Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives

This Note argues that Alaska Natives' subsistence lifestyle is an essential element of their culture and should be protected as such by the law. After outlining alternate understandings of subsistence, the Note analyzes the current treatment of subsistence as culture in both federal and Alaska law. The Note contends that existing law does not adequately value Native subsistence culture because it denies the existence of a right in some cases and provides ineffective remedies in others. The Note concludes by proposing a system in which Native villages would be vested with a group right to recover for damage to subsistence culture.

I. INTRODUCTION

[T]he entry of oil companies into Alaska in the late 1950s and thereafter was not the first (and likely not the last) challenge to Native culture. Who moved in on whom as between the Alutik, Indian, and Yupik/Inupiat peoples is lost in the anthropological fog of ten to fifty thousand years ago. Then came the Russians, then the American whalers, then the miners, and with them the United States Government came to Alaska. All of these incursions have impacted and, to a lesser or greater degree affected, Native culture.

—United States District Judge H. Russell Holland¹

While Alaska Natives have faced decades, even centuries, of profound challenges to their unique way of life, perhaps no single year was as trying for Alaska’s indigenous population as 1989.

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That year presented two formidable obstacles to Natives' ongoing struggle to maintain their cultural identity. First, on March 24, 1989, the largest oil spill in U.S. history occurred when the Exxon Valdez oil tanker ran aground at Bligh Reef, releasing more than eleven million gallons of oil into the surrounding waters of Prince William Sound. Second, on December 22, 1989, the Alaska Supreme Court ruled in McDowell v. State that a key provision of the state's statute governing subsistence uses of fish and game violated various sections of the state constitution.

While these two events might at first appear unrelated, they illustrate the two contemporary factors that circumscribe Alaska Natives' ability to perpetuate their culture. The Exxon Valdez oil spill demonstrates that environmental disasters can substantially and rapidly deplete the natural resource base upon which Alaska Natives depend to maintain their way of life. At the same time, the McDowell decision, which increased the ability of non-Natives to access the scarce resources traditionally used for Native subsistence, increased the likelihood of further depletion of such resources. In sum, these developments are typical of the daunting

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4. Christopher L. Dyer et al., Social Disruption and the Valdez Oil Spill: Alaskan Natives in a Natural Resource Community, 12 SOC. SPECTRUM 105, 117 (1992) (noting that for a vast majority of the communities in the Prince William Sound area, the harvest level of subsistence resources in the year following the spill was the lowest of any year for which data are available).

5. See State v. Morry, 836 P.2d 358, 368 (Alaska 1992) (declaring that “after McDowell there are no statutory standards for determining those individuals who are ineligible to participate in subsistence hunting and fishing”).

challenge that Alaska Natives will continue to face in attempting to protect their traditional way of life.\(^7\)

This Note will analyze how both federal and Alaska law have responded to these contemporary challenges and will suggest ways in which subsistence law might better address threats to Alaska Natives' subsistence lifestyle. Part II of this Note will describe the subsistence way of life and will argue that subsistence rights are understood better as Native group rights rather than as individual rights. Part III will then demonstrate that the current tendency to analyze subsistence as an individual right leads to inadequate legal protection for Alaska Native culture. Finally, Part IV will propose a legal regime based upon a group rights view of subsistence, defend a notion of group rights as appropriate in this area of the law and argue that such a scheme will supply more fitting rights and remedies to preserve this distinctive way of life.

II. DEFINING SUBSISTENCE: SUSTENANCE OR CULTURE?

Much of the subsistence debate in Alaska revolves around the definition of the term "subsistence" itself. Each of the two primary understandings of subsistence, one as an individual right to sustenance, the other as a group's right to subsistence to sustain its culture and traditions, influences the perceived scope and nature of subsistence rights.

A. Subsistence as an Individual Right to Sustenance

Soon [the Native Americans'] means of subsistence has almost entirely gone, and these unlucky folk prowl their deserted forests like starving wolves. . . . So, strictly speaking, it is not the Europeans who chase the natives of America away, but famine . . . .

—Alexis De Tocqueville\(^8\)

De Tocqueville's nineteenth century description of Native subsistence and the harm resulting from its disruption is an accurate one. Subsistence involves the hunting, fishing and gathering of

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7. See James A. Fall, The Division of Subsistence of the Alaska Department of Fish and Game: An Overview of its Research Program and Findings: 1980-1990, 27 ARCTIC ANTHROPOLOGY 68, 88 (1990) ("The job of describing and understanding contemporary subsistence hunting, fishing, and gathering in Alaska is a tremendous undertaking which has only begun.").

8. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 323 (J.P. Mayer ed. & George Lawrence trans., 1988).
natural resources as the principal means of obtaining food. The view of subsistence as a method of achieving sustenance has remained a popular one, both in Alaska and elsewhere. Thus, "subsistence as sustenance," what some commentators have called the "minimalist perception of subsistence," plays a crucial role in the lives of many Alaskans.

Subsistence as sustenance has persisted among Alaska Natives for various reasons. The region's harsh climate, its distance from other food sources, high regional unemployment among Alaska Natives and Natives' relative lack of cash reserves combine to make reliance on natural resources a virtual necessity. Nutritional concerns may also compel Natives to use locally harvested resources as a food staple. In addition, some Native Alaskans

9. See, e.g., CASE, supra note 6, at 275 ("[S]ubsistence uses must, at the very least, include . . . hunting, fishing or gathering for the primary purpose of acquiring food."); Mary Kancewick & Eric Smith, Subsistence in Alaska: Towards a Native Priority, 59 UMKC L. Rev. 645, 648 (1991) ("[S]ubsistence hunting and fishing . . . refers to hunting and fishing to provide necessary food.").

10. E.g., Bobby v. Alaska, 718 F. Supp. 764, 777 (D. Alaska 1989) ("In its purest form, the subsistence lifestyle is quite literally the gaining of one's sustenance off the land."); State v. Tanana Valley Sportsmen's Ass'n, Inc., 583 P.2d 854, 859 n.18 (Alaska 1978) ("For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life."); THOMAS R. BERGER, VILLAGE JOURNEY 5 (1985) ("In Alaska . . . subsistence means hunting, fishing, and gathering."); Kancewick & Smith, supra note 9, at 648 ("This . . . understanding [of subsistence, being dependent upon hunting and fishing for food,] has been plentifully evident in the newspaper coverage of the subsistence controversy in Alaska.").


12. Kancewick & Smith, supra note 9, at 648.

13. CASE, supra note 6, at 275.

14. North Slope Borough v. Andrus, 486 F. Supp. 332, 343 (D.D.C.) ("[A] scientific panel on the nutritional aspects of aboriginal whaling . . . has found that when Eskimos have changed to a modern diet, their health and nutrition have deteriorated."); aff'd in part and rev'd in part, 642 F.2d 589 (D.C. Cir. 1980); CASE, supra note 6, at 275 ("[I]n Alaska . . . those . . . relying on the subsistence way of life do in fact depend on renewable resources for a substantial portion of their nutrition."); Catherine A. Rinaldi, Note, Amoco Production v. Village of Gambell: The Limits to Federal Protection of Native Alaskan Subsistence, 7 VA. J. NAT. RESOURCES L. 147, 151-52 (1987) ("[S]tudies have shown that a subsistence diet has special nutritional value and lends itself better to survival in Alaska than would a more conventional diet.").
have complained that non-Native foods fail to satisfy their hunger.\(^{15}\) In short, disruptions in the ability to harvest subsistence resources negatively affect the physical welfare of subsistence users\(^{16}\) and, if left unremedied, might ultimately result in the repercussions that De Tocqueville predicted.

Both federal and Alaska law have recognized that subsistence as sustenance is important to Alaskans and, in response, have granted legal rights to engage in subsistence practices. For instance, in the Alaska National Interest Lands Conservation Act (ANILCA),\(^ {17}\) Congress explicitly declared that Alaskans rely on subsistence resources for sustenance and that the availability of such resources is presently threatened.\(^ {18}\) In response, Congress provided a resource management scheme for federal lands that accords a preference to subsistence uses.\(^ {19}\) Alaska has enacted a

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18. In its findings, ANILCA provides in pertinent part that

[the] Congress finds and declares that:

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses [and that]

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management.


19. Section 804 of ANILCA declares, in part, that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." Id. § 3114. ANILCA's resource management scheme and subsistence preference will be discussed in greater detail infra, at notes 71-97 and accompanying text.
somewhat similar system of preferences governing state lands, primarily due to shared concerns about subsistence as sustenance.

Any right to engage in subsistence solely for purposes of sustenance is, at its root, an individual one. An "individual right" establishes what one commentator has described as "limitations on organized society and government in favor of the individual." In essence, an individual right is possessed by an individual *qua* individual and, as such, can only be asserted by its individual possessor. Thus, rights to subsistence arise from "whatever individual right or privilege the U.S. or state governments recognize to food, shelter, and clothing, federal equal protection guarantees, and [Alaska's] provision that its citizens have equal individual rights to natural resources." While the collection and distribution of subsistence resources is almost always undertaken by some sort of group, the actual consumption of those resources and the physical benefit derived therefrom necessarily occur at an individual level. Furthermore, the harm resulting from the deprivation of a right to subsistence as sustenance is individual as well, as only individuals can physically starve. In short, if subsistence practices are defined in terms of sustenance, then rights associated with those practices accrue to the individual alone, and remedies based on notions of individual rights suitably would redress any potential harm.

B. Subsistence as a Group Right to Culture

When we talk about subsistence, we should be talking about Native culture and their land. You cannot break out subsis-

20. *See ALASKA STAT. § 16.05.258 (1992).* Alaska's subsistence preference statute will be analyzed in greater depth infra, at notes 99-125 and accompanying text.

21. *See McDowell v. State, 785 P.2d 1, 10 (Alaska 1989)* ("One purpose of the [subsistence preference statute] is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so.").


23. Kancewick & Smith, *supra* note 9, at 652. This source of subsistence rights, at least as a matter of state law, appears to have been validated by State v. Eluska, 724 P.2d 514 (Alaska 1986).

24. Indeed, group action lies at the core of subsistence activities, particularly among Alaska Natives. *See infra* notes 25-53 and accompanying text.
tence or the meaning of subsistence or try to identify it, and you can't break it out of the culture. The culture and the life of my Native people are the subsistence way of life. And that's what we always used, the subsistence way of life. It goes hand in hand with our own culture, our own language, and all our activities.

—Jonathon Solomon, Fort Yukon

Defining subsistence in Alaska solely in terms of sustenance is not completely satisfactory. As a general matter, most observers agree that subsistence involves something more than merely hunting and fishing in order to procure food. This "something more" can be characterized as "subsistence as culture."

For Alaska Natives, subsistence includes not only hunting and fishing for physical sustenance. It also encompasses a complex web of relationships that define and distinguish their traditional culture. As Thomas R. Berger, former chairman of the Alaska Native Review Commission, explained, "[f]or Alaska Natives, subsistence lies at the heart of culture, the truths that give meaning to human life of every kind. Subsistence enables the Native peoples to feel at one with their ancestors, at home in the present, confident of the future." Thus, for Alaska Natives, the term "subsistence" connotes a unique way of existence that has been, and continues to be, passed down from generation to generation for as long as they can remember.

Despite the reluctance of some Alaska residents to recognize this cultural component of subsistence, the notion of "subsistence as culture" has been nearly unanimously accepted by a broad array

25. BERGER, supra note 10, at 52 (quoting Jonathon Solomon).
27. BERGER, supra note 10, at 55.
28. See generally Kancewick & Smith, supra note 9, at 645-52.
29. See id. at 648 (citing various stories in Alaska newspapers in which some non-Native residents imply that the availability of commercial food sources abrogates any need for Natives to engage in subsistence).
of authorities. Congress, federal administrative officials, federal courts, Alaska courts, and commentators in the fields of anthropology, sociology, psychology, and law have all acknowledged, to one degree or another, the cultural significance of Native subsistence.

Just as harm to subsistence as sustenance can lead to nutritional impoverishment, the disruption of subsistence resources can also cause cultural injury. Such damage can take many forms. For example:

30. See 16 U.S.C. § 3111(1) (1994) ("[T]he continuation of the opportunity for subsistence uses . . . is essential to Native . . . traditional[] and cultural existence . . . .")


32. See, e.g., United States v. Alexander, 938 F.2d 942, 945 (9th Cir. 1991) ("If [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life."); Katelnikoff v. United States Dep't of Interior, 657 F. Supp. 659, 665 (D. Alaska 1986) ("What was to be protected [by a subsistence exemption to the Marine Mammal Protection Act] was the right [of Alaska Natives] to be left alone and to continue their centuries-old way of life . . . .").

33. See, e.g., State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854, 859 n.18 (Alaska 1978) ("[S]ubistence hunting is at the core of the cultural tradition of many [Alaska Natives].").

34. See generally, FIENU-RIORDAN, supra note 15.

35. See, e.g., Christopher L. Dyer, Tradition Loss as Secondary Disaster: Long-Term Cultural Impacts of the Exxon Valdez Oil Spill, 13 SOC. SPECTRUM 65, 75 (1993) ("[S]ubistence . . . provide[s] the primary means of cultural existence."); Dyer et al., supra note 4, at 110 ("A subsistence lifestyle practiced by ancestors defines the contemporary cultural identity of [Alaska Native] communities.").

36. See, e.g., Lawrence A. Palinkas et al., Community Patterns of Psychiatric Disorders after the Exxon Valdez Oil Spill, 150 AM. J. PSYCHIATRY 1517, 1522 (1993) [hereinafter Palinkas et al., Community Patterns] ("[S]ubistence activities . . . provide the foundation for social support and community cohesion."); Lawrence A. Palinkas et al., Social, Cultural, and Psychological Impacts of the Exxon Valdez Oil Spill, 52 HUM. ORGANIZATION 1, 3 (1993) [hereinafter Palinkas et al., Social, Cultural, and Psychological Impacts] ("[T]he social processes of taking, processing, and distributing [subsistence] foods has cultural significance beyond the importance of the food consumed.").

37. See, e.g., BERGER, supra note 10, at 48-72; CASE, supra note 6, at 276; FIENU-RIORDAN, supra note 15; Boardman, supra note 6, at 1000-01; Gudgell, supra note 26, at 167; Kancewick & Smith, supra note 9, at 647-52; Quam, supra note 26, at 178-80; Rinaldi, supra note 14, at 149-53; Twitchell, supra note 26, at 636.

38. See supra notes 14-15 and accompanying text.
instance, a substantial decrease in subsistence harvests may precipitate a breakdown in the interdependence between generations that exists among extended Native families.\(^3\) Furthermore, it could impair the spiritual significance of exchanging goods with other community members,\(^4\) replace the traditional notion of stewardship over land with the concept of individual ownership,\(^5\) and disrupt all aspects of Native social and spiritual interaction.\(^6\) More importantly, however, disruptions of subsistence resources may foster an inability to transmit cultural values, as well as Alaska Natives' traditional language, from one generation to another.\(^7\) These "core traditions" are the essence of transgenerational community, and provide for stability of community through time."\(^8\) Thus, what ultimately is at stake in protecting subsistence resources is the future existence of a unique and long-standing Native culture.

Studies analyzing the cultural impacts of the Exxon Valdez spill demonstrate the harm that the depletion of subsistence resources can cause to Alaska Natives. For example, two different studies have concluded that Alaska Natives living in villages affected by the spill were more susceptible to various psychological disorders than were non-Natives residing in similar communities.\(^9\) Other sociological studies have found that the spill resulted in the permanent displacement of Native social and exchange networks.\(^10\) These studies confirm that subsistence is culture for Alaska Natives by showing that the cultural impacts of subsistence disruptions are not only substantial, but are also qualitatively different from the harm suffered by those who engage in subsistence solely for sustenance.

\(^{39}\) See Fienup-Riordan, supra note 15, at 309-11.

\(^{40}\) Id. at 311-12.

\(^{41}\) Id. at 312.

\(^{42}\) Id. at 318-20.

\(^{43}\) Id. at 325-26.

\(^{44}\) Dyer, supra note 35, at 68.

\(^{45}\) See Palinkas et al., Community Patterns, supra note 36, at 1519-22 (concluding that Alaska Natives were particularly vulnerable to depression as a result of the spill when compared to non-Natives); Palinkas et al., Social, Cultural, and Psychological Impacts, supra note 36, at 7-10 (finding that the spill was significantly associated with general anxiety disorder and post-traumatic stress disorder among Alaska Natives).

\(^{46}\) See Dyer, supra note 35, at 75-85; Dyer et al., supra note 4, at 118-23.
Much as rights to subsistence as sustenance are ultimately possessed by the individual, rights to subsistence as culture are only understandable as group rights. As one author has observed:

A cultural right is a group right, for by its very nature culture is a communion of its members rather than the sum of the attitudes and life-projects of the various individuals within the group. Just as one would not understand [an] orchestra, its success and its failure, in terms of the success and failure of individual members, so one would not understand culture in terms of the attitudes of the individual members. The argument for cultural rights cannot, therefore, be understood in terms of individual rights. It is within groups that constitutive narratives (cultures) are produced and through groups that sense is made of the social world.\(^47\)

This claim is particularly valid in the context of Alaska Native subsistence, where emphasis is placed on community stewardship over resources and redistribution of those resources for the betterment of the group, as opposed to some notion of individual ownership and profit.\(^48\)

These two conceptions of subsistence, as sustenance and as culture,\(^49\) are not mutually exclusive. Instead, in some sense they

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48. See Fienup-Riordan, supra note 15, at 311-16 (assessing the impact of subsistence disruption on the traditional methods of exchange of goods and services among the Alaskan Yup’ik).

49. A third characterization of subsistence is as an alternative economic system by which more than just the minimal needs of subsistence users are met. See John A. Kruse, Alaska Inupiat Subsistence and Wage Employment Patterns: Understanding Individual Choice, 50 Hum. Organization 317 (1991) (concluding that, at least among the Inupiat of northern Alaska, many Natives choose to engage in a subsistence economy even through wage employment alternatives are available). For example, one commentator acquainted with subsistence activities has theorized that subsistence practices act as a means of production, distribution, and exchange of goods. Berger, supra note 10, at 56. Others have noted that Alaska Natives place a high value on material security and therefore tend to eschew what they regard as the enormous risks of relying exclusively on wage employment. See, e.g., Kruse, supra, at 317 ("[M]any Alaska Natives . . . perceive hunting and fishing to be the most secure economic base."); Rinaldi, supra note 14, at 151 ("[T]he] desire to safeguard material security would account, in part, for the hesitation of northern communities to embrace high risk, high opportunity cash alternatives."). It is perhaps for this reason that Congress, in ANILCA, indicated that subsistence is essential not only to rural Alaskans’ physical well-being, but to their economic existence as well. 16 U.S.C. § 3111(1) (1994). Congress further defined subsistence to include barter, sharing for personal or family consumption, and customary trade. Id. § 3113. Nonetheless, for purposes of this Note, what might
represent a complex, symbiotic relationship in which sustenance and culture rely on one another to define Native life. On one hand, Alaska Natives' spiritual relationship toward the land\textsuperscript{50} dictates that only those resources necessary for the community's physical well-being should be put to use.\textsuperscript{51} In this way, subsistence as culture reinforces subsistence as sustenance.\textsuperscript{52} On the other hand, Alaska Natives' view of the land may be a consequence of the demands of Alaska's harsh seasonal climate. Perhaps perishable resources traditionally were not used for profit because long-term physical survival depended upon their continued availability. In this way, subsistence as sustenance may have acted as the genesis of subsistence as culture.

No matter which of these views is adopted, the interplay between subsistence as sustenance and subsistence as culture is surely a critical element of Native identity. To recognize the former while neglecting the latter is to ignore the central components of Native life. Thus, the word "subsistence" alone, with its bare connotation of material survival, is perhaps a flawed means of understanding Alaska Natives' use of natural resources. Current attempts to define legal subsistence rights founder due to the disparity between English terminology and the realities of Native life, which has made subsistence arguably "[Alaska's] most volatile political issue."\textsuperscript{53}

Apart from wholly definitional concerns, important public policy considerations justify using Alaska law to protect subsistence

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\item \textsuperscript{50} See, e.g., BERGER, supra note 10, at 75 ("Natives believe the land should be passed on to their children. This spiritual and cultural relationship with the land is the bedrock of Native culture.").
\item \textsuperscript{51} See FIENUP-RIORDAN, supra note 15, at 312 ("By definition a subsistence harvest can have no surplus.").
\item \textsuperscript{52} See BERGER, supra note 10, at 68 ("For Alaska Natives, health and well-being are functions of the material and spiritual nourishment that the land provides . . . ").
\item \textsuperscript{53} Kancewick & Smith, supra note 9, at 649 (quoting Doogan, \textit{State Board Fishing for Miracle of Understanding Subsistence}, ANCHORAGE DAILY NEWS, Nov. 30, 1990, at B1).
\end{itemize}
as culture and/or encouraging federal law to do so.\textsuperscript{54} First, environmental policy-makers in Alaska might benefit from observing Native resource management practices and incorporating those that are useful into the state's own environmental protection schemes.\textsuperscript{55} As such practices are inherently related to subsistence culture, the failure to remedy harm to Native culture might impair the efficacy of Native resource management systems, thereby unnecessarily eliminating a valuable source of innovative environmental protection strategies.\textsuperscript{56}

Second, both Native and non-Native Alaskans suffer as a result of injuries to Native culture. The strains placed on Native lifestyles due to loss of subsistence resources may result in self-destructive behavior such as suicide or alcoholism among individual Natives.\textsuperscript{57} Efforts to assimilate Native communities by failing to protect subsistence as culture "may be largely unavailing with respect to the [Native] community itself and unintentionally destructive with respect to members of that community."\textsuperscript{58} Harm to one segment of society affects all members, whether directly, through factors such as increased crime, or indirectly, through increased welfare burdens and lost productivity due to poverty. Therefore, safeguarding Alaska Native culture may reduce social costs visited upon other Alaskans by these types of harmful behavior.

Third, affording greater protection to subsistence as culture under Alaska law would gradually eliminate the current dual

\textsuperscript{54} Given the special trust relationship between the federal government and Native Americans, see infra notes 60-70 and accompanying text, federal law may be the more effective, and perhaps more appropriate, means by which to protect Native culture.


\textsuperscript{56} See, e.g., David S. Case, \textit{Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?}, 60 U. COLO. L. REV. 1009, 1034-35 (1989) (observing that, absent the scientific, legal, and political efforts of Native organizations which operate based on cultural practices, "the fate of the bowhead whale would no doubt otherwise have been decided without the wisdom of the Inupiat").


wildlife management system, allowing the state to regain manage-ment authority over public lands in Alaska that are currently governed by federal regulations under ANILCA. ANILCA allows the Alaska government to control the management of federally held lands in Alaska, provided that certain criteria are met. This reform would decrease both the amount and the cost of litigation over subsistence rights, as citizens of the state would be subject only to one set of regulations.

Given the costs associated with harm to Native culture and the centrality of subsistence to its maintenance, Alaska should be eager to alleviate damage to subsistence as culture as part of its general responsibility to protect the well-being of its citizens. However, as Part III will demonstrate, current law has been ineffective in its efforts to remedy cultural harm.

III. EXISTING SUBSISTENCE LAW: THE FAILURE OF CURRENT RIGHTS AND REMEDIES

The legal regimes presently governing subsistence rights in Alaska can be divided into four categories: (1) those marked by an absence of both rights and remedies to protect subsistence as culture; (2) those that contain inadequate rights and insufficient remedies; (3) those that fail to confer adequate rights only; and (4) those that fail to offer sufficient remedies only. No matter what the flaw may be, whether one of right, of remedy or of both, Alaska’s current legal regimes are unsuited to address harm to subsistence as culture.

A. Absence of Rights and Remedies: Federal Trust Responsibilities Toward Native Americans

The preservation of Native cultures has long been recognized as a legitimate object of federal concern. In particular, the federal government possesses trust responsibilities toward Native American tribes based upon the tribes’ political status as “nations,” a trust relationship considered to be “a bedrock principle

59. The nature of this dual management system and its policy implications are addressed infra, at notes 71-97 and accompanying text.
61. See, e.g., Worcester, 31 U.S. (6 Pet.) at 559 (“The Indian nations had always been considered as distinct, independent political communities... The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”).
of federal Indian law.” These special trust responsibilities extend to the relationship between the federal government and Alaska Natives and impose a fiduciary duty on the federal government to protect Native subsistence culture. For instance, in *People of Togiak v. United States*, the court observed that the obligations imposed upon the federal government by its trust relationship with Alaska Natives included “duties so to regulate as to protect the subsistence resources of Indian communities ... and to preserve such communities as distinct cultural entities against interference by the States.” Thus, this unique relationship places the burden on federal law to safeguard subsistence as culture.

The protection provided by this trust relationship between the federal government and Native Americans is enhanced in two ways. First, the statutes that protect Native subsistence and create the trust relationship are considered Indian legislation. As such, any

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65. *Id.* at 428 (emphasis added). The federal government’s trust responsibilities were used as evidence that, in passing the Marine Mammal Protection Act ("MMPA"), Congress intended to preempt the field of marine mammal protection, and, therefore, Department of the Interior regulations transferring the power to regulate hunting of such mammals to the State of Alaska were invalid. *Id.* at 428-30.

66. Congress has sought to fulfill this responsibility in various ways. Such attempts include Title VIII of ANILCA, 16 U.S.C. § 3111 (1994) (indicating that subsistence is “essential to Native ... cultural existence”); the Alaska Native exemption to the MMPA, see 16 U.S.C.A. § 1371(b) (West 1985 & Supp. 1995); Katelnikoff v. United States Dep’t of Interior, 657 F. Supp. 659, 666 (D. Alaska 1986) (noting that Congress’s concern in enacting the Native exemption was “the preservation of traditional aspects of native culture and lifestyle”); 118 CONG. REC. 25,258 (1972) (statement of Sen. Stevens) (“If this exception were not included, Alaskan Natives would lose their traditional way of life, the way they have lived for centuries . . . .”); and the liability provisions of the Trans-Alaska Pipeline Authorization Act ("TAPAA"), see 43 U.S.C.A. § 1653 (West 1986 & Supp. 1995) (providing strict liability for harm to natural resources used for subsistence purposes if such damage resulted from activities along the trans-Alaskan pipeline right-of-way); Jordan v. Amerada Hess Corp., 479 F. Supp. 573, 576 (D. Alaska 1979) (observing that the TAPAA damages provision was enacted, in part, to protect the subsistence lifestyle of Alaska Natives), *aff’d sub nom.* Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868 (9th Cir. 1981).
ambiguities in them are construed in favor of the Natives. The second, government actions under such statutes must take cultural concerns into account. For example, one court has recognized that the government's trust responsibilities serve three purposes: (1) to "preclude[] the use of environmental statutes to undermine subsistence cultures;" (2) to "require[] [federal executive officials] to be cognizant of the needs of [Native] culture;" and (3) to demand "rigorous application of the environmental statutes to protect the species necessary for [Natives'] subsistence." However, the trust relationship alone is insufficient to protect subsistence as culture. There are two limitations that prevent it from independently remediying cultural harm. Most importantly, these responsibilities arise only when the government explicitly recognizes them in its enactments. Thus, there must be a statutory trigger before the

67. See, e.g., People of the Village of Gambell v. Clark, 746 F.2d 572, 581 (9th Cir. 1984) (stating that Title VIII of ANILCA is Indian legislation), rev'd in part sub nom. Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987); 126 CONG. REC. 29,279 (1980) (statement of Rep. Udall) (same); Smith & Kancewick, supra note 63, at 514-15 (stating that statutes pertaining to Alaska Natives, including Title VIII of ANILCA, are "Indian laws"). The ambiguity in the statute must be real, however, in order for this rule of statutory construction to apply. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 555 (1987). The rule of construction therefore does not "permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." Id. (quoting South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986)).

68. North Slope Borough v. Andrus, 486 F. Supp. 332, 344 (D.D.C.) (North Slope Borough I), aff'd in part and rev'd in part, 642 F.2d 589 (D.C. Cir. 1980) (North Slope Borough II). The district court in North Slope Borough I held that the Secretary of the Interior violated these responsibilities by failing to comply with the Endangered Species Act in the regulation of oil leases in the Beaufort Sea. Id. The Court of Appeals for the District of Columbia Circuit reversed in part, holding that the Secretary had given "purposeful attention to the special needs of the [Natives]" and that such attention was sufficient to fulfill the government's trust responsibilities. North Slope Borough II, 642 F.2d at 612. The court of appeals' determination that the Secretary had given sufficient consideration to Native needs does not abrogate the general duty to take such concerns into account. It simply means that the government's trust responsibilities were fulfilled in this particular instance.

69. See North Slope Borough II, 642 F.2d at 611 ("[A] trust responsibility can only arise from a statute, treaty, or executive order[,] ... [and] the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute.") (quoting North Slope Borough I, 486 F. Supp. at 344). The North Slope Borough II court appeared to take this limitation quite seriously, noting that the extinguishment of all Alaska
federal government incurs these duties. In addition, these trust responsibilities are not absolute; they may be overridden by competing national or international policy concerns.70

In short, federal trust responsibilities toward Alaska Natives, standing alone, provide neither rights nor remedies that enable federal law to redress harm to Alaska Native culture. Instead, they are dependent on predicate rights or remedies that not only must be created by statute, but also must expressly imbue Natives with rights and remedies arising from the federal government's trust responsibility. However, as will be shown, existing statutes purporting to grant such rights and remedies inadequately protect subsistence as culture, thereby rendering the federal government's trust responsibilities toward Alaska Natives a hollow means of protection.

B. A Failure of Both Rights and Remedies: ANILCA

Enacted in response to the failure of both the Secretary of the Interior and the State of Alaska to protect Native subsistence adequately under the Alaska Native Claims Settlement Act ("ANCSA"),71 ANILCA72 is the most significant federal enact-

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Native aboriginal hunting and fishing rights by the enactment of the Alaska Native Claims Settlement Act ("ANCSA"), see 43 U.S.C. § 1601(b) (1988), may also have extinguished any federal trust responsibility toward Alaska Native subsistence. North Slope Borough II, 642 F.2d at 612 n.151.

70. See, e.g., North Slope Borough II, 642 F.2d at 612-13 (holding that the trust responsibility allows the government to balance its competing interests so long as the special needs of Alaska Natives are considered); Adams v. Vance, 570 F.2d 950, 956-57 (D.C. Cir. 1978) (considering the United States' foreign policy concerns to sufficiently outweigh the federal government's trust responsibilities to Alaska Natives); CASE, supra note 6, at 293 ("[W]hen pitted against ... competing public interests of the United States, the federal trust responsibility [is] an important but not overriding consideration. When pitted directly against the international interests of the United States, ... the responsibility has been held insufficient to warrant court intervention. ... ").


ment governing Alaskan subsistence. Moreover, because of the breadth of its applicability, ANILCA has exerted a strong influence on subsistence law in other legal regimes.

ANILCA was enacted for two purposes. First, it was designed "to fulfill the policies and purposes of [ANCSA]," namely, to provide for an immediate, fair, and certain settlement of aboriginal land claims without litigation or the creation of rights, privileges or obligations based on permanent racial classifications. Second, Congress intended "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." ANILCA thus represents an attempt to strike a balance between protecting the subsistence way of life and avoiding both costly litigation and the use of racial classifications to resolve land disputes.

Three of ANILCA's provisions are crucial to its efforts to accomplish these goals. First, ANILCA defines subsistence in terms of the customary and traditional uses of wildlife by rural Alaskans. Second, it creates a preference for subsistence uses by establishing two tiers of regulations. In the first tier, where fish and game populations are sufficiently numerous to satisfy all subsistence uses, regulations must grant a priority to subsistence uses over all

73. ANILCA governs fish and game management on all public lands in Alaska. 16 U.S.C. § 3114. Public lands are defined as all lands, waters, and interests over which the United States holds title. See id. § 3102(1)-(3). Public lands in Alaska account for approximately 218 million of Alaska's 365 million acres of land. The other lands belong either to the state (103 million acres) or to Natives (44 million acres). See Boardman, supra note 6, at 1003 n.41.

74. In particular, ANILCA has had a profound influence on the evolution of Alaska's state subsistence law. This is due in substantial part to the fact that ANILCA permits Alaska to retain management authority over public lands if it enacts fish and game regulations consistent with ANILCA. See 16 U.S.C. § 3115. For a more detailed discussion of ANILCA's influence on Alaska law, see infra notes 99-125 and accompanying text.

75. 16 U.S.C. § 3111(4).
77. 16 U.S.C. § 3112(1).
78. The definition of subsistence reads in part:
As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

Id. § 3113.
In the second, where such populations are insufficient to satisfy all subsistence uses, limitations may be placed on subsistence uses according to various criteria. Finally, ANILCA provides a remedy for violations of the subsistence preference by authorizing a private civil action against the state or the federal government in which the plaintiff may demand enforcement of ANILCA's requirements, including preliminary injunctive relief in an appropriate case.

ANILCA serves the important function of declaring that subsistence as culture is worthy of legal protection. First, it explicitly states that "the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence." Second, by permitting preliminary injunctive relief, ANILCA suggests that harm to subsistence may constitute an irreparable injury sufficient to warrant this equitable remedy. Third, ANILCA encourages private actions to enforce its provisions by awarding attorney's fees to prevailing plaintiffs. Despite these positive attributes, ANILCA nevertheless inadequately protects subsistence as culture, both in its rights and in its remedies.

79. The subsistence preference provides, in part, that "[e]xcept as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." Id. § 3114.

80. The subsistence preference provision continues: Whenever it is necessary to restrict the taking of populations of fish and wildlife on [public] lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:
(1) customary and direct dependence upon the populations as the mainstay of livelihood;
(2) local residency; and
(3) the availability of alternative resources.
Id. § 3114.

81. Id. § 3117.
82. Id. § 3111(1) (emphasis added).
83. See id. § 3117. The United States Court of Appeals for the Ninth Circuit has held that cultural injuries are sufficient to establish irreparable harm and warrant preliminary injunctive relief. See Native Village of Quinhagak v. United States, 35 F.3d 388, 394 (9th Cir. 1994) (holding that, to obtain a preliminary injunction, Native plaintiffs "needed to prove nothing more" than that the challenged regulations would "interfere with their way of life and cultural identity").
84. 16 U.S.C. § 3117.
1. **ANILCA's Rights.** ANILCA's rights creates a significant tension between subsistence as sustenance and subsistence as culture. As one pair of commentators has observed:

The tension embodied in ANILCA between the minimalist and cultural conceptions of subsistence is reflected in the use of the terms "rural Alaska resident" and "customary and traditional" in the definition of "subsistence uses." By rendering non-Native rural residents equally eligible for the same "subsistence" priority, Congress necessarily undercut its ability to fully protect the cultural component of subsistence; in requiring state and federal regulations to reflect customary and traditional practices, Congress forced consideration of that very component. To a certain degree, ANILCA safeguards Natives' rights to subsistence as culture by protecting "customary and traditional" uses of resources, as well as in its status as "Indian legislation" for purposes of statutory construction. However, the shortcoming in ANILCA's rights arises not only because non-Native rural residents are entitled to a subsistence preference, but also because Native non-rural residents, even if they can prove that they engage in subsistence for cultural reasons, are not entitled to this preference. In distinguishing between rural and non-rural residents, rather than between Native and non-Native residents, ANILCA's provisions are wholly incompatible with the congressionally expressed goal of protecting Native cultural existence.

David S. Case argues that the move away from granting subsistence rights exclusively to Natives in one sense "represent[s] a diminution of Native rights, but in another . . . represent[s] incorporation of Native values into non-Native culture." While both of his claims may have merit, Case is still unable to avoid the distinction between Native and non-Native cultures. While subsistence values may be increasingly incorporated into non-Native life, they simply do not represent a core cultural identity for non-Natives, as they do for Natives. Mary Kancewick and Eric Smith support this conclusion by observing:

85. Kancewick & Smith, *supra* note 9, at 662.
86. See *supra* note 67 and accompanying text.
87. See *supra* note 82 and accompanying text. Moreover, such a distinction is conceptually unsound. See Kancewick & Smith, *supra* note 9, at 669 ("It is difficult conceptually to determine the 'customs and traditions' of a mixed community of Natives and non-Natives. . .").
88. Case, *supra* note 6, at 279.
This is not to say that non-Natives do not engage in what they perceive to be subsistence—the taking of fish and game for personal sustenance. This is also not to say that there are not families who have chosen to live this way for perhaps three generations or that there are not individual non-Natives who have come to identify themselves with this minimalist way of life, finding in it a zen sort of richness. But it is to say that Native subsistence and non-Native subsistence are not the same thing.\(^9\)

Defining subsistence in terms of “rural residency” rather than in terms of Native status may have resulted from political pressure from Alaska officials, who believed that granting a Native-based subsistence preference would violate state constitutional provisions.\(^9\) Because Alaska would be required to adopt regulations consistent with ANILCA’s subsistence preference in order to retain management authority over public lands,\(^9\) the preference’s consistency with the Alaska Constitution was an important concern. Ironically, the effort was futile, as the Alaska Supreme Court held that the state’s regulations based on rural residency violated the Alaska Constitution.\(^9\) Thus, ANILCA’s segregation of rural and non-rural residents has fallen victim to the very constitutional scrutiny that it had hoped to avoid. This is not to say, of course, that a classification based on Native status would be entirely free from constitutional scrutiny,\(^9\) but such a distinction would have at least fulfilled Congress’s original intent of protecting Natives’ cultural right to subsistence.

2. ANILCA’s Remedies. One court has characterized ANILCA as “a law without a bite” because it “does little more
than provide a broad outline of what uses must be preferred over others." For example, ANILCA does not, of its own force, provide remedies for violations of the regulations that implement the subsistence preference. Such remedies are apparently left to the rulemaking authority and discretion of the Secretary of Interior or to the State of Alaska. Instead, the "sole Federal judicial remedy" provided by ANILCA is a civil suit against either the state or the federal government to require the submission of regulations consistent with ANILCA's subsistence priority. While this language does not prohibit rural Alaskans from relying on a "subsistence defense" to federal criminal prosecutions, ANILCA's only affirmative mandate is that regulations managing wildlife on public lands give priority to subsistence. It does not require that individual instances of harm to subsistence, particularly to subsistence as culture, actually be remedied.

In sum, ANILCA's inability to protect subsistence as culture adequately is rooted in its reluctance to view subsistence as a group right of Alaska Natives. In its efforts to avoid using Native status as the touchstone of ANILCA's subsistence preference, Congress employed the necessarily culture-neutral classification of rural versus urban residency. Such an approach, based as it is on individual rights, may protect subsistence as sustenance, but it absolutely fails to recognize that subsistence as culture is a group concept that can be protected only through a group right. Further, the lack of legal remedies, such as damages, leaves Natives without any means of recompense for actual damage to their

94. United States v. Alexander, 938 F.2d 942, 945 (9th Cir. 1991).
95. 16 U.S.C. § 3117(c) (1994). This provision has been interpreted to mean that ANILCA "prohibits courts in civil proceedings from awarding relief not listed in the statute, such as damages." Alexander, 938 F.2d at 948.
96. Alexander, 938 F.2d at 948. In Alexander, the defendants had been charged with violating the Lacey Act, a federal criminal statute prohibiting the transportation in interstate or foreign commerce of fish or wildlife taken or sold in violation of state law. Id. at 945. The United States Court of Appeals for the Ninth Circuit held that the defendants could challenge the state regulations that provided the predicate for the Lacey Act violation on the grounds that they were inconsistent with ANILCA. Id. at 948. However, this defense is available only to rural Alaskans who establish that their use of the wildlife in question was "customary and traditional" within the meaning of ANILCA. Id. Alexander therefore recognizes that subsistence users within the meaning of ANILCA cannot be punished criminally for engaging in subsistence activities.
97. See supra notes 25-53 and accompanying text.
subsistence culture. Through both its unsuitable rural resident preference and its inability to provide compensation for specific instances of harm, ANILCA fails to provide either effective rights or useful remedies to redress harm to Native subsistence culture.

C. Failures in Rights Alone: Alaskan Subsistence Law and Federal Maritime Law

Unlike ANILCA, some laws addressing subsistence issues fail to give any legal effect whatsoever to the concept of subsistence as culture. These regimes are characterized by two groups, each with a distinct weakness. First, Alaska's current subsistence management provisions\(^9\) fail to provide rights that redress harm to Native culture caused by increased access to subsistence resources. Second, federal maritime law as interpreted in the *Exxon Valdez* litigation denies Natives access to sufficient means of relief to recover for the depletion of subsistence resources by pollution.

1. Alaskan Subsistence Law. The evolution of Alaskan subsistence law has been quite turbulent.\(^99\) In 1978, in anticipation of ANILCA, the Alaska legislature passed a subsistence statute that traced both ANILCA's two-tiered approach to wildlife regulation and its definition of subsistence.\(^100\) However, this statute did not limit subsistence uses to rural residents. In a successful effort to comply with ANILCA and retain management authority over public lands in Alaska, the state instead adopted various regulations linking the subsistence preference to rural residency.\(^101\) In 1985, the Alaska Supreme Court invalidated these regulations in *Madison v. State Department of Fish & Game*,\(^102\) holding that the term "customary and traditional" in the regulations referred to uses of subsistence resources, not users. Therefore, the regulations did not restrict the subsistence preference to rural areas and were inconsistent with the statutes under which they were enacted.\(^103\) Consequently, Alaska's subsistence

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98. The principal statutory provisions are Alaska Statutes sections 16.05.258 (1992), 16.05.259 (1992), and 16.05.940(32) (1994).
103. *Id.* at 174.
program was no longer in compliance with ANILCA. To avoid losing control over its public lands, the Alaska legislature quickly passed a new statute that retained the former law's two-tiered regulation structure but also explicitly contained a rural residency requirement. In turn, the Alaska Supreme Court annulled this requirement in *McDowell v. State*.

Since *McDowell*, the taking of wildlife in Alaska has been governed by a dual management system: federal regulations promulgated under ANILCA govern wildlife uses on public lands, while state regulations enacted under Alaska's subsistence provisions control wildlife uses on other lands. This state of affairs has produced several undesirable consequences. In particular, it has led to two notable protracted litigations: one concerning whether Alaska's navigable waters fall under ANILCA's definition of public lands, and another addressing whether the federal government has the authority to regulate wildlife use on Alaska's public lands in the absence of an Alaska subsistence statute that complies with ANILCA. As of this writing, the federal government is authorized to promulgate subsistence regulations for Alaska's public lands and for those navigable waters in which the United States possesses an interest by virtue of the reserved water rights doctrine.

Moreover, the evolution of Alaskan subsistence law in *McDowell* and subsequent cases exhibits a fundamental antagonism to protecting subsistence as culture. The *McDowell* court relied solely on the conception of subsistence as sustenance by, among other ways, citing data that purported to demonstrate that a substantial percentage of urban Alaska residents rely on hunting and fishing in order to obtain basic food, whereas numerous rural residents do...

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104. Act effective June 1, 1986, ch. 52, 1986 Alaska Sess. Laws; see also Bobby, 718 F. Supp. at 768.
106. See supra note 73.
107. See Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994).
109. See Babbitt, 54 F.3d at 552-54. Further, "the federal agencies that administer the subsistence priority are responsible for identifying those waters." *Id.* at 554.
not.\textsuperscript{110} In particular, this data fails to address whether the urban residents who engage in subsistence practices are Natives doing so for cultural reasons, and whether the rural residents who do not rely on such practices are non-Natives with no cultural impetus to lead a subsistence lifestyle.\textsuperscript{111}

While Alaska's current subsistence statute, Alaska Statutes section 16.05.258(b), is somewhat similar to ANILCA, the rights that it currently provides are wholly incapable of protecting subsistence as culture. For instance, although it mirrors ANILCA's two-tier approach to wildlife regulation,\textsuperscript{112} section 16.05.259 explicitly rejects the "subsistence defense" permitted by ANILCA.\textsuperscript{113} More importantly, after McDowell, the Alaska statute differs significantly in its definition of "subsistence uses." Not only did the Alaska Supreme Court eliminate the rural residency requirement in McDowell,\textsuperscript{114} but, in an earlier case, it also broad-

\textsuperscript{110} McDowell v. State, 785 P.2d 1, 5 (Alaska 1989).
\textsuperscript{111} For another critique of McDowell's exclusive reliance on the concept of subsistence as sustenance, see Kancewick & Smith, supra note 9, at 671-72.
\textsuperscript{112} The first tier, Alaska Statutes section 16.05.258(b)(1)-(3), which is designed to govern situations in which the wildlife population is sufficient to satisfy all subsistence uses, is actually divided into three subcategories. The first applies to situations in which all consumptive uses can be satisfied; the second governs circumstances in which all subsistence uses and some, but not all, other consumptive uses can be satisfied; and the third regulates situations in which all subsistence uses, but no other uses, can be satisfied. Each of the three subcategories of the first tier accords subsistence uses a priority.

The statute's second tier applies when the wildlife population is insufficient to satisfy all subsistence uses. See ALASKA STAT. § 16.05.258(b)(4) (1992). In such circumstances, other consumptive uses are prohibited, and subsistence uses are regulated according to criteria similar to ANILCA's second tier. Id.; 16 U.S.C. § 3114 (1994); see also supra note 80 and accompanying text. However, as of May 1995, the Alaska statute is not completely in line with ANILCA. In State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995), the Alaska Supreme Court held that the second factor to be examined in according a subsistence priority—"the proximity of the domicile of the subsistence user to the stock or population," ALASKA STAT. § 16.05.258(b)(4)(B)(ii) (1992)—was unconstitutional under McDowell.

\textsuperscript{113} Compare ALASKA STAT. § 16.05.259 (1992) ("In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.") with United States v. Alexander, 938 F.2d 942 (9th Cir. 1991) (permitting criminal defendants to assert subsistence use as a defense to their federal prosecution). Alexander is discussed in detail at supra note 96.

\textsuperscript{114} On remand in McDowell, the superior court apparently severed the rural residency requirement from Alaska Statutes section 16.05.940(32) and left the
ly interpreted the terms “customary and traditional” to allow
greater access to resources than the comparable terms in AN-
ILCA.\textsuperscript{115}

In \textit{State v. Morry},\textsuperscript{116} the Alaska Supreme Court continued
this trend by holding that the terms “customary and traditional”
define the specific wildlife populations subject to subsistence uses
and the post-harvest use of those populations, rather than the
methods of harvest themselves.\textsuperscript{117} This interpretation is utterly
incompatible with the concept of subsistence as culture, as now
“there are no statutory standards for determining those individuals
who are ineligible to participate in subsistence hunting and fishing.
. . . [A]ll Alaskans are [now] eligible . . . .”\textsuperscript{118} In reaching this
conclusion, the \textit{Morry} court ignored the fact that “customary and
traditional” methods of harvest are often the hallmark of subsis-
tence as culture.\textsuperscript{119}

Alaska law’s inability to protect subsistence as culture is
essentially due to its nearly exclusive emphasis on individual rights,
of which \textit{McDowell} is particularly poignant evidence. In \textit{McDowell},
the supreme court declared that Alaska’s subsistence law serves
two primary purposes: to allow individuals to obtain the basic
necessities of life and to aid communities whose residents depend
on subsistence to live.\textsuperscript{120} Yet, because “communities are merely
the collective sum of . . . residents,”\textsuperscript{121} the statute has only a
single purpose: to protect subsistence as sustenance. Given that
goal, the court could confidently declare that “[a] classification

\textsuperscript{116} After \textit{McDowell}, Alaska’s statute therefore defines “subsistence uses” as:
the noncommercial, customary and traditional uses of wild, renewable
resources [rural residency requirement stricken by the \textit{McDowell} court]
for direct personal or family consumption as food, shelter, fuel, clothing,
tools, or transportation, for the making and selling of handicraft articles
out of nonedible by-products of fish and wildlife resources taken for
personal or family consumption, and for the customary trade, barter, or
sharing for personal or family consumption . . . .
\textit{ALASKA STAT. § 16.05.940(32)} (1992).
\textsuperscript{117} See, e.g., Madison v. State Dep’t of Fish & Game, 696 P.2d 168, 176
(Alaska 1985).
\textsuperscript{118} \textit{Id}. at 169-70.
\textsuperscript{119} \textit{Id}. at 368 (emphasis added).
\textsuperscript{120} \textit{See}, e.g., BERGER, \textit{supra} note 10, at 48-55.
\textsuperscript{121} McDowell v. State, 785 P.2d 1, 10 n.20 (Alaska 1989).
\textsuperscript{122} \textit{Id}.
scheme employing *individual characteristics* would be less invasive of [state constitutional] values and much more apt to accomplish the purpose of the statute than the urban-rural criterion.”"  

Were the court to approach the identical statute with a group rights point of view, it would surely reach another result. Under the subsistence as culture approach, the importance of subsistence to Alaska Native culture would be ample justification for an alternate classification scheme, one that allowed Natives a priority over all others in subsistence activities.

In sum, Alaska’s subsistence statutes render all Alaskans individually eligible as subsistence users.  

However, not all Alaskans have a primary cultural connection to subsistence practices, as Native groups do.  

Inevitably, as Alaska’s population continues to grow, expanding access to and pressure on subsistence resources, the cultural harm suffered by Alaska Natives will only continue to increase. Yet, Alaska law currently contains no mechanism for avoiding these repercussions.

2. Federal Maritime Law. Federal maritime law governing pollution also fails to protect subsistence as culture, as cogently illustrated by a recent decision in the *Exxon Valdez* litigation. In *In re Exxon Valdez*, a class of individual Alaska Natives sought

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122. *Id.* at 11 (emphasis added). The Alaska Supreme Court has recently reaffirmed the importance of Alaskans’ individual subsistence rights by striking down another legislative attempt to classify subsistence users by a residential criterion. In *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995), the court held that basing the subsistence priority in Alaska Statutes section 16.05.258(b)(4) on “the proximity of the domicile of the subsistence user to the stock or population” was unconstitutional under *McDowell*.


125. Alaska’s subsistence statutes are not alone in their failure to protect subsistence as culture. Recovery for cultural harm as a result of oil pollution has also been difficult under Alaska law. For instance, the Alaska Act, a statute governing the release of hazardous substances into state waters, allows recovery for personal injury, property damage, and many forms of economic losses, but not for damage to subsistence resources. *Alaska Stat.* § 46.03.824 (1991) (“Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit.”). While this statute may allow recovery for subsistence as sustenance as an “economic benefit,” it clearly provides no such remedy for subsistence as culture.

126. No. A89-0095-CV (HRl), Order No. 190, 1994 WL 182856 (D. Alaska Mar. 23, 1994). The court was sitting in admiralty and, thus, applied federal
to recover for damage to their subsistence lifestyle arising out of the Exxon Valdez oil spill. The individuals were unable to recover from the Trans-Alaska Pipeline Liability Fund by the decision of the fund’s administrator that subsistence damages were not "economic." Nevertheless, the Natives proceeded under a common law theory of public nuisance. The court observed that under this theory, the Natives could recover only if they proved that the harm they suffered was different in kind from that suffered by the general public. Then, the court granted summary judgment for the defendant, holding that the Natives suffered harm different only in degree, not in kind, from that suffered by the general public. In so ruling, the court relied heavily on an individual rights notion of subsistence. Echoing Morry, the court declared:

All Alaskans have the right to lead subsistence lifestyles, not just Alaska Natives. All Alaskans, and not just Alaska Natives, have the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings. Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique. These attributes of the Alaska Native lifestyle only make it different in degree from the same subsistence lifestyle available to all Alaskans.

The court accepted Exxon's argument that "a fervent environmentalist who adores nature or an avid sport fisherman or hunter suffered the same injury as the Native Alaskans," and, thus, it held that the Natives could not maintain a private action for public nuisance.

As this holding demonstrates, federal maritime law essentially fails to recognize the Natives' right to remedy harm to their subsistence culture. The critical step in the court's analysis is the

maritime law.

127. See infra note 149 and accompanying text.
128. See Quam, supra note 26, at 200.
129. In re Exxon Valdez, 1994 WL 182856, at *1. The court indicated that the plaintiff's nuisance theory may have failed regardless of its decision because the Federal Water Pollution Control Act preempts the federal maritime and common law of nuisance in the area of water pollution. Id. at *2-3.
130. Id. at *1.
131. Id. at *2, *5.
132. Id. at *2 (footnote omitted).
133. Id.
notion that subsistence is an individual right to sustenance. Beginning with this premise, as the court did,\textsuperscript{134} the conclusion that the harm suffered by Alaska Natives is different only in degree is nearly inescapable. If all Alaskans possess the same rights to use natural resources for subsistence purposes, then the fact that Alaska Natives take greater advantage of those rights distinguishes them from other Alaskans only in degree, not in kind.

However, viewed from a group rights perspective, the court's decision is questionable. If the court had adopted a different premise, that subsistence rights are enjoyed by groups, then the harm suffered by Alaska Natives is indeed different in kind.\textsuperscript{135} Even if a fervent environmentalist and an avid sportsman rely on subsistence practices for their physical well-being, the fabric of their culture is not threatened by the depletion of subsistence resources. In contrast, the cultural identity of Alaska Natives is irrevocably linked to subsistence practices, and the damage to them as a group is qualitatively different from the damage to the general population. Thus, if the court were to consider the Native plaintiffs to possess a group right to subsistence, it would be incorrect to say that their subsistence lifestyle is not unique.\textsuperscript{136}

Both Alaska law and federal maritime nuisance law refuse to recognize subsistence as culture by rejecting the notion that groups possess subsistence rights over and above those possessed by individuals. By focusing myopically on subsistence solely as the individual's right to sustenance, these legal regimes fail to consider demonstrated, redressable cultural injuries.

D. Failures in Remedies Alone: Endangered Species Statutes and Federal Oil Pollution Laws.

Unlike many of the laws heretofore analyzed, some bodies of law do provide rights that are specifically designed to protect

\textsuperscript{134} The Exxon Valdez court relied explicitly on McDowell v. State, 785 P.2d 1 (Alaska 1989), to establish this premise. Id. at *2 n.6. For a detailed analysis of McDowell, see Boardman, supra note 6, at 1003-13.

\textsuperscript{135} See Gallagher, supra note 2, at 588 ("Certainly, the Alaskan native, who is dependent upon the ecosystem for subsistence, has suffered damage different in kind from other Alaskan citizens who have a more tenuous connection to the environment.").

\textsuperscript{136} In re Exxon Valdez, No. A89-0095-CV (HRH), Order No. 190, 1994 WL 182856, at *2 (D. Alaska Mar. 23, 1994) ("Neither the length of time in which Alaska Natives have practiced a subsistence lifestyle nor the manner in which it is practiced makes the Alaska Native subsistence lifestyle unique.").
subsistence as culture. Native exemptions to endangered species statutes and the remedial provisions of federal pollution statutes are two cogent examples.

1. *Endangered Species Statutes.* Endangered species statutes that exempt Native subsistence uses from their prohibitions are intended, to a certain degree, to remedy harm to subsistence as culture. "Every statute and treaty designed to protect animals or birds has a specific exemption for Native Alaskans who hunt the species for subsistence purposes." The Marine Mammal Protection Act ("MMPA") and the Endangered Species Act ("ESA") are the most relevant examples. Each act explicitly exempts from its restrictions Alaska Natives who use the protected species either for subsistence purposes or for producing Native handicrafts or clothing. The goal of these exceptions is to protect subsistence as culture, both by explicitly limiting the exemption to Alaska Natives and by permitting Natives to use protected species for purposes beyond personal consumption. These provisions come the closest of any body of law to providing rights that adequately protect subsistence as culture.

However, the rights that these exemptions provide are not entirely unassailable; in the end, they are actually individual rights. In the terminology of one commentator, the MMPA and the ESA only supply "derivative" group rights rather than "intrinsic" rights,
because they are ultimately possessed and asserted by the individual.143 Therefore, they are as limited as other individual rights schemes, such as ANILCA. In particular, the Native exemptions are granted to individual Natives, not to Native groups. Furthermore, they require that takings not be "accomplished in a wasteful manner."144 Thus, the exemptions apparently would not apply in situations where the taking of a marine mammal or an endangered species by an individual Native might be wasteful vis-a-vis that individual, but not wasteful vis-a-vis the Native group. An example of such an instance would be where the taking is not done for individual physical consumption, but for cultural occasions, such as a religious ceremony. Failure to respond to such a situation demonstrates the limitations of the individual rights scheme these exemptions employ.

However, the more troubling aspect of these exemptions is that the remedies available are inadequate to respond to the cultural harm caused by damage to subsistence resources. While each contains enforcement mechanisms designed to ensure compliance with its provisions,145 neither statute remedies harm to culture resulting from takings of protected wildlife by those not eligible for the exemption. When Native culture is harmed by those who violate these statutes, the Natives' only apparent recourse is to seek to compel future compliance. These laws provide no recompense for cultural harm already done.

2. Federal Pollution Statutes. Like the endangered species exceptions, two federal pollution statutes, the Trans-Alaska Pipeline Authorization Act ("TAPAA")146 and the Oil Pollution Act of 1990 ("OPA"),147 allow recovery for loss of subsistence use when natural resources are damaged by pollution. TAPAA provides that holders of pipeline rights-of-way are strictly liable for

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144. 16 U.S.C. §§ 1371(b)(2), 1539(e).
145. The MMPA, for instance, subjects those who violate the act to civil penalties. See id. § 1375. In addition to statutory penalties, the ESA permits citizen suits to enforce compliance with its provisions. See id. § 1540(a), (b), (g).
damages resulting from activities in connection with those rights-of-way, including the loss of "natural resources relied upon by Alaska Natives, Native organizations or others for subsistence or economic purposes," without regard to ownership of those resources.148

Prior to 1990, TAPAA also authorized strict liability recovery of up to $100 million from the Trans-Alaska Pipeline Liability Fund for "all damages" resulting from the discharge of oil transported through the trans-Alaska pipeline and loaded on a vessel at the pipeline's terminal facilities.149 By regulation, such damages were defined as "any economic loss, . . . including but not limited to . . . [l]oss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing and gathering opportunities."150

The Trans-Alaska Pipeline System Reform Act of 1990151 repealed this latter provision effective sixty days after all claims under the TAPAA had been settled. Thus, OPA currently governs situations previously covered by TAPAA's repealed oil discharge provision. OPA permits recovery by an Indian tribe trustee for the loss of natural resources or of the use of such resources152 and for damages for loss of subsistence use of natural resources without regard to ownership.153

While these statutes allow aggrieved parties to recover for damage to "subsistence," as currently interpreted, they do not remedy harm to subsistence as culture. In particular, the statutes allow anyone relying on natural resources for physical well-being,154 and for physical well-being only, to recover for economic

149. Id. § 1653(c)(1), (3).
154. See, e.g., 43 U.S.C. § 1653(a)(1) (Supp. V 1993) (permitting recovery under TAPAA for loss of natural resources "relied upon by Alaska Natives, Native organizations or others for subsistence or economic purposes") (emphasis added); 33 U.S.C. § 2702(b)(2)(C) (permitting recovery under OPA for "loss of subsistence use of natural resources . . . by any claimant who so uses natural resources") (emphasis added).
By equating subsistence with economics, federal pollution law permits recovery by any individual who relies on subsistence for sustenance, yet excludes recovery for damage to the subsistence culture of Native groups. Such a remedial scheme not only seems inconsistent with the nature of Native subsistence activities; it subtly equates subsistence with sustenance, thereby failing to cure cultural harm caused by pollution.

In sum, current attempts at redressing harm to subsistence as culture, whether they grant rights, remedies or both, are nonetheless based on an individual rights perspective of subsistence. As these legal regimes demonstrate, individual rights are competent only to protect subsistence as sustenance, even when the intent is to safeguard subsistence as culture. To truly remedy harm to subsistence as culture, the nature of legal subsistence rights must be reconsidered at a fundamental level.

IV. A GROUP RIGHTS APPROACH TO SUBSISTENCE: A PROPOSAL

Subsistence, as it is used nowadays, merely lumps us in. The State of Alaska cannot discriminate, so subsistence is everyone's right. We use the word subsistence in a politically separate term and, in fact, when the state uses subsistence, it is a privilege. To us, subsistence is our inherent right because that is how we have always been and, I believe, that is how we will always be.

—Suzy Erlich, Kotzebue

Subsistence is best understood as a unique cultural identity, worthy of legal protection. Only a right vested in Alaska Natives as a group will adequately remedy damage to subsistence as culture. This Part will outline a group rights approach to protecting subsistence as culture, suggest ways in which harm to subsistence

155. See, e.g., 43 U.S.C. § 1653(a)(1) (permitting recovery under TAPAA's right-of-way provision for damage to natural resources used for "subsistence or economic purposes") (emphasis added); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1015 (E.D. La. 1993) (declaring that the term "subsistence use" under OPA "relates to use of a natural resource . . . to obtain the minimum necessities for life") (emphasis added); In re Cleveland Tankers, Inc., 791 F. Supp. 669, 678 (E.D. Mich. 1992); 43 C.F.R. § 29.1(e)(6) (declaring that loss of subsistence opportunities is a function of loss of profits for purposes of the TAPL Fund).

156. As one observer has explained, "These [whale-hunting] customs must be viewed as religious rules rather than economic laws." Michie, supra note 16, at 82 n.15 (1979).

157. BERGER, supra note 10, at 65 (quoting Suzy Erlich).
culture might be adequately remedied under such a scheme, and show that a notion of group rights is appropriate in this area of the law. The suggested reforms are generally legislative in nature, for, as the United States Court of Appeals for the Ninth Circuit has observed, "[this] issue . . . cries out for a legislative . . . solution."\(^{158}\)

A. The Proper Group

In order to avoid the pitfalls associated with utilizing individual rights to protect subsistence as culture, subsistence rights must vest in, and be asserted by, a group that possesses a core cultural relationship with subsistence life. There are two possibilities in this regard. First, Native corporations created under ANCSA could assert group subsistence rights.\(^{159}\) However, the scope of a Native corporation's authority to protect subsistence would be limited to the extent of its proprietary interests.\(^{160}\) Moreover, for a Native corporation to legitimately assert Alaska Natives' right to subsistence, the interests of the corporation would have to be identical to the interests of its individual shareholders, a proposition that the federal district court in Alaska has heretofore been unwilling to accept.\(^{161}\) Finally, granting subsistence rights to Native corporations would require Native corporations to have an obligation, beyond making a profit, to affirmatively protect subsistence as culture, another proposition that has not as of yet achieved legal recognition.\(^{162}\)

A more plausible proponent of group rights to subsistence as culture is Alaska Native villages. First, Native villages are easy to

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159. Vesting a group right to subsistence in Native corporations is intellectually defensible, as corporations are the only apparent exception to the belief that liberal democratic theory denies the legitimacy of intrinsic group rights. See Svensson, supra note 143, at 421 n.1.
160. See, e.g., Aleut Corp. v. Arctic Slope Regional Corp., 484 F. Supp. 482, 488 (D. Alaska 1980) (observing that an Alaska Native corporation's attempt to protect subsistence as culture "confuses fiduciary obligations with the acquisition of a compensable interest in such resources and culture"); Quam, supra note 26, at 188-89 (explaining that, in the Exxon Valdez litigation, Native corporations could proceed with their legal actions only after they had obtained title to lands selected under ANCSA).
162. See id. at 488.
identify. The vast majority of Native villages have been listed as such, either by ANCSA\textsuperscript{163} or by the Bureau of Indian Affairs.\textsuperscript{164} Moreover, membership in such communities, including membership by Natives currently residing in urban areas, is also determinable.\textsuperscript{165} While individual members of Native villages would not be able to assert rights to subsistence as culture, a Native village’s ability to identify its members still has the important advantage of allowing the village to determine if harm to the subsistence activities of individual members constitutes a violation of the village’s group subsistence rights. Therefore, identifying the groups that would possess cultural subsistence rights would not be an unworkable task.

Second, Native villages are arguably sovereign Indian tribes, much like their counterparts in the lower forty-eight states.\textsuperscript{166} As such, they would benefit from the “special government-to-government relationship between Natives and the federal government.”\textsuperscript{167} This is an especially important factor, as under federal Indian law, tribal status would more easily immunize Native villages from federal equal protection and due process challenges to their rights.\textsuperscript{168} Tribal sovereignty would also allow Congress to bypass


\textsuperscript{165} See Kancewick & Smith, supra note 9, at 674-75.

\textsuperscript{166} Whether Alaska Native villages have tribal status has been the subject of some controversy. The debate over this issue is outlined in Smith & Kancewick, supra note 63, and comprehensive treatment of this volatile issue is beyond the scope of this Note. However, it should be mentioned that Congress has explicitly recognized various Alaska Native groups as Indian tribes. See, e.g., 25 U.S.C.A. §§ 1212-15 (West Supp. 1995) (clarifying that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe and implicitly noting that there are other federally recognized tribes in Alaska). Moreover, the United States District Court for the District of Alaska has held that the Neets’aii Gwich’in of Venetie and Arctic Village satisfy the common law definition of a tribe enunciated in Montoya v. United States, 180 U.S. 261, 266 (1901). Native Village of Venetie I.R.A. Council v. State, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), 1994 WL 730893 (D. Alaska Dec. 23, 1994). As such, the State of Alaska must, for instance, afford full faith and credit to the adoption decrees of the tribal government. Id. at *22.

\textsuperscript{167} Kancewick & Smith, supra note 9, at 676.

\textsuperscript{168} See Morton v. Mancari, 417 U.S. 535, 551-555 (1974) (observing that employment preferences for Native Americans do not violate due process “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’s
contrary provisions in the Alaska Constitution when providing subsistence rights exclusively to Native villages.169

Third, and perhaps most importantly, Native villages are the groups most interested in remediying harm to subsistence as culture. They represent the basic unit in which that culture is practiced,170 provide the organizational structure of both tribal government171 and village subsistence activities,172 and are the most interested in the long-term viability of subsistence resources.173 As such, Native villages should be the entities to assert a group right to subsistence as culture.

B. The Proper Rights

A comprehensive group right to subsistence as culture is not entirely novel, as the crucial elements of this approach are already scattered throughout the structure of existing subsistence law. Nevertheless, expressly adopting a group rights perspective in subsistence legislation would give life to the concept of subsistence as culture.

For instance, Kancewick and Smith recommend that Congress legislatively replace ANILCA's rural residency preference with a subsistence priority for Native villages.174 This proposal, they contend, would protect subsistence as culture, bring treatment of Alaska Natives into conformity with treatment of other Native Americans by preempting contrary state law, and resolve the administrative difficulties of ANILCA's current provisions.175

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169. See Kancewick & Smith, supra note 9, at 676.

170. See, e.g., FIENUP-RIORDAN, supra note 15, at 31-35 (describing the subsistence activities of Native Yup'ik villages); Michie, supra note 16, at 84 (noting that, among the Inupiat, "[d]uring a whale hunt, virtually the entire village participates in whaling related activities").

171. See Smith & Kancewick, supra note 63, at 491-94.

172. See Michie, supra note 16, at 79 n.1 (observing that, among the Inupiat, the whaling crew captain serves as de facto chief of the Native village because of his leadership role in subsistence activities).

173. See Quam, supra note 26, at 187-91 (contrasting the Native corporations' goal of being compensated for damage to their property interests resulting from the Exxon Valdez spill with the Native villages' objective of having subsistence resources returned to their pre-spill condition).

174. See Kancewick & Smith, supra note 9, at 674-77. ANILCA's remaining provisions, including its two-tier subsistence priority, would be retained and would operate in the same manner as at present. See id. at 675.

175. Id. at 675-77.
Moreover, such legislation would achieve these goals, they conclude, without impairing the state's ability to enact secondary subsistence priorities for non-Native uses.\textsuperscript{176}

While Kancewick and Smith's proposal effectively responds to ANILCA's defects, additional measures are necessary to apply a group rights perspective to subsistence doctrines currently based on individual rights. For instance, eligibility for an exemption to endangered species statutes should remain limited to Alaska Natives,\textsuperscript{177} but the ability to claim the exemption should also vest in Native villages. These statutes would thereby protect group subsistence activities that would not otherwise qualify as individual subsistence under the statutes' current provisions. In proceedings against individual Natives for alleged violations of these laws, individual Natives would still be able to offer subsistence use as a defense, as permitted by the current exemptions. In addition, however, Native villages would also be able to argue for exemption from the statutes on the grounds that the activities of their members were undertaken for the cultural use of the group. The overall effect would be to recognize the cultural uses of these resources by Native villages, overcoming the weaknesses inherent in an individual rights approach to subsistence.\textsuperscript{178}

These proposals would also help to correct the anomalies in federal maritime law evident in the \textit{Exxon Valdez} decision. The primary aim of the group rights approach is to establish definitively that the cultural harm suffered by Alaska Natives when subsistence resources are lost is different in kind from the harm suffered by the general public.\textsuperscript{179} Thus, if a qualitative difference between subsistence as sustenance and subsistence as culture were statutorily enacted, Native groups would have little difficulty in bringing private actions for public nuisances under federal maritime law to obtain relief from environmental disasters such as the \textit{Exxon Valdez} oil spill. To be true to the proposed group rights approach,

\begin{itemize}
  \item \textsuperscript{176} For example, Kancewick and Smith suggest that state law could grant non-Native uses of subsistence resources for sustenance a priority over commercial and sport uses. \textit{Id.} at 675.
  \item \textsuperscript{177} See 16 U.S.C. § 1371(b) (1994) (MMPA's Alaska Native exemption); 16 U.S.C. § 1539(e) (1994) (ESA's Alaska Native exemption); \textit{see also supra} notes 137-42 and accompanying text.
  \item \textsuperscript{178} For a discussion of these weaknesses in the context of exemptions to endangered species statutes, see \textit{supra} notes 143-45 and accompanying text.
  \item \textsuperscript{179} \textit{See supra} notes 135-36 and accompanying text.
\end{itemize}
only Native villages would be able to assert a public nuisance claim successfully; individual Natives, or a class thereof, would not. Thus, because the plaintiffs in Exxon Valdez were a class of individual Natives asserting individual rights, the court's decision is actually consistent both with current federal maritime law and with the proposed group rights approach. The court implicitly seemed to recognize as much in noting that "[t]he affront to Native culture occasioned by [the oil spill] is not actionable on an individual basis." However, the recommendations offered here would make such damage actionable on a group basis, a fundamentally distinct method of ensuring the protection of cultural subsistence rights.

C. The Proper Remedies

In addition to modifications in subsistence rights, the remedies giving effect to those rights should also be modified to redress harm to subsistence as culture more effectively. In keeping with the nature of the rights involved, the proposed remedies should reflect a group approach to subsistence as well. Beyond those already in existence, this Note offers three proposals for expanding the remedies for harm to subsistence as culture. First, both ANILCA and the endangered species statutes should be amended to permit private suits by Native villages against those who violate the statutes' provisions. Native villages could seek either to enjoin future violations of these statutes or to collect damages for cultural harm caused by past violations. This

180. In re Exxon Valdez, No. A89-0095-CV, 1994 WL 182856, at *1 (D. Alaska March 23, 1994) (noting that the plaintiffs were an "Alaska Native class").

181. Id. at *5 (emphasis added).

182. For reference to existing remedies under ANILCA, see supra notes 94-97 and accompanying text. For a discussion of existing remedies under MMPA and ESA, see supra note 145 and accompanying text. The entire discussion about the inability of federal oil pollution statutes to protect subsistence as culture, supra notes 146-56 and accompanying text, is also essentially about remedies.

183. ANILCA already permits suits seeking injunctive relief, including preliminary injunctions, see 16 U.S.C. § 3117 (1994), and the United States Court of Appeals for the Ninth Circuit has held that harm to culture is independently sufficient to constitute an irreparable injury that cannot be adequately remedied at law. See Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994) (holding that allegations of harm to subsistence warrants the granting of a preliminary injunction); see also supra note 83 and accompanying text.

184. For instance, OPA already permits recovery for some damage to subsistence. See 33 U.S.C. § 2702(b)(2)(C) (Supp. V 1993); supra notes 152-53 and
remedy would function much like suits by Indian tribe trustees already permitted by current law.\(^{185}\) Moreover, this remedy is not entirely without precedent, as the ESA already permits suits by private citizens to enforce its provisions.\(^{186}\) To be sure, proving liability in such suits may be difficult. Under the group rights approach, Native villages would be required to establish that unlawful conduct proximately caused cultural harm to the village as a whole, and not just to its individual members. Nevertheless, a private remedy would redress cultural harm left unremedied by present law, thereby vindicating subsistence as culture.

Second, current pollution statutes should explicitly permit Native villages to recover cultural damages occasioned by the loss of resources relied upon for subsistence. Natives should also be able to obtain injunctive relief similar to that proposed for ANILCA and the endangered species statutes under the federal oil pollution provisions. These remedies would acknowledge the significant cultural harm that pollution can cause and provide relief accordingly, either through compensation or through injunction of the source of the pollution. Such remedies are not without precedent. For example, TAPAA's right-of-way provision currently permits Alaska Native organizations to recover for loss of natural resources used for subsistence without regard to ownership of those

accompanying text.


Recognizing a trust relationship between Alaska Native villages and its members is one way in which the interests of individual Alaska Natives can be protected under the proposed approach to subsistence. Individual members could also use the village's political processes to persuade the village to pursue the course of action desired by the members. A village will necessarily respond to views on which there is a general consensus among its members. As one commentator has explained:

[The] survival [of American cities and Indian tribes] depends almost completely on the ability to muster support on critical issues from their residents and convince outsiders of the merits of their causes. The fact that tribes and cities have remained vibrant and autonomous in many respects is a testimony to their ability to build internal consensus and acquire external acceptance.


resources. A group rights subsistence approach would simply import this concept into OPA's damages provisions. It would also explicitly modify both TAPAA and OPA to bestow remedies on Native villages to compensate them for cultural damages due to the loss of natural resources. Notwithstanding the group rights approach’s focus on subsistence as culture, it would not eliminate a Native or non-Native individual’s ability under present law to recover for loss of natural resources relied upon for individual sustenance. Alaska Native villages could merely seek additional compensation, over and above that already available to individuals, for the cultural harm suffered as a result of pollution.

Third, in suits for damages, recovery should be measured by the degree of group harm suffered. Such a measure would be roughly similar to a group form of hedonic damages already permitted under personal injury law. Because harm to culture is essentially a damage to the group's ability to enjoy its collective "life," such a measure would most closely approximate the type of harm suffered by Native villages. Indeed, the court in *Exxon Valdez* recognized that the Native class's claim for cultural damages was akin to a loss of enjoyment of life claim, but it rejected the theory because the Natives did not assert a personal injury claim. A group rights approach would compensate Native villages for cultural harm without any requirement that they establish individual injury, as the cultural harm is suffered by the group as a whole, rather than by any one individual.

While admittedly unusual, it is not unimaginable to conceptualize compensable harm to a community. In *United States v. Hatahley*, a federal district court adopted just such an approach. In assessing the pain and suffering experienced by Native Americans due to the unlawful seizure and destruction of their horses and burros, the district court employed a concept of “community loss” or “community sorrow” to reach a total figure representative of the amount of loss suffered by the community. The court then equally divided that total among the individual plaintiffs, awarding $3500 to each. Although the Tenth Circuit rejected this formulation

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190. *Id.* at 924-25.
of damages,\textsuperscript{191} it did so, in part, because it stated that the right involved was an individual one.\textsuperscript{192} A concept of damages based on the compensation of group rights would permit such an approach to assessing cultural damages without violating fundamental principles of remedies law.\textsuperscript{193} Alaska Natives possess a group right to lead their subsistence way of life; therefore, courts of law should not be powerless to remedy a loss that can be felt only in the aggregate, despite the law's ordinary insistence on individual vindication.

D. The Proper Approach

The tendency of Anglo-American law and liberal democratic theory is to grant rights only to individuals.\textsuperscript{194} As a general rule, conferring legal rights on groups, particularly ethnic groups, is not viewed as a legally legitimate function of the law.\textsuperscript{195} In short, group rights remain a controversial concept. Nevertheless, there are several reasons why employing a group approach to Native rights in general, and subsistence rights in particular, provides perhaps the strongest rationale for an exception to this rule.

First, Native Americans, including Alaska Natives, occupied America before the Europeans, and their own legal and political institutions were already in place when the Europeans arrived.\textsuperscript{196} Thus, in contrast to other ethnic groups, they have no homeland other than this country in which to ensure their culture's preservation.\textsuperscript{197} Moreover, no other ethnic group can assert a right to culture based on an ancient connection to this land.\textsuperscript{198} Cultural

\textsuperscript{191.} Id. at 925.

\textsuperscript{192.} Id.

\textsuperscript{193.} See id. at 923 ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party.").

\textsuperscript{194.} For a general discussion of this principle in the context of Native American tribes, see Svensson, supra note 143.

\textsuperscript{195.} See, e.g., id. at 429 (observing that in liberal democratic theory, "[o]nly individuals are conceived of as holding rights and bearing claims; groups are merely aggregates of individuals whose status in law and politics arises not from their collective identity, but from the rights and interests of the individuals of which they are composed").

\textsuperscript{196.} See, e.g., BERGER, supra note 10, at 155-56 ("[N]ative Americans] were here first, with their own societies, laws, and institutions. . . .")

\textsuperscript{197.} See, e.g., Worthen, supra note 57, at 628-29.

\textsuperscript{198.} See BERGER, supra note 10, at 156-57 ("[A] land-based culture and way of life mark Native Americans off from other minorities.").
preservation in this country is therefore a compelling goal for Alaska Natives, and all Native Americans, in ways that it is not for other cultural groups. Thus, the imperatives of preserving Native culture justify the adoption of a group rights approach to subsistence.

Second, unlike many other ethnic minorities in the United States, Native Americans, including Alaska Natives, did not voluntarily accept the individualist principles of liberalism by immigrating to this country.\(^{199}\) For instance, Native tribes did not relinquish any of their sovereignty when the United States was formed.\(^{200}\) Therefore, as groups, Native American tribes should, in theory at least, possess greater rights than American states, who did surrender some degree of sovereignty when this country was founded.\(^{201}\) Treating Alaska Native villages as sovereign tribes for purposes of federal Indian law\(^ {202}\) would strengthen the claim that group rights are an appropriate means by which to protect subsistence as culture.

Third, due to a long history of wrongs wrought against them, Native Americans are "specially disadvantaged groups" whom, under one theory, the equal protection clause was designed to protect.\(^ {203}\) Under this view, use of a group rights approach to

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199. See, e.g., BERGER, supra note 10, at 155-56 ("Native Americans ... did not choose America ... and they wish to remain distinct."); Kapashesit & Klippenstein, supra note 55, at 942 ("Aboriginal communities ... have not in any comparable way consented to be part of a liberal individualist social structure.").

200. See Clinton, supra note 22, at 745 n.16 ("The people of the states consented to the diminution in their sovereignty which occurred through the adoption of the United States Constitution. ... By contrast, the tribes were involuntarily forced into the federal union, often in violation of express or implied treaty guarantees of political autonomy.") (citations omitted).

201. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 21 (1986) (Stevens, J., concurring in part and dissenting in part) (observing that under the majority’s holding in the case, federal courts must, under certain circumstances, give more deference to tribal court decisions than to state court decisions); BERGER, supra note 10, at 157 ("No other minority can assert a right to ... distinct political institutions founded on the recognition of Native sovereignty."); Clinton, supra note 22, at 745 ("[T]he tribal claim to group political, cultural, religious, and other forms of group autonomy and rights is far stronger than the states’ claim to state rights as a group.").

202. See supra notes 166-69 and accompanying text.

203. See Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 154-55 (1976). The criteria to qualify as a "specially disadvantaged group" under Fiss’ analysis is three-fold: (1) social groupness; (2) perpetual subordination; and (3) circumscribed political power. Id. Native Americans,
address subsistence as culture would not violate equal protection principles, irrespective of the tribal status of Alaska Natives. Finally, Alaska is the "last frontier" regarding Native hunting and fishing rights. In comparison with their counterparts in contiguous America, Alaska Natives have only recently been exposed to the advances of western civilization; they have not yet been overrun by them. Alaska therefore offers perhaps the final location in the United States in which subsistence remains able to act as a viable cultural system. As group rights are the most effective means to preserve this viability, their use in protecting Native culture is justified.

V. CONCLUSION

The harm to the subsistence culture of Alaska Natives resulting from its increasing contact with Western expansion merits legal consideration. Current law, however, provides an inadequate response to this harm, due to its unwavering allegiance to individual rights. The proposals offered here demonstrate that subsistence culture is most effectively protected by some type of group right. Moreover, Alaska Native subsistence presents one of the strongest cases for departing from American law's general commitment to individualism. The revisions proposed in this note are wide-ranging in scope, and will certainly not occur overnight. While 1989 may indeed have been a benchmark year in defining the current subsistence controversy, more difficult years and decisions undoubtably lie ahead.

William M. Bryner

including Native Alaskans, meet all three criteria.