultural rationale, Atkinson offers a vague right that will be difficult to apply, thereby undermining rational wildlife management. Courts, especially when reviewing rulemaking and regulatory

99. Id.
100. See infra notes 115-17 and accompanying text.
101. Atkinson, supra note 7, at 438 ("At the heart of the subsistence priority is Congress's overriding commitment to protect Native subsistence lifestyle and culture.").
102. See 16 U.S.C. § 3111(1) (1994) (finding that the continuing opportunity for Alaska Natives to practice subsistence is essential to their economic existence).
103. Id. § 3113.
104. Atkinson, supra note 7, at 427.
105. Id.
106. Id. at 428.
statutes, are best at applying concrete, rational definitions, not statutes defined along the hazy contours of a particular group's cultural context. Furthermore, a cultural justification provides little guidance to the Secretary of the Interior, who must administer wildlife resources. The Secretary may encounter difficulties in attempting to reconcile a scientifically based wildlife conservation scheme with a subsistence definition that affords Natives an entitlement based on cultural practices.

However, Atkinson is not alone in her mistake. Even ANILCA's legislative history explains that traditional uses are "not restricted to methods passed down from generation to generation and [are] not intended to foreclose the use of new, unidentified means of surface transportation." 107 Thus, snowmobiles and airplanes could become traditional vehicles for subsistence hunting within ANILCA's attempt to protect Native culture. That ANILCA could not define traditional Native culture without acknowledging its modern evolution demonstrates the weakness of a culture-based approach. As Native culture adapts to modern surroundings, the effectiveness of ANILCA's resource management provisions will wane due to its reliance upon Native culture as the lodestar of its subsistence policy.

C. Alaska State Law

Despite ANILCA's shortcomings, the Alaska legislature has embraced its cultural approach in an effort to comply with Title VIII and thereby gain control over federal lands in Alaska. 108 Consequently, state subsistence policy affects wildlife regulation on all public lands within the state, even though most land in Alaska is not state-owned. 109

Like ANILCA, Alaska law recognizes a Native subsistence right. Given its relatively abundant wildlife resources and the economic and physical need of many rural residents to supplement their diet with such foods, 110 Alaska traditionally has allowed the subsistence taking of wildlife. Alaska's current subsistence hunting

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107. Id. at 428-29 (citing S. REP. NO. 1300, 95th Cong., 2d Sess. 227 (1978)).
108. See supra notes 98-99 and accompanying text.
110. CASE, supra note 9, at 275.
and fishing scheme consists of legislation enacted in 1978, \(^{111}\) although post-ANILCA laws flesh out these provisions. The 1978 law established a Subsistence Division of the Alaska Department of Fish and Game, which was to conduct studies of Alaskan subsistence uses. \(^{112}\) In addition, the law ordered the state Board of Game and Board of Fisheries to craft regulations permitting subsistence taking. \(^{113}\) The most controversial section of the law, however, gave subsistence hunting and fishing priority if the overall taking of a particular resource were restricted for conservation purposes. \(^{114}\) ANILCA directed the state to devise a regulatory scheme "to afford long-term protection to the subsistence way of life." \(^{115}\) By 1982, the state had created its regulatory program, largely adopting ANILCA's definition of subsistence as the customary and traditional uses of wildlife resources. \(^{116}\) However, a 1985 decision of the

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112. Id. For a lucid summary of Alaskan subsistence policy, see Atkinson, supra note 7, at 431-33.
113. Atkinson, supra note 7, at 431. A brief tour of the current index to the Alaska Administrative Code reveals an intricate tapestry of subsistence regulations ranging from geographic limitations to species-specific fishing practices.
114. ALASKA STAT. § 16.05.258(c) (1992). Part of this statute was invalidated by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989), discussed supra, at notes 127-36 and accompanying text. Following McDowell, the statute was amended to remove the subsistence preference, at least until October 1, 1996, when a delayed amendment is scheduled to shift the language back to that struck down by the court. This maneuver again betrays different interpretations of the statute: is it designed to perpetuate a "way of life" or to allow those who need nourishment to find it in the wild? A subsistence preference seems to weigh on the side of need-based reasoning, affording to those in need the ability to live off the land, assuming that the definition of subsistence is economically grounded. However, urban residents have expressed their position as endorsing a "no special rights" for Natives mentality. A clear signal of the legislature's intent could deflate their arguments.
115. Atkinson, supra note 7, at 428. ANILCA granted Alaska the right to manage fish and wildlife on public lands if certain criteria were met, such as compliance with ANILCA's subsistence provisions. Id. at 430; see also 16 U.S.C. § 3115 (1994).
116. Atkinson, supra note 7, at 431-32; see also Madison v. State Dep't of Fish and Game, 696 P.2d 168, 176 n.13 (Alaska 1985) ("[T]he] words 'customary and traditional' in the 1978 subsistence law were taken from § 703 of HR 39, 95th Congress, 2nd Session (1978), which Congress passed in modified form in 1980 as [ANILCA].")
Alaska Supreme Court, *Madison v. State Department of Fish and Game*,\(^{117}\) had a significant impact on the state program. In *Madison*, a group of Native commercial fishermen challenged the state's two-tiered regulations governing the issuance of subsistence fishing permits.\(^{118}\) The regulations gave a priority to "sustenance" licenses over sport and commercial licenses if the state restricted subsistence permits because of dwindling fish stocks.\(^{119}\) Qualification for this sustenance license preference was based on a number of factors, including "customary and direct dependence" on the resource, residency near the resource and the availability of alternative resources.\(^{120}\)

Holding for the commercial fishermen, the court stated that the state could not restrict subsistence use based on rural residency,\(^{121}\) since the sponsor of the controlling bill, Representative Anderson, was on record opposing a rural residency requirement.\(^{122}\) According to Representative Anderson, culture and history supported a subsistence exception for both Natives and non-Native rural and urban dwellers. During the floor debates on the bill, he stated that "[t]he use of customary and traditional also is in recognition of a historical use of fish and game for food, shelter, fuel, clothing, tools, transportation, etc. This is not only in conformance with the aboriginal uses, but also those that have come . . . later."\(^{123}\)

However, Representative Anderson's statement is not as clear as the court insists. His argument that historical Native and non-Native uses must be protected can be interpreted in two conflicting ways. It can support a necessity-based justification, since rural dwellers living far from towns are dependent on fish and game for their survival. It can also justify a culture-based explanation, since those same individuals have an historic stake in preserving their way of life. The law's preamble reflects this confusion, stating that "'[i]t is in the public interest to clearly establish subsistence use as

\(^{117}\) 696 P.2d 168 (Alaska 1985).

\(^{118}\) *Id.* at 172.

\(^{119}\) *Id.* at 174. By the term "sustenance" licenses, I am referring to licenses issued to people whose personal use of the fish is necessary for their survival.

\(^{120}\) *Id.*

\(^{121}\) *Id.* at 176-78.

\(^{122}\) *Id.* at 175.

\(^{123}\) *Id.* (quoting Rep. Anderson) (emphasis omitted).
a priority use of Alaska’s fish and game resources and to recognize
the needs, customs, and traditions of Alaskan residents.”

The ultimate effect of the Madison court’s action may have been
beneficial; it prompted an amendment of the Alaska subsistence
law that explicitly established a rural subsistence preference. This
amendment, enacted in a 1986 law, retained the two-tier subsis-
tence stratification but required all subsistence users to be rural
residents.25 Whatever the legislature’s intent in enacting the
rural requirement, it permitted the rational enforcement of a need-
based policy of rationing limited wildlife resources. Even though
the 1986 law implemented ANILCA’s charge, its text was free from
cultural assumptions about subsistence taking, apparently concerned
instead with a necessity-based model for subsistence rights. The
law’s definition of “rural” implicated economics or need, stating
that a rural area is “[a] community or area of the state in which the
noncommercial, customary, and traditional use of fish or game for
personal or family consumption is a principal characteristic of the
economy of the community or area.”26

Unfortunately, the Alaska Supreme Court struck down the 1986
law in McDowell v. State,27 holding that the rural subsistence
preference violated sections 3, 15 and 17 of Article VIII of the
Alaska Constitution.28 Essentially, the court ruled that the rural
preference conflicted with the Alaska Constitution’s common use
requirement in Article VIII, which governs the use of state natural
resources.29 Yet by reading the article to require common usage
of resources by all, the court trivialized the trust responsibility that
Article VIII imposes on the state. Rational management of natural
resources does not necessarily guarantee that all people will benefit
equally from those resources at all times.30

McDowell makes it even more difficult to divine the legislative
purpose behind Alaska’s subsistence law. The court’s anti-“special
rights” reasoning seems to argue for a non-cultural reading of both

124. Id. at 176 (quoting Act effective Oct. 10, 1978, ch. 151, § 1, 1978 Alaska
Sess. Laws 1 (2d Sess.)).
ALASKA STAT. § 16.05.258 (1987)).
128. Id. at 9.
129. Boardman, supra note 4, at 1008-09.
130. Id. at 1008.
the law and the state constitution, but, at the same time, it does not lend itself to a rational need-based analysis of the policy.131 Furthermore, the court's language appears more political than legal; its decision could be taken as a response to a 1982 ballot initiative to repeal the 1978 subsistence law in favor of a "consumptive use" priority.132 According to Case, the failed 1982 initiative demonstrates the continued political debate over a generally acceptable rationale for subsistence laws.133

Under the McDowell analysis, any statute that carves out taking rights for a distinct group, whether cultural or economic, could be suspect.134 For example, the court explicitly rejected the state's argument that the law at issue did not create an unconstitutional "closed class," since class membership depended only on a necessity-based residence requirement and was easily attained by moving to a rural area.135 According to James Boardman, creating a class based on financial need would violate the equal access clause of section 15 of Article VIII.136 Thus, while economic and

131. By reading sections 3, 15 and 17 of Article VIII of the Alaska Constitution together, the court "concluded that exclusive or special privileges to take fish and game are prohibited." Boardman, supra note 4, at 1008; McDowell, 785 P.2d at 9.

132. Case, supra note 9, at 275.

133. Id.

134. Boardman, supra note 4, at 1013.

135. McDowell, 785 P.2d at 6-7. The court stated:

We find this argument unpersuasive. If it were valid, virtually any discrimination based on residence would be justified—the residents of the disfavored area could simply move. Such a rationale is inconsistent with the prevailing approach in territorial discrimination cases, which is to subject territorial classifications to scrutiny under the equal protection clause.

Id. at 7. Unfortunately, the court failed to look at the logic behind the law itself. It read the provision as simply granting "special rights" to one group at the expense of the other instead of understanding it to be a key component in a regulatory policy designed to ensure sustainable fish and game use for all Alaskans.

136. Boardman, supra note 4, at 1013. "Section 15 of article VIII contains an express prohibition against exclusive or special privileges to take fish." Id. at 1008. Section 15 reads, in pertinent part, that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Alaska Const. art. VIII, § 15.

Boardman argues that a limited-entry licensing system for subsistence fishing could be constitutional, since a recent amendment to section 15 gives the state the power to limit entry. Boardman, supra note 4, at 1014. A current limited-entry commercial fishing system is based on an "optimum number of permits . . .
physical needs best justify a subsistence policy, such a standard could be illegal under the court’s dicta.

In response to McDowell, the Alaska legislature enacted yet another subsistence law. Attempting to avoid an unconstitutional “group” classification, the new law allows the establishment of a subsistence priority in an area if subsistence is “a principal characteristic of the economy, culture, and way of life.” In contrast, areas that do not meet this requirement are classified as “nonsubsistence areas,” in which no subsistence priority may be granted to any group. In deciding whether an area qualifies for subsistence use, the state regulatory bodies may consider an array of factors, including social and economic structure, economic stability and cultural values associated with the taking of resources in that area. This law focuses on the aggregate use of fish and game in an area, rather than on the users’ characteristics, avoiding the section 15 problems that could arise if certain individuals are prohibited from subsistence hunting because of group membership.

This focus blurs the law’s rationale. By concentrating on geographic areas, the legislature fell back on a cultural justification, since individual needs no longer could be considered. The language of the law hints that past practice, not present need, is the real touchstone. State regulators must determine “whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life” of an area, not whether subsistence is necessary for human sustenance based on the availability of other foods. This design, even if intended to appease the Alaska Supreme Court, will distract state game officials from their task of preserving and managing wildlife resources. Under this newest iteration of the law, they cannot count on a roughly

determined by state biologists for each fishery; these permits then are issued to fishermen based on a point system.” Id. at 1014 n.110. However, a limited-entry subsistence scheme could be a bureaucratic and financial nightmare to enforce, given the number of Native and non-Native subsistence takers. Furthermore, the system would still have to allow urban residents an opportunity to compete for licenses, which would contradict a true need-based rationale for subsistence fishing and hunting. Perhaps the best solution is a judicial reversal of McDowell itself.

137. ALASKA STAT. § 16.05.258(c) (1992).
138. Id.
139. Id. § 16.05.258(c)(1), (c)(2), (c)(10).
140. Boardman, supra note 4, at 1008.
141. ALASKA STAT. § 16.05.258(c) (1992).
stable and quantifiable need-based Native subsistence harvest in formulating long-term plans. Rather, their programs must now take account of a malleable cultural practice, a criteria that is hard to quantify and easy to exaggerate. Like Geertz’s example of an anthropologist who necessarily creates a fiction in describing a culture, since he or she is at least one step removed from the cultural context, state regulators can base their judgments only upon an impression of area history, not present material needs. Thus, a cultural definition of subsistence undergirds present Alaska law, a definition that mirrors the analogous provisions of ANILCA.

This legal justification resurfaced most recently in State v. Kenaitze Indian Tribe, in which the Alaska Supreme Court gave its constitutional blessing to state regulatory bodies’ statutory ability to create nonsubsistence areas. The court emphasized that in such areas, “subsistence activities can still take place. What is eliminated ... is the statutory subsistence priority.” As the Alaska Constitution’s common use clauses “are not implicated unless limits are placed on the admission to resource user groups,” the existence of nonsubsistence areas is constitutional. Thus,

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142. See Geertz, supra note 25, at 14-15; see also supra note 28 and accompanying text.
143. See supra note 28 and accompanying text.
144. Id.
145. Id. at 640.
146. Id. (quoting Tongass Sport Fishing Ass’n v. State, 866 P.2d 1314, 1318 (Alaska 1994)). The statute permitted state regulators to distinguish between users based on several factors, including “the proximity of the domicile of the subsistence user to the stock or population.” ALASKA STAT. § 16.05-.258(b)(4)(B)(ii) (1992). On the direct authority of McDowell, the court held that this residence-based requirement violated sections 3, 15 and 17 of Article VIII of the Alaska Constitution. Kenaitze Indian Tribe, 894 P.2d at 639. The court’s
Alaska’s subsistence law has finally, although not completely, survived constitutional scrutiny by the supreme court. Unfortunately, the court’s holding allows state regulatory bodies to continue to base their decisions on a vague cultural standard, rather than a concrete analysis based in principles of sound resource management.

Nonetheless, the primary beneficiaries of Alaska’s subsistence law are still likely to be Natives and others living in remote areas, who remain able to live a subsistence lifestyle and fulfill their economic needs. While the overall result may be beneficial for Natives, the law is open to abuse and corruption because of its flawed policy and muddled legislative intent. First, urban residents can still take resources for subsistence purposes, even if they do not live in subsistence areas. This feature defies rational resource management and is a relic of a legal regime that favors nebulous geographic rights over individual needs and responsibilities. Second, the law relies upon a cultural meaning of subsistence taking, itself a dangerous notion, but also opens up such taking to urban dwellers whose cultural context is vastly different from that of Natives. Therefore, the law is internally inconsistent. Finally, the law reflects the McDowell court’s refusal to reconcile the management of a limited resource with a nuanced constitutional right to share in that common resource. In doing so, it ignores...
the fact that an interpretation that endangers the bases for both rights may ultimately destroy them and will, at a minimum, postpone their final reconciliation. If a blanket subsistence right results in dwindling natural resources, then all Alaskans' rights to share in those resources diminishes.

Alaska legislators may have recognized these shortcomings. They passed a delayed amendment in 1992 to the current subsistence law that was to take effect on October 1, 1995. However, shortly after the Alaska Supreme Court decided Kenaitze Indian Tribe, the legislature postponed the application of the amendment until October 1, 1996. This amendment will change the post-McDowell law back to its former state, replete with a regulatory preference for local residents if state regulators limit subsistence uses. Perhaps partially acknowledging the reasonableness of a need-based limit to subsistence uses, the lawmakers seem to be asking the supreme court to reconsider the issue and rationalize its logic. Given the seven-year time span between McDowell and the effective date of the amendment, it also seems that they hedged their bets that the justices favorable to McDowell will no longer sit on the Alaska Supreme Court.

in the sensitive area of natural resources management, it is difficult to benefit all of the people all of the time. Often a benefit to one group can cause harm to another potential user. . . . The [court's] result accentuated the special privileges prohibition and anti-exclusionist values of article VIII, without reconciling the implications of this interpretation for Alaska's natural resources and Alaska natives dependent on those resources. Furthermore, this construction may harmonize all three sections [(3, 15 and 17)], but it diminishes the value of the common-use clause to the benefit of all the people of Alaska. The McDowell court failed to realize that the granting of a special privilege, under certain circumstances, may indeed benefit all Alaskans.

Boardman, supra note 4, at 1009.

152. The full text of the future amendment is found in the notes following ALASKA STAT. § 16.05.258 (1992).
153. Under the Alaska Constitution, the governor appoints supreme court justices and superior court judges based on the nominations of a judicial committee appointed by the state bar. ALASKA CONST. art. IV, § 5. However, each justice or superior court judge is subject to approval or rejection in a nonpartisan vote at the first general election held more than three years after his or her appointment. ALASKA CONST. art. IV, § 6. After that first vote, each supreme court justice must stand for approval every ten years, and each superior
Alaska subsistence law is still in a state of flux, without an acceptable policy justification. Yet Alaskan subsistence resources remain widely available; as long as use is restricted to sustenance, resources will renew themselves. In this regard, federal wildlife protection law poses a more troublesome problem. Its subsistence rationales lean heavily toward a cultural basis and are at least as confused as those in state law.

IV. SUBSISTENCE PROVISIONS IN FEDERAL WILDLIFE LAWS: THE MARINE MAMMAL PROTECTION ACT

Federal wildlife laws, such as the Marine Mammal Protection Act of 1972 ("MMPA"),154 contain exceptions for Alaska Natives who rely on protected species for subsistence. Like other state and federal subsistence laws, the justifications for these provisions are murky. Though a necessity rationale could provide strong support for at least some exceptions, the provisions are mainly culturally motivated, which fosters uncertainty and leaves these laws open to exploitation by both Natives and non-Natives.

After enacting ANILCA, "Congress passed [the MMPA] in direct response to public outrage at the slaughter of harp seal pups in Canada, as well as in reaction to general concerns about the well-being of whales, porpoises, and other marine mammals."155 The MMPA's operative language bans the taking or importing of all marine mammals and marine mammal parts into the United States.156 In addition to exemptions for scientific research and taking by permit, the Act grants Alaska Natives "an exclusive right to take marine mammals, so long as it is 'not accomplished in a wasteful manner,' for 'subsistence purposes' or to create 'authentic Native' handicrafts or clothing."157

court judge must stand for approval every six years. Id. This policy was explained in Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979). In Buckalew, the court noted that the framers of the Alaska Constitution rejected the federal life tenure model, desiring a system in which judges and justices would be accountable to the people for their decisions. Id. at 244.

157. Case, supra note 7, at 1022 (citing 16 U.S.C. § 1371(b)).
Like other such laws, definitions found in the statute and its implementing regulations provide some explanation for the Alaska Native exemption. The act itself neglects to define “subsistence,” leaving that task to the Department of Commerce. In regulations, the Department has defined the term “subsistence” as “the use of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or those who depend upon the taker to provide them with such subsistence.” The MMPA further explains that “‘authentic native articles of handicrafts and clothing’ means 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.” However, this definition is open to interpretation. For example, if traditional methods of hunting can include the use of a snowmobile, does a fur jacket made for a Barbie doll qualify as an authentic native handicraft? The Department of the Interior has attempted to answer this question by further defining authentic native handicrafts as items “commonly produced on or before December 21, 1972.”

The definitions themselves are easily applicable, but they do not rely on one consistent rationale. The definition of “subsistence” appears to be based on economic or physical need and is therefore easier to interpret. However, the definition of “handicraft” shuns economic reasoning, as it is apparently premised on cultural factors. While the definitions of these two terms contradict one another, the regulations further complicate matters by attempting to arrest Native cultural development at the end of 1972. Although the 1972 cut-off regulation may be designed to facilitate interpretation, it has three main faults. First, it is by no means easy for a court to discern whether a particular item was produced traditionally before 1972. Second, the choice of date is

seemingly arbitrary as well: why should 1972, and not 1872, be the cut-off date? Finally, if the goal of the MMPA is to maintain cultural continuity, then the time limit negates that intent. If Alaska Natives may use traditional materials to perpetuate their cultures as they wish, it is unreasonable for the statute to deny them the ability to make handicrafts that were not invented before 1972.

This last issue implicates an economic necessity argument, which, as illustrated by the applicable case law, is a subtext running throughout the legislative history of the MMPA. For example, in United States v. Clark, four Alaska Natives shot nine walruses, a species protected by the MMPA. They removed only the heads, the penis bones and the flippers from the carcasses, butchered one carcass and ultimately discarded the other eight. Clark and his companions were charged with violating the MMPA and its implementing regulations, which prohibit Natives from taking protected species in a wasteful manner. Clark brought an action against the Department of the Interior, arguing that the regulations conflicted with the MMPA’s original intent. Alternatively, Clark contended that if there were no conflict, then the MMPA itself was unconstitutionally vague.

The court held that the regulations were within the authority conferred on the Department of the Interior by the MMPA and

163. But see United States v. Clark, 912 F.2d 1087 (9th Cir. 1990), cert. denied, 498 U.S. 1037 (1991), in which the court focused on Senator Ted Stevens’ sparse economic reasoning. The court specifically rejected the contention that the MMPA tries to maintain cultural continuity and evolution, arguing that it is incongruous to find Stevens asking that the native Alaskans be free to use all the carcass, not just part of it, while [the appellant] and amicus argue that Stevens’ position supports [the appellant’s] claim. . . . [The appellant] suggests that custom has now changed to the point that taking walrus for a few parts alone (head, oosik and flippers) should be considered non-wasteful. . . . [B]ut that does not mean that the new custom, if it be such, is not wasteful. It only means that Congress may have to revisit this area of the law if it now wishes to allow native Alaskans to take animals under the changed conditions. Id. at 1089. Couched in these terms, this economic rationale is limitless, as long as the Natives take the whole carcass. Such a rationale could justify slaughtering walrus and sending their prized parts to Asia for use in aphrodisiacs, which is clearly not a rational use of a threatened wildlife resource.


165. Id. at 1088.

166. Id. at 1088-89.

167. Id. at 1089.
that the Act was not unconstitutionally vague, as it provided sufficient notice to Clark that he could be held criminally responsible. Most importantly, the court examined Congress’s legislative intent in passing the MMPA and found that Congress grounded it in an economic justification. After reciting a litany of congressional statements extolling Natives’ limited commercial use of marine mammal products, the court declared that “[given] the legislative history and the statutory text, we hold that the exemption is properly viewed as protecting subsistence hunting and use of mammal parts for a limited cash economy, so long as neither use is wasteful.”

Subsequent case law has both contradicted and supported the Clark court’s conclusion that the Alaska Native exemption from the MMPA is based on an economic need rationale. In Katelnikoff v. United States Department of the Interior, two Alaska Natives shot approximately thirty-five sea otters, skinned them, discarded the carcasses and later tanned their furs. Katelnikoff used the pelts to make crafts, including teddy bears, hats and fur flowers, some of which were made from commercially available designs. Though she tagged them with an authentic handicraft stamp, U.S. Fish and Wildlife officials seized them, claiming that they violated the time-limit regulation because they were not of a sort “commonly produced on or before December 21, 1972.” Katelnikoff sued for the pelts’ return, claiming that the regulations exceeded statutory authority. She argued that the regulations frustrated Congress’s intent to create Native commercial enterprises by “allow[ing] her virtually no use of sea otter pelts because of the pre-twentieth century regulations on native uses and the species’ near extinction during the first half of this century.”

168. Id. at 1090.
169. Id. at 1089.
170. Id. (emphasis added).
172. Id. at 660.
173. Id. at 660-61.
176. Id.
177. Id. at 662.
In response, the court examined the MMPA’s legislative history, finding that “the purpose of [Senator Stevens’] amendment was to enable natives to continue to produce native arts and crafts; what was to be protected was the right to be left alone and to continue in their centuries-old way of life and the chosen trade of their forefathers.” 78 Thus, the court adopted a cultural justification for the law. In addition to other problems with this approach, the court finessed the friction between a cultural standard and the 1972 cut-off date; the court merely stated that there are no “traditional” uses of otters, since there were almost none available to hunt before 1972. 79 Such a cultural justification in effect freezes Native culture at its 1972 stage of development. On the other hand, a necessity-based approach recognizes that Natives’ needs change over time; if meeting those needs does not substantially hurt the resource, then the sustenance-based definition allows Native culture to adapt and grow. 80

In a later, but related case, Didrickson v. United States Department of the Interior, 81 the court returned to this issue. Didrickson was charged with the violation of the same regulation for selling a sea otter parka with snaps and zippers. 82 The Department of the Interior seized the articles on the grounds that this use was not traditional, since snaps and zippers were not commonly used in otter parkas before 1972. 83 Although the court invalidated the pertinent regulation, it did not completely repudiate a culturally based rationale for the MMPA. 84 It held instead that under section 1371(b) of the MMPA, the Secretary of the Interior may regulate Native handicrafts only if an animal stock is depleted. “Had Congress intended to authorize the Secretary to maintain any particular harvest level for purposes of the exception, it would have explicitly given the Secretary such power. . . . Section 1371(b) is clearly intended to limit the Secretary’s authori-

178. Id. at 665. The court also noted that though Congress sought to encourage authentic handicrafts, “more striking is that body’s concern with the preservation of traditional aspects of native culture and lifestyle.” Id. at 666.
179. Id. at 667.
180. See infra notes 214-18 and accompanying text.
182. Id. at 1284.
183. Id.
184. Id. at 1291.
The court reasoned that Congress did not intend the Department to "gap-fill" the MMPA by ordering a 1972 cut-off date. Consequently, the court invalidated the 1972 cut-off regulation, stating instead that "traditional" uses are those that have occurred throughout Native Alaskan history. As a result, Didrickson's use of the otter pelts was traditional within the requirements of the Alaska Native exception to the MMPA; the court could "hardly think of anything more 'traditional' to an Alaskan native than making a parka made from animal fur and exchanging it for some other useful item."

The Didrickson court's reasoning is best supported by a necessity argument: snaps and zippers should be allowed because they allow the Natives to participate better in a limited cash economy and because parkas are traditional uses of animal pelts. Yet the court's language endorses a cultural reading of the law. If the 1972 cut-off is stricken, then Katelnikoff can once again make her fur flowers, and perhaps even a fur stole for a Barbie doll, as long as these items are "authentic." The court effectively adopted the broadest cultural reasoning possible, allowing widespread Native use of protected animals under the guise of traditional and authentic uses. On appeal, the United States Court of Appeals for the Ninth Circuit upheld the district court's acceptance of a cultural justification for the law, insisting that "authentic" uses are those "done in traditional native ways." As did the district court, the court of appeals adopted a broad cultural definition that allows traditional uses to be any new use, as long as it meets the MMPA's other production criteria.

The most plausible explanation for the various interpretations of Congress's intent in enacting the MMPA is that the legislative record supports both a cultural and an economic motivation.

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185. Id. This result seems to conflict, at least in spirit, with Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which instructed lower courts generally to defer to agency interpretations of their own substantive statutes if the law is ambiguous. On this issue, the MMPA appears ambiguous, since two courts interpreted the statute in very different ways.
186. Didrickson, 796 F. Supp. at 1288.
187. Id. at 1289.
188. Id. at 1290.
189. Didrickson v. United States Dep't of the Interior, 982 F.2d 1332 (9th Cir. 1992).
190. Id. at 1342.
191. Id.
During the floor debate on the bill, Senator Ted Stevens of Alaska championed the cause of Native subsistence takers from his state. He introduced scores of telegrams and letters into the record justifying an exception on both theories. Stevens's legislative partner, Alaska Representative Nick Begich, framed his argument in terms of cultural continuity:

"In spite of intervening pressures of great magnitude, a cultural system centering on subsistence still thrives in some regions of Alaska, and ocean mammals play an important role in maintaining the subsistence level. I would make it very clear that it is incumbent on all of us to respect this situation and approach actions which would alter it with great care."

Later, Senator Stevens even hinted that subsistence taking should include the ability of the Eskimo Foods company to can seal meat, a practice that is difficult to justify on either cultural or sustenance grounds. Mechanically canning seal meat for later consumption is certainly not a time-honored practice among Aleuts leading a distinct Native lifestyle; nor is it part of a sustenance existence, since it relies on modern technology to preserve and distribute the canned product. Rather, it is a simple legal exclusion from the clear mandate of the MMPA requested by an interest group wishing to better its economic position.

During March 1972 floor debates, Stevens continued to confuse the issue, first arguing that without an exception for Natives, the MMPA would make Natives "face the certain fate of cultural extinction." Later, in the June 1972 debates, he stated that "if this exception were not included, Alaskan Natives would lose their traditional way of life, the way they have lived for centuries."

195. Id. Since culture is an evolutionary process, not a time-bound object, Stevens' logic is not squarely on point. Such a fear should not form the basis for laws, since Native subsistence culture is derivative of Natives' physical need for the resources in question.
196. 118 CONG. REC. 25,258 (1972). Striking a painfully earnest tone, Stevens claimed that

Alaskan arts and crafts are an artistic and social heritage. This skill, handed down from generation to generation, reveals as much of their history as paintings of Rembrandt and other famous European artists
This statement provided the Katelnikoff court with the basis for a cultural justification. However, Senator Stevens apparently never considered why the Natives would lose their traditional way of life. They would do so because they rely on these resources for practical reasons; in short, they need the available food.

In his March 1972 statements, Stevens again avoided the obvious sustenance argument, claiming that “the Alaska Native needs cash. If he is to have the choice to live where his people have dwelt for centuries, he must be permitted to make a living there.” Stevens made no mention of taking for nutritional purposes. Rather, he chose to work the Natives into the cash economy: “[T]he only industry that the Alaska Native can count on to support himself and his family is one based upon full utilization of the ocean mammals. . . . This is an industry of Native manufacture, handicrafts and carving.” This rationale allowed the Clark court to argue that the law is grounded in an economic concern, albeit one that ignores a more readily defensible economic justification that conserves Native hunting and fishing culture. Stevens failed to see that infusing cash into the Native economy is a sure way to alter old habits and “traditional” culture. Instead, he praised the fact that “snowmobiles have largely replaced dog sleds.”

The equivocal legislative history and case law is betrayed by the Natives’ quick response to this political and economic threat. The Natives responded as any rational interest group would; they lobbied Congress for protection from change. Their reaction in flooding Stevens’s office with telegrams and testimony demonstrates their ability to play by the rules of the Western system of government and questions the need to ascribe culturally distinct motives to their subsistence taking. Furthermore, it is difficult to understand how Alaska Native hunting and fishing practices are culturally different from those of other Native Americans. A reveals [sic] of the white man’s past history. Removing the privilege of passing this cultural legacy to future generations will sever children as yet unborn from the past. It will create a cultural diaspora.

Id. at 25,259.
198. Id.
199. Id.
200. See supra note 94 and accompanying text.
need-based approach would not fall prey to such inconsistencies. Alaska Natives are more remote from affordable store-bought food than many, if not most, Native Americans.

However, even in Alaska, the subsistence need of some Native groups is different than that of others. After oil was discovered on Inupiat land, Warren Matumeak, a tribal elder, stated that "things have changed for the better. We have schools, roads, firefighting equipment. Our houses have kitchens and flush toilets and T.V.'s. It's sad that some people think that we should have to go back to the old ways." While things may not have changed for the better for all Inupiats, surely Matumeak has a different subsistence need than members of the Gwich'in tribe, who live in remote villages on oil-free lands and remain dependent on caribou for sustenance. Embracing the cultural model treats these different cultures identically, filtering out the disparate needs of very different lifestyles.

In addition, the Native handicraft exemption has caused an even more pernicious side effect. Since cultural expectations evolve over time in response to changing material conditions, the exception cannot be limited to those who sell traditional Native wares. Especially after the African elephant ivory ban went into effect,

Species Act are applicable to Alaska Natives only). The court stated that the Alaska Native exemptions were driven by a need to preserve social unity but that there was no such need in Hawaii. "While some native Hawaiians may choose to isolate themselves from the conveniences of modern society, most native Hawaiians do not live in areas so remote that access to conventional food supplies is virtually non-existent." Id. at 1397. This logic easily could be extended to Alaska Natives: Why do they choose to live in isolated villages when they can just as easily move to the cities? In a fit of circular logic, the court seems to think that subsistence activity is culturally stronger in Alaska primarily because Native Alaskans have traditionally pursued broad subsistence activities, while Native Hawaiians have not.


203. Id. Egan notes that, according to Gwich'in leader Sarah James, "the Gwich'in are caribou people. For thousands of years we have lived with caribou right where we are today. We're talking about an Indian nation that still lives on the land and depends on this herd. In my village, about 75 percent of our protein comes from caribou." Id. (quoting Sarah James).

204. See Elephant Skin and Bones, ECONOMIST, Feb. 29, 1992, at 48. For an interesting discussion on wildlife preservation, including ivory and the North Pacific Fur Seal Treaty, see Birds and Bees; Governments are Trying to use Treaties to Prevent Extinction, in Survey: the Environment, ECONOMIST, May 30, 1992, at 15.
this entitlement created tremendous incentives for poor Natives to make some quick cash by selling ivory and walrus parts in Asian markets, where the demand for ivory remains high. As United States v. Clark illustrates, Natives will butcher walruses for just a few pieces, including the tusks and the oosik, or penis bone. Poaching has become so rampant that "Alaskan native carvers report a shortage of walrus ivory for their own needs." According to Jim Sheridan, a special agent at the U.S. Fish and Wildlife Service's Anchorage office, "the black market is trading as much in drugs—if not more—than in cash. . . . We have a case where the whole head. . . . might have been worth $300 to $500, but it was going for six [marijuana] joints."  

Unfortunately, as Didrickson demonstrates, courts can regulate Native taking of species protected by the MMPA only if the taking in question is "wasteful" and if the species taken is classified as "depleted." According to Debra Gilcrest, non-wasteful Native taking of walrus and other resources is becoming more rare, and waiting for the Department of Commerce to list the walrus as "depleted" may come too late to save the herds. Yet poaching continues under the current legal regime, feeding cash into poor Native communities. This trade underscores the folly of the culturally driven Native takings exceptions. These "traditional"

205. See generally Gilcrest, supra note 155, at 144-46.
206. 912 F.2d 1087 (9th Cir. 1990), cert. denied, 498 U.S. 1037 (1991). The oosik is highly sought as an aphrodisiac in Asia. Alaska Representative Don Young recently urged U.S. Fish and Wildlife Director Mollie Beattie to allow Natives to sell uncarved oosiks as Native handicrafts in Asian markets, undercutting any cultural justifications that the subsistence exception might still retain. See In the Loop: That's Pronounced Ooow Sick, WASH. POST, Feb. 16, 1994, at A17.
208. Id. (quoting Jim Sheridan).
210. Gilcrest, supra note 155, at 144. "The exploding Japanese market for salmon roe has led to many cases in which the Natives who are fishing will simply gather the eggs and discard the rest of the salmon." Id. Gilcrest also notes that the four-fold increase in the price of ivory in 1980 corresponded with an increasing number of headless walruses turning up on Alaska shores. Id. at 144-45. See also Clark, 912 F.2d at 1089 (finding the taking of the head, flippers and oosik to be wasteful).
communities are now being subjected to the problems of the drug trade, fueled by entitlements designed to preserve a centuries-old culture. Furthermore, the demand for cash in these areas itself undermines the claim that Native communities are culturally or socially distinct. While they may be different, individual Natives have had so much contact with Western society that they have acquired Western economic desires. If some Natives cannot resist the temptations of an economic or pharmacological fix for their troubled communities, then subsistence law cannot rest on cultural assumptions that are at best patronizing and at worst destructive.

The MMPA offers disincentives for rational resource allocation. Its definitions are vague, and, although the legislative history of Congress's intent is murky, it reflects an overriding culturally oriented justification for the Alaska Native exception. Instead of establishing a cultural right to use marine mammals, as in Katelnikoff and Didrickson, or cementing a limitless notion of a blubber and oosik-based cash economy, implicit in Clark,212 Congress should adopt a need-based justification for the exception. Such a justification would function as a type of property right; Natives who lead sustenance lifestyles, such as the Gwich'in, and especially Natives living along the coast, would be able to take protected marine mammals because they need the animals for food and for craft materials for personal use in a non-cash economy. Any loosening of this standard would be susceptible to the manipulation of "Bic-pen" scrimshaw213 and other techniques designed to exploit the exclusive MMPA taking entitlements by selling marine mammal products in the world market.

212. United States v. Clark, 912 F.2d 1087, 1089 (9th Cir. 1990), cert. denied, 498 U.S. 1037 (1991) ("A close examination of the genesis of the bill demonstrates that the subsistence exemption is intended to clarify that the meat, blubber, and organs need not be used for subsistence, but may also be used as the basis of a cash economy.").

213. Bic-pen scrimshaw refers to a method used by Alaska Natives to comply with the MMPA's handicraft carving conditions while actually preserving the ivory tusks for sale in Asia. According to Michael Parrish:

Native Alaskans are allowed to sell raw ivory to each other, and to sell ivory to non-natives if it has been crafted in traditional ways—such as scrimshaw, or being carved into traditional animal statues. In fact, one trick used by traders to avoid the Marine Mammal Act is termed "Bic-pen scrimshaw," for carving so limited and light that the marks can be easily sanded off—after it has been sold as legally handicrafted ivory. Parrish, supra note 207.
[T]he self-sufficient days of living off the land are over; the average [Alaska] Native lives in a village, splitting time between subsistence hunting and fishing, and trying to make enough money for such necessities as ammunition, hunting gear, heating oil, house payments or rent, food and clothes. A typical village's isolation makes these items horribly expensive. Heating oil, flown in from Kodiak, costs Akhiok residents $117 for a 55-gallon barrel, which during the winter lasts about two weeks in most households. Some 40 percent of Natives are on public assistance.\(^{214}\)

Given these hardships, it makes sense to allow Alaska Natives to use the resources around them for their survival. However, basing such a right in ideas of cultural autonomy or preservation instead of human need is dangerous. Doing so ultimately risks upsetting a delicate balance between human needs and rational resource preservation. Among numerous other flaws in the cultural paradigm, non-quantifiable and malleable value choices factored into wildlife management create uncertainty, which threatens long-term wildlife resource planning and protection. More importantly, a cultural justification allows certain groups to claim an entitlement based not on need but on an unwillingness to change.

While this Article has been concerned primarily with criticism of the dominant culturally based subsistence model, perhaps an alternative vision would be useful: Alaska Natives should be allowed to choose their own future,\(^ {215}\) at least as long as that choice does not endanger the long-term survival of wildlife populations. Although Natives' desire to conserve the real or imagined status quo connects them to other interest groups, such as farmers or loggers, they are different in an important respect.\(^{216}\) A necessity-based subsistence exception to a rational resource management plan would permit Natives to retain the basic contours of their culture\(^ {217}\) while molding their lifestyles to accommodate

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214. Sharpsteen, supra note 1.
215. See supra note 19 and accompanying text.
216. Of course, Alaska Natives are also subjugated peoples to some degree; even the most virulently pro-timber logger or successfully subsidized farmer cannot claim that dubious honor. Still, factoring historical guilt into the equation leads policy makers back to the culturally based paradigm, whose evident flaws argue against its retention. See supra notes 22-44 and accompanying text.
217. Other interest groups, like farmers, would not be able to maintain their traditional ways of life if national resources were managed to meet the twin goals
the sustainable use and preservation of wildlife populations. A need-based justification would also recognize the value that Natives place in traditional hunting but demand that that practice reflect necessity and sustainable resource use, touchstones that are overlooked in current subsistence laws.

A general reconception of subsistence laws might take one of three forms, all of which seek to preserve wildlife resources. First, the subsistence taking exceptions simply could be excised from wildlife protection laws. Second, a licensing scheme could be established, which would allow Natives to take certain wildlife species for reasons of necessity. Third, an entitlement trading scheme based upon the emission credit trading system could be established within Native communities.

At first glance, simply outlawing subsistence taking might solve the problem of species preservation and, at the same time, avoid a cultural justification for Native wildlife uses. After all, if subsistence hunting is outlawed, then wildlife resources would be in less danger of overuse. Unfortunately, such a scenario is unlikely after ANCSA and the onset of a full-fledged cash economy among Alaska Natives. Curtailing even need-based subsistence hunting for Natives probably would exacerbate the taking abuse problem. If Natives in need of food, cash or household items could no longer legally take animals to support themselves, economic pressures would compel them to find some other way to survive. If the animals could not be taken legally, then they would be taken illegally. Apart from taking animals for their food value, Natives likely would increase their takes of animals whose parts would

218. A good example is the experience of the ancient Hebrews, who could no longer practice sacrifice after the Temple at Jerusalem was destroyed. With no physical place for sacrifice, that facet of the culture was abandoned, but the religion and culture continued to evolve. They became text-based, not geographically based, as rabbis and scholars interpreted texts in light of their Diaspora experiences. See generally MAX I. DIMONT, JEWS, GOD AND HISTORY 64-65, 71, 112 (1962); JOSEPH TELUSHKIN, JEWISH LITERACY 61, 137 (1991); Gerson D. Cohen, The Talmudic Age, in GREAT AGES AND IDEAS OF THE JEWISH PEOPLE 165-66, 177-78 (Leo Scharz ed., 1956); Robert Goldenberg, Talmud, in BACK TO THE SOURCES 129 (Barry W. Holtz ed., 1984).
fetch the highest market price. Thus, even more tusks and oosiks would appear in Asian markets if a total subsistence taking ban were established. Cutting the food and income stream to beleaguered Native communities is unlikely to preserve animal populations, even though it technically would eliminate Native taking based on a cultural justification.

Instead of completely eliminating Native subsistence provisions, a licensing scheme could be established based on economic need or necessity. The government could parcel out licenses according to both economic need and the populations of Natives relative to animal populations. This method would eliminate a cultural justification in its definition of subsistence taking, and it would allow certain Natives to maintain their present ability to take the animals they need to survive.

However, this plan presents more than a few problems. First, it explicitly employs needs testing in its allocation of the taking entitlement, a practice generally shunned by entitlement programs. It is perhaps unfair to test the neediness of a population that historically has been maltreated and subjugated, while at the same time wealthy senior citizens collect social security checks. Second, the licensing scheme assumes that vast government sums could be spent in establishing and policing a licensing system; it is unclear from where this money would come. Moreover, simply restricting the number and type of kills that Natives could make would not necessarily cut down the number of wasteful kills. If nothing is offered in trade for the Natives’ lost profits from black market animal parts, the economic incentive to kill for these uses would remain.

A subsistence entitlement trading scheme might avoid the problems posed by these two solutions. Such a system would allow the Alaska Native community as a whole to decide how best to use a limited number of taking credits by employing the market mechanism to sort out a myriad of different value choices. Certainly the market is not flawless, but, as noted earlier, the post-ANCSA universe is irretrievably market-based. ANCSA was a watershed piece of legislation whose policies are now the foundation for distinct, investment-backed expectations. Even though the ANCSA land lottery created Native winners and losers, an entitlement trading scheme could use that wealth disparity to address the different needs and desires for Native taking rights across the entire Native community.
Making use of the existing ANCSA structure, an entitlement trading system would assign a set number of taking rights to Native corporations whose members depend on animal hunting to survive. This taking would be a need-based right; in its initial allocation of entitlements, the system would distribute taking rights only to groups who depend on subsistence to survive. The taking entitlements could be exercised only within that Native corporation's geographic area, and only if the wildlife populations could sustain that use based on government-conducted population surveys.

The corporations would then distribute the taking entitlements to their members. The Native corporations that "won" the ANCSA lottery, that is, those that received tracts of resource-rich land, would not receive entitlements in the initial distribution, since the system would assume that these rich corporations would have the resources to spread the oil wealth among their members. Yet after this initial allocation of entitlements, and after a thorough process of teaching Alaska Natives how the scheme operates, some but not all of the entitlements could be traded for cash with members of the "rich" Native corporations, those who did not receive entitlements in the initial allocation. The market would allow individuals to make trade-offs between their ability to hunt for a living and their ability to take money in exchange for that right. The reserve entitlements, those that could not be traded, would ensure that the members of the poorer Native corporations would be able to eke out a bare existence if they traded away all of their tradeable rights for little value.

This system would use an economic need-based definition of subsistence for its initial allocation, yet it would allow individual Natives to judge exactly what "need" means. For some, need translates into calories to survive; for others, need consists of participating in a ritual hunt. By allowing Natives to value these uses for themselves, the trading system would not obliquely accept a cultural subsistence definition. Rather, it would utilize an explicitly economically oriented subsistence definition in its initial allocation. By allowing Natives to assign their own values to these entitlements, the trading system would recast one of ANCSA's chief weaknesses into a strength. ANCSA assigned some Native corporations distinctly "better" land, in a capitalist sense, than it did to others. The trading scheme would lead those rich corporations to redistribute the ANCSA wealth through the entitlement trading market.
For example, an Alaska Native that sits on the board of a successful, oil-rich native corporation simply may not need to hunt seals or walruses to make a few extra dollars. Nevertheless, the seal or walrus hunt may still have symbolic meaning for that individual. If the board member values the hunt ritual enough, he or she can pay for the right to continue the hunt by sharing oil wealth with a poorer Native community. In this way, the trading system reinforces community identity and distributes the ANCSA land wealth more fairly, by recognizing the responsibility the lottery-rich Natives have toward their poorer community members and by allowing the Natives themselves to choose how to allocate many of the taking entitlements.

As do the other suggestions, the trading scheme has its faults. It still allows individuals to take animals based on cultural motivations, even though it does not expressly enshrine those cultural rationales. The problem of means testing a historically maltreated population also arises, as it did in the licensing system, in that it may not be fair for the government to choose the winners of the initial allocation based purely on wealth and need. In addition, the trading system may be overly reliant on cash as a method of equalizing economic disparity without taking its harmful effects into account. As the critics of the ANCSA system point out, fully embracing a cash economy drives some individuals to poach walrus and bears. It is questionable whether the trading system’s strong emphasis on the cash medium and the market mechanism would exacerbate that problem by legitimizing cash as a universal good. Moreover, unless the educational program is very strong and enacted over a long period of time before the initial allocation, the market mechanism might favor the wealthy Native corporations that are accustomed to the capitalist system and accordingly possess stronger bargaining power.

Yet when judged against other possible solutions, the taking entitlement trading system is the best equipped to achieve the goal of sustainable wildlife use. It is a compromise that allows Natives to choose their own future by valuing the right to take wildlife, while also protecting the long-term survival of those species. The enactment of such a scheme would undoubtedly alter the traditional lifestyles of some of the Natives. However, in the long run, that

219. Note, however, that the trading scheme could reduce the pressure to trade in ivory and oosik by redistributing wealth across the Native population.
change will help to preserve healthy wildlife populations. Since Native culture and traditions are based upon the existence of those populations, modifying the "traditional" Native lifestyle by changing the subsistence regime to embrace an entitlement trading system and shunning cultural taking justifications may be Alaska Natives' best chance to maintain the basic cultural continuity of their communities.