August 1, 2025

Introductory Note: I have prepared this curriculum with the objective of sparking interest in the academic community on various important legal and policy questions raised by the federal government's treatment of lands it owns in Alaska. As you will see, it is a general overview aimed primarily at a non-Alaska audience.

The primary academic targets are law and graduate school professors and students studying natural resource, public land, environmental and Native American law and policy, though it can be adapted for use by others.

Many issues addressed are, as it notes, currently in flux, given the Trump (II) Administration's announced intent to overturn or at least reexamine a number of them. Accordingly, I plan to update it periodically.

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SYLLABUS—INSTRUCTIONAL MATERIALS[1]

PROTECTING ALASKA'S NATIONAL PUBLIC LANDS: AN EXPLORATION OF CONTEMPORARY ISSUES

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PART I: Introduction and History to 1980.[2]

Alaska's breathtakingly gorgeous, largely intact natural areas have long fired the American imagination. Few places on the planet offer such unblemished landscapes and ecosystems on such a stupendous scale—at 365 million acres, Alaska is larger than the three next largest states (Texas, California, Montana) combined. Indeed, the word is said to derive from an Indigenous Aleut word meaning "great land."

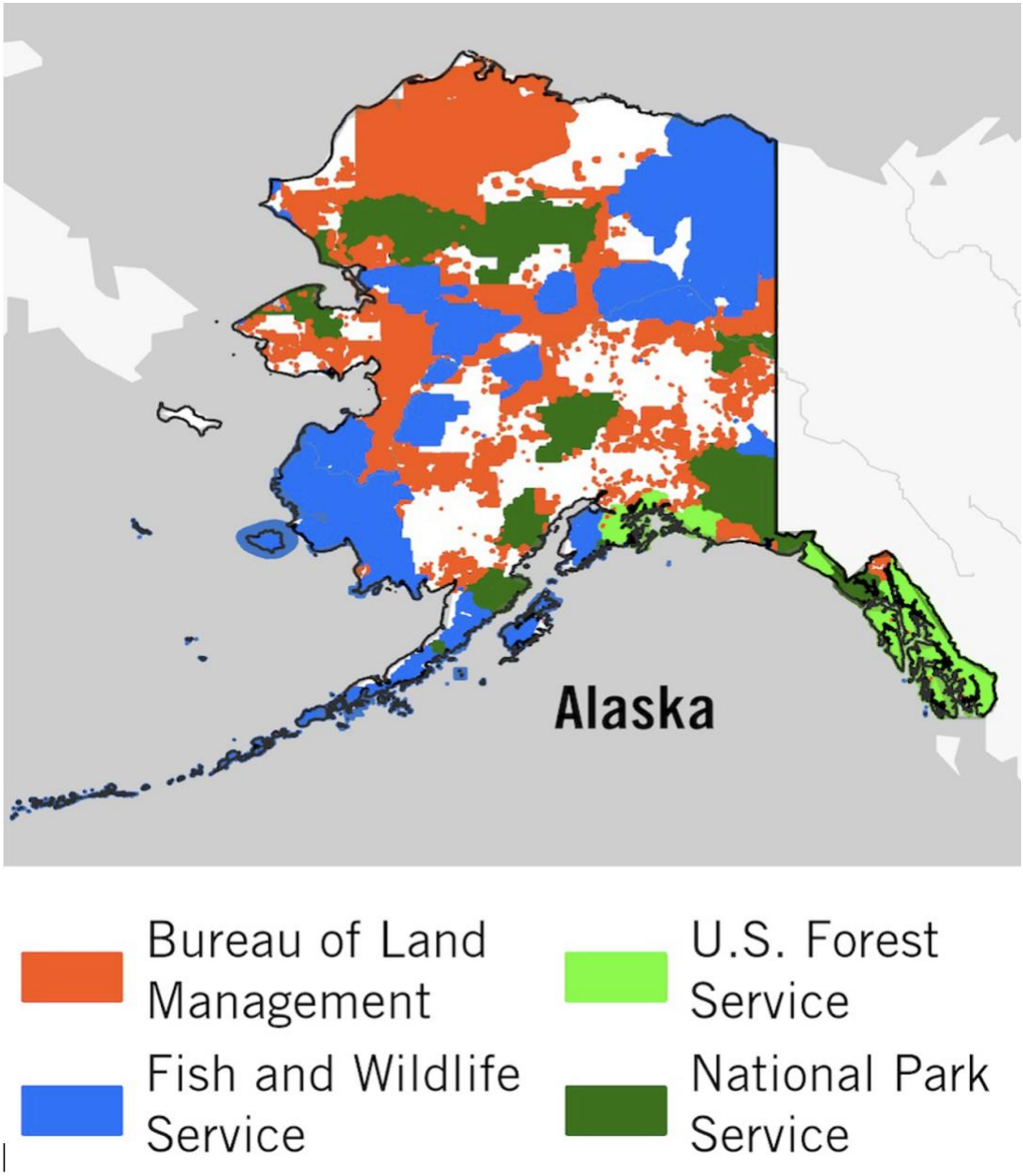
Alaska's relatively sparse human population of about ¾'s of a million (nearly half of which live in the Anchorage area) ranks it 48th among the states. Nearly one in five is Native (a higher proportion than any other state), including most of its scattered rural residents, who deeply identify with the landscapes they have inhabited for millennia.

Within Alaska's boundaries are

---more than 100 million acres of largely treeless tundra in the northern and northwestern parts of the state.
---some of the planet's most important habitat for migratory birds, and iconic wildlife like polar and massive brown bears, walruses, bald eagles, moose, salmon, and more than thirty caribou herds of some 750,000 animals that migrate up to several hundred miles seasonally.
---over half of the total acreage in the nation's National Wilderness Preservation System.
---tens of thousands of glaciers, more than 99% of the national total, the highest peak in North America, and 17 of the 20 highest peaks in the United States.
---the world's largest temperate rainforest in its southeastern panhandle.
---more than one-third of the nation's coastal shoreline (by some estimates, more coastline than the entire contiguous U.S.).

Most of these features are found on the 222 million acres managed by four federal agencies: the National Park Service, the Forest Service, the Fish & Wildlife Service, and the Bureau of Land Management. Besides the nearly 60% of Alaska's 375 million acres owned by the federal government, the State of Alaska owns almost 30%, and most of the remainder is owned by Alaska Native corporations.

[2] Unless otherwise noted, much of the history covered here is drawn from, and sourced in, Chapter 56 of Leshy, *Our Common Ground* 513-27 (2022).


Alaska
Bureau of Land Management
U.S. Forest Service
Fish and Wildlife Service
National Park Service

As described in more detail in what follows, for a century after it acquired Alaska from Russia in 1867, the U.S. Congress and Executive Branch took steps to preserve many of these features and qualities for future generations, just as it has done in the contiguous United States. But beginning around 1970, preservation efforts took on a new focus in Alaska. A national campaign combining Native and national environmental and conservation interests culminated in Congress enacting the landmark Alaska National Interest Lands Conservation Act (ANILCA) in 1980.

The premise of this curriculum is that ANILCA and related federal actions to protect Alaska's stupendous natural qualities are worthy of focused study for several reasons. One is simply because of their scale and design, which aim at preserving whole, largely intact ecosystems to the extent possible.

Another is their special cultural significance. The strong identification of Alaska Native communities with these lands helped persuade Congress to protect, on all of the state's federal public lands, subsistence hunting and fishing opportunities for the state's rural, mostly Native residents. These protection efforts implicate important

legal and policy questions of natural resource, public land, environmental and Native American law which are addressed further below.

A third reason for such focused study is that these Alaska resources are under serious threat. Over the last few decades the Arctic has warmed some three to four times faster than the rest of the planet, a phenomenon researchers call Arctic amplification.[3] This makes many of the impacts of global climate change more pronounced in Alaska than almost anywhere else.[4] Permafrost, which stores large amounts of organic carbon, extends under more than 80% of the state, reaching depths of two thousand feet in its northern plain along the Arctic Ocean. Its thawing, the vulnerability of the state's coastal regions to sea-level rise,[5] and other effects pose major threats to the state's infrastructure and human inhabitants.[6] Its effects on wildlife and other natural values suggest what could be in store for many public lands in the lower 48 states.[7]

Sea-ice cover in the Arctic Ocean has likewise shrunk by nearly half since ANILCA was enacted in 1980,[8] which is leading to the development of new shipping routes. It is also causing some increase in geopolitical tensions, as both Russia—just 50 miles away across the Bering Strait—and China have recently sent planes and boats through the Arctic area around Alaska.[9] This reduction in the state's relative isolation diminishes the protection it has afforded to many relatively pristine public lands.

There remains considerable pressure to open up more of Alaska's public lands to petroleum drilling, including iconic places like the coastal plain of the Arctic National Wildlife Refuge. Alaska's government remains quite dependent upon petroleum extraction activities, even as public-lands-dependent tourism has grown in economic importance. Petroleum's contribution to greenhouse gas emissions is,

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[3] Mika Rantanen, et al, Communications Earth & Environment, vol. 3, no. 168 (2022).

[4] https://uaf-accap.org/alaskas-changing-environment/(2024).

[5] The severe threat to the Native Village of Kivalina on the northwest Alaska coast has attracted much publicity; its lawsuit against the petroleum industry to recover damages under the common law of public nuisance was rejected in Native Vill. Of Kivalina v. ExxonMobil Corp. 696 F.3d 849 (9th Cir. 2012).

[6] Arctic warming required the starting point for this year's iconic Iditarod Trail Sled Dog Race, the 1,000-mile trek across the Alaskan wilderness known as the "Last Great Race on Earth," to be moved 360 miles north this year, from Anchorage to Fairbanks, for the first time in its 53-year history. https://www.goodmorningamerica.com/news/story/global-warming-threatening-future-iconic-dog-sled-races-119297097.

[7] For example, about one-third of the national wildlife refuges are in coastal areas threatened with inundation by sea-level rise. https://www.defenders.org/sites/default/files/publications/national-wildlife-refuges-and-sea-level-rise.pdf.

[8] https://climate.nasa.gov/vital-signs/arctic-sea-ice/?intent=121.

[9] See, e.g., D. Kiss et al, See How Russia is Winning the Race to Dominate the Arctic, Wall St. Journal, Feb. 3, 2025.

of course, a major driver of climate change, including Arctic warming. It is therefore particularly ironic that the petroleum industry must now take ever-costlier steps to keep melting permafrost from impairing oil and gas development in northern Alaska.[10]

These challenges might optimistically be viewed as an opportunity for protecting more public lands more effectively. Indeed, some have argued that Alaska, with its relatively intact ecosystems and ecoregions and mostly healthy populations of native species—provides a globally exceptional opportunity and a showcase for protecting biodiversity in a context linked to natural climate solutions.[11]

But this rosy view should be contrasted with the executive order President Trump issued on January 20, 2025, which was captioned "Unleashing Alaska's Extraordinary Resource Potential."[12] It calls for developing Alaska's resources "to the fullest extent possible." It also—suggesting how uncoupled President Trump is from the natural world—is utterly silent on climate concerns and protecting the environment. Its specific directives are considered further below.

A. 1867-1959[13]

When the U.S. acquired Alaska from Russia in 1867 for $7.2 million, its scattered population was believed to number around 35,000. Almost all were Alaska Natives whose ancestors had been there for thousands of years. (The Native population may have been reduced by half or more during the more than a century of Russian control, the result of massacres, enslavement and diseases brought by outsiders.) Very little land was subject to non-Indigenous ownership claims. The 1867 Treaty of Cession acknowledged that the "uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."[14] For more than a century afterward, the U.S. did little to resolve Native claims to land, as discussed further below.

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[10] See, e.g., https://insideclimatenews.org/news/11072021/thawing-permafrost-trans-alaska-pipeline/.

[11] "The Importance of Alaska for Climate Stabilization, Resilience, and Biodiversity Conservation," 4 Front. For. Glob. Change 701277-94 (Vynne, et al., eds., 2021).

[12] https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-alaskas-extraordinary-resource-potential/.

[13] Useful overviews can be found in Stephen Haycox, Battleground Alaska: Fighting Federal Power in America's Last Wilderness (University Press of Kansas, 2016), and Teresa Hull and Linda Leask, "Dividing Alaska, 1867-2000: Changing Land Ownership and Management," Alaska Review of Social and Economic Conditions, vol. XXXII, No. 1, (U. Alaska Institute of Social and Economic Research (November 2000).

[14] 15 Stat. 539 (1867). The most comprehensive treatment of Alaska Native legal rights is David S. Case & David A. Voluck, Alaska Natives and American Laws (3d. ed. 2012). See also Cohen's Handbook of Federal Indian Law § 13.1 (LexisNexis 2024).

In 1869, in what was the first formal effort to use public lands to protect wildlife in U.S. history, Congress reserved the Pribilof Islands north of the Aleutian Archipelago to try to control a massive slaughter of its fur seals population that was then underway. The next year Congress gave Native Alaskans—Unangax people from the Aleutian Islands forcibly relocated to the Islands by the Russians to provide the labor—the right to harvest seals on the islands for traditional purposes, and the year after that Congress authorized the Treasury Secretary to issue a lease to an Alaska company authorizing harvesting of seals while regulating it as "necessary for the[ir] preservation." But these gestures toward protecting Native peoples and nature could not withstand the stronger forces favoring plunder and exploitation, as the fur seal population continued to decline over the next several decades, and the Native harvesters were subjected to conditions some characterized as akin to slavery.[15]

In 1892 President Benjamin Harrison established a 400,000-acre forest reserve on Afognak Island southwest of Anchorage. A few years later a gold rush attracted thousands of gold seekers to the Klondike area along the Canadian/Alaskan border as well as to northwest Alaska. Around the same time, reports of Alaska's splendors from visitors like John Muir and Henry Gannett gained national attention. In 1901 Gannett, a co-founder of the National Geographic Society, presciently called Alaska's scenery "more valuable than the gold or fish or the timber," whose worth will be "measured in direct returns in money received from tourists."[16]

Over the next several decades, Presidents and Congress combined put significant protections in place for nearly 50 million acres of Alaska's public land. The largest were

> Tongass National Forest (1902, 1907, and 1909, T. Roosevelt, totaling nearly 16 million acres).
> Chugach National Forest (1907 and 1908, T. Roosevelt, approximately 5 million acres).
> Aleutian Islands Reservation (1913, Taft, 2.7 million acres).
> Denali (formerly Mt. McKinley) National Park (1917/1922/1932, Congress, totaling 2.6 million acres).
> Katmai National Monument (1918, Wilson, 1931, Hoover, totaling 2.7 million acres).

[15] See, e.g., https://www.nps.gov/articles/000/aps-20-2-9.htm. Over its first couple of decades, seal harvesting in the Pribilofs produced nearly as much revenue for the Treasury as the amount the U.S. paid to Russia for the entire Territory. *Our Common Ground*, 139.
[16] Id., at 514.

Glacier Bay National Monument (1925, Coolidge, 1939, FDR, totaling 2.2 million acres).
Kodiak National Wildlife Refuge (1941, FDR, 1.9 million acres).
Kenai National Moose Range (1941, FDR, 1.9 million acres).

In 1959 Interior Secretary Fred Seaton initiated protections for three large National Wildlife Ranges which were put in final form in 1960, shortly after statehood. These were the Arctic (8.9 million acres), Kuskokwim (1.87 million acres), and Izembek (430,000 acres).[17]

Counting these last three, when Alaska became a state, its public lands included nearly 21 million acres in national forests, some 19 million acres in national wildlife refuges or ranges, and 7.5 million acres in the national park system.

Besides these protective actions, in 1923 President Harding set aside more than 23 million acres in far northwestern Alaska as a potential future oil supply for the U.S. Navy.[18] Several million more acres were reserved over the years as potential hydropower sites, although almost none were ever built.

At statehood, about 98% of Alaska's acreage was owned by the federal government, subject to unresolved Native claims. Fewer than one million acres were in private ownership, and the rest belonged to state and local governments as a result of federal grants in the territorial period.

B. Statehood

Military-connected immigration caused Alaska's population to grow during and after World War II, but when Congress admitted Alaska to the Union as the 49th state in 1959, its population was still only about 225,000, of which about 20% were Native American—a proportion that has not changed much since.

Although some Alaskans like to characterize the state as a victim of federal policymaking, the facts show otherwise. In section 6 of the statehood act, Congress gave the new State the right to select and acquire title to approximately 105 million acres of unreserved federal land[19]—an area larger than California, and nearly 30%

[17] A complete list of public land reservations in Alaska can be found here. https://sdms.ak.blm.gov/sdms/AlaskaOrdersIndex.pdf.
[18] Exec. Order No. 3797-A (Feb. 27, 1923).
[19] 72 Stat. 339 (1958).

of the state's area. It was by far the largest amount of land any new state received, and was more than double the percentage of land Congress had given any other western state upon admission to the Union.[20] The United States also gave the new state rights to any minerals found in these lands, which previous statehood land grants had not usually done.[21]

Congress initially gave the new state twenty-five years to complete its selections but subsequently extended the deadline several times. From early on, the state used some of these selections to acquire lands thought to be rich with petroleum. Revenues the state has derived from these lands, especially on the North Slope, has enabled the state to avoid a sales tax, and to abolish its personal income tax in 1980. The state has also put some $80 billion into a Permanent Fund that has allowed it to give each resident an annual payment (in 2024, it was approximately $1700).[22]

The state has moved deliberately, looking especially for land with petroleum and other mineral potential. As of 2024, title to approximately 70 million acres has been transferred. State selections of another 29 million acres have been tentatively approved, subject to future survey, with another 5 million acres remaining in the entitlement.[23] State selections have resulted in Alaska owning and deriving revenue

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[20] For comparison, three of the last states previously admitted, Utah, New Mexico and Arizona, each received 11% of the lands within their borders, and the eleven contiguous western states together received a total of 70 million acres of land from the United States upon admission. Paul W. Gates, History of Public Land Law Development, 804-05 (1968).

[21] See *Our Common Ground*, p. 376; 72 Stat. at 342, § 6(i). The Statehood Act extended a 1957 Act of Congress that had given the Territory of Alaska 90% of the mineral revenue collected on federal lands in the state, which was much more generous than the 50% share Congress gave other states under the Mineral Leasing Act of 1920. Pub.L. No. 85-88, 71 Stat. 282 (1957); 72 Stat. 339, 351, § 28 (1958). The State later litigated and lost its argument that the Statehood Act constituted a binding contract by which Congress effectively guaranteed in perpetuity a financial return to the state from federal mineral development. See Alaska v. United States, 35 Fed. Cl. 685 (1996), aff 'd, 119 F.3d 16 (Fed. Cir. 1997), cert. denied, 522 U.S. 1108 (1998); Ivan L. Ascott, *The Alaska Statehood Act Does Not Guarantee Alaska Ninety Percent of the Revenue from Mineral Leases on Federal Lands in Alaska*, 27 Seattle U. L. Rev. 999 (2004). In general, by practically all measures, Alaska receives more federal dollars per capita than any other state. https://usafacts.org/articles/which-states-rely-the-most-on-federal-aid/.

[22] The history of the Permanent Fund can be found here. https://apfc.org/history/.

[23] https://www.blm.gov/programs/lands-and-realty/regional-information/alaska/land_transfer/state-entitlements. At this link can be found a map showing where the state has selected lands. Alaska (and Hawaii, admitted at the same time) are unique in statehood grants of federal land because their statehood acts did not attempt to direct or limit how these lands should be managed. Other statehood acts, particularly for states west of the Mississippi, generally required that such lands, or the income derived from them, be held for state education. To date Alaska has dedicated somewhat more than one million acres to produce revenue for education and mental health, leaving the vast majority available for economic development, resource extraction, and revenue generation, including sale. See generally, Steven M. Davis, the Other Public Lands (Temple U. Press, 2025) at p. 143; Davis, Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States, 48 Nat. Res. J. 303 (2008).

from lands with rich petroleum deposits, especially on the North Slope, which has allowed the state to avoid a state sales tax and to abolish its personal income tax in 1980. Some of the petroleum revenue is channeled into a Permanent Fund (currently containing more than $80 billion) from which the state makes an annual per capita payment to its residents (in 2024, the payment was approximately

Section 4 of the Statehood Act provided that as a "compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to lands . . . held by the United States," as well as to "any lands or other property, (including fishing rights)" held by any Natives or held by the U.S. in trust for Natives. It underscored the point by noting that the United States retained "absolute jurisdiction and control" over such lands and other property until the U.S. decided otherwise.

C. Settling Native Claims to Land[24]

Alaska Native peoples governed themselves under customary practices before the acquisition of the Territory in the 1867 Treaty of Cession from Russia. The next fifty years saw limited non-Native expansion into most parts of Alaska, though there were notable conflicts with new settlers in the southeast Alaska panhandle, the Anchorage area, Fairbanks and Nome.

The federal government took very few steps prior to 1971 to resolve the land rights of Alaska Natives. When it established a civil government for the Alaska territory in 1884, Congress provided that "Indians … shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them," but at the same time reserved for future legislation "the terms under which [they] may acquire title to such lands."[25] Congress established a Native reservation (Metlakatla)on the 113,000-acre Annette Island in the southeast in 1891, after an Indigenous group from British Columbia had settled there. In 1906 it enacted a Native Allotment Act, giving individual Alaska Natives a right to claim up to 160 acres of federal land, and in 1926 enacted a Native Townsite Act, allowing Natives to acquire lots in Native townsites.

The Indian Reorganization Act of 1934 (IRA) applied to Alaska, but amendments in 1936 addressed unique aspects of Alaska tribes. Eventually, over 70 Native communities organized under the Alaska IRA.[26] During this era, the federal

[24] *Our Common Ground*, pp. 513-20.
[25] 23 Stat. 24, 26 (1884).
[26] Cohen's Handbook on Federal Indian Law, § 13.01[4][a], p. 865.

executive branch began establishing, in piecemeal and localized fashion, Native reserves that altogether involved a couple of million acres of federal land. The Interior Secretary's establishment of the 1.8-million-acre Venetie Reservation in 1943 triggered so much opposition that it effectively halted the policy of establishing new Native Reservations.[27] In the wake of World War II, the timber industry and its congressional boosters sought to establish a public-lands-based lumber and pulp industry in southeast Alaska. Brushing off protests from Tlingit and Haida Natives, Congress responded by enacting what came to be known as the Tongass Timber Act.[28]

Not long afterward, the federal government moved from a national policy supporting tribal sovereignty to the so-called "termination era."[29] The aboriginal title issue loomed over many aspects of the federal-tribal-territorial relationship, and as noted in the previous section, was left unresolved at statehood in 1959.

In the 1960s, Native communities organized the Alaska Federation of Natives (AFN) and began pressing Congress to address their claims. Their campaign received a strong boost in 1966 when Interior Secretary Stewart Udall halted most action on Alaska's statehood land selections until Congress legislated on the subject.[30]

In 1968 a large petroleum deposit was discovered on state-owned land at Prudhoe Bay on the Alaska's North Slope, and the state and the oil industry sought build an 800-mile-long Trans-Alaska Pipeline System (TAPS) to transport the oil to an ice-free harbor on Prince William Sound for loading on tankers for shipment to refiners and markets. But in 1970, at the request of Native Villages, a federal court stopped the Interior Secretary from issuing a right of way for the pipeline until Native claims were resolved.[31] That greatly upped the pressure on Congress to enact the Alaska Native Claims Settlement Act, or ANCSA.

As interest in exploiting more of Alaska's natural resources grew, U.S. conservation groups around the same time established an "Alaska Coalition" to spearhead a national campaign to permanently protect more of Alaska's public lands. That effort,

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[27] See Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).

[28] In 1955, the U.S. Supreme Court rejected the Tlingit's claim for compensation for Tongass lands. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). For a historical critique, see Joseph William Singer, Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States, in Indian Law Stories, 229-59 (Goldberg et al. eds. 2011).

[29] Id., § 2.10 [1], p.11-113.

[30] Public Land Order No. 4582, 34 Fed. Reg. 1025 (1969).

[31] Native Village of Allakaket v. Hickel, 1 Envtl. L.Rptr. 65021(D.D.C. 1970).

as Interior Secretary Rogers Morton observed, sought to seize an opportunity to avoid past mistakes and "do things right the first time."

The Coalition immediately began working with the AFN to include a mechanism in ANCSA for the Interior Secretary to identify and temporarily protect those Alaska public lands thought to be suitable candidates for permanent protection. It also supported AFN's demand that Alaska Natives' traditional subsistence uses of public lands be protected.[32] This was a very early example of Indigenous and nature conservation interests working together to preserve natural values and traditional uses, something that in recent years has become quite common in many places around the globe.[33] The collaboration culminated in the incorporation of subsistence protection provisions addressed in Part II(B), infra, in the landmark 1980 legislation.

In December 1971, President Nixon signed ANCSA into law. Laying out what it called a "fair and just settlement" of all "aboriginal land claims,"[34] it gave Alaska Natives nearly $1 billion and the right to select and obtain ownership of some 44 million acres of public land.[35] ANCSA also extinguished all aboriginal land claims, including "any aboriginal hunting and fishing rights that may exist."[36] The Conference Committee Report stated that "[Congress] expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."[37]

The complicated mechanism ANCSA established—never used before, or since—called for the land to be selected by and distributed to more than 200 local Native Village corporations and thirteen Regional Native corporations (the thirteenth being for Alaska Natives not then residing in the state). These corporations, whose shareholders are Alaska Natives, are organized as private entities under state law and hold legal title not constrained or protected by a federal trust responsibility. This

[32] In contrast to this collaboration, in the late 1960s "an unusually direct, and rare, collision between" Native Americans and public land protection advocates had been triggered when the latter, led by the Sierra Club, had opposed the Havasupai Tribe's proposal to enlarge its reservation by transferring some land from Grand Canyon National Park and an adjacent national forest. In 1975, with the support of key Arizona members of Congress, Congress came down mostly on the side of the Havasupai Tribe. See *Our Common Ground*, pp. 566-67.

[33] See, e.g., https://iucn.org/sites/default/files/2022-06/es-2021-12625.pdf; https://www.wri.org/research/securing-rights-combating-climate-change; https://www.nature.org/en-us/about-us/who-we-are/how-we-work/community-led-conservation/.

[34] 43 U.S.C. § 1603.

[35] See Case & Voluck, supra n. 7, at 171. $462.5 million came from the U.S. Treasury and $500 million from the state, some of the latter derived from federal oil and gas lease revenues that were shared with the state. See 43 U.S.C. § § 1605(a)(3), 1690.

[36] 43 U.S.C. § 1603.

[37] H.R. Rep. No. 92-476, at 37 (1971).

distinguishes them from sovereign Tribal Governments found in the lower 48 states.[38]

ANCSA's §17(d)(2), which came to be known simply as "D2," empowered the Interior Secretary to withdraw—that is, to put off limits to most forms of divestiture, including to most Native corporation and state selections—up to eighty million acres of "unreserved public lands" in the State that the Secretary "deems are suitable for" inclusion in national conservation systems for national parks, forests, wildlife refuges and wild & scenic rivers. This withdrawal would automatically expire in December 1978, giving Congress seven years to act. A complimentary provision in §17(d)(1) ("D1") effectively allowed the Secretary to withdraw public land in Alaska deemed necessary to protect "the public interest," but without an acreage limitation or an expiration clause.[39] The section 17 withdrawals set the stage for Congress to deliberate over what would become the Alaska National Interest Lands Conservation Act (ANILCA).

D. The Road to ANILCA 1971-1980

ANCSA's enactment removed one obstacle to constructing the TAPS, but one more impediment remained. In early 1973, in a lawsuit brought by conservation interests, a federal court of appeals ruled decided that existing law (primarily, a statute Congress had enacted in 1920) foreclosed Interior from issuing rights-of-way permits of sufficient size to accommodate the pipeline.[40] This put the matter back before Congress where, after intensive debate and a tie-breaking vote in the U.S. Senate by Vice President Spiro Agnew, it amended the law to cure the problem.[41] TAPS was then built and began operation in 1977.

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[38] Village corporations could select lands immediately surrounding their settlements. Regional corporations were established for regional economic and social development. With few exceptions, ANCSA's §19 abolished previous reserves of land made for Native use. See generally chapter 5 of Case and Voluck, supra n. 12; see also https://ancsaregional.com/overview-of-entities/. The fairness of ANCSA's terms of settling Native Claims have been praised and criticized. See, e.g., Charles F. Wilkinson, Blood Struggle: The Rise of Modern Indian Nations, 235-36, 239 (2005); Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission, 26-33, 155-71 (1985).

[39] Many D1 withdrawals remain in place but revocations are under active consideration, as discussed in Part IV(A), below.

[40] Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir 1973).

[41] 87 Stat. 584 (1973), codified at 43 U.S.C. §1652. The deadlock in the Senate was over whether to exempt the Interior Department from further considering alternative routes for the pipeline. Agnew's tie-breaking vote to grant the exemption was a rebuff to conservationists who favored routing the pipeline through Canada to the Midwest, where refinery capacity and domestic demand for oil were the greatest, because that would avoid the risk of oil spills from tanker traffic. Their fears were realized in 1989 when the tanker Exxon Valdez ran aground in Prince William Sound and spilled 260,000 barrels of oil, fouling more than a thousand miles of coastline in southern Alaska.

Meanwhile, in 1972, Interior Secretary Rogers Morton withdrew 80 million acres of public land in Alaska under D2, and another 57 million acres under D1. Around the same time, he made many millions of acres of public land available immediately for selection by the state and by Native corporations. That, along with the strong boost TAPS gave the state's economy, made it somewhat easier for Congress to craft strong protections for large tracts of national public lands across the state.

The overarching focus in the debates over ANILCA was on putting land in the national park, forest, wildlife refuge, wilderness and wild & scenic river systems, and how to protect the subsistence hunting and fishing traditionally practiced on these and other federal public lands. The agreement between the Alaska Native community and conservationists to enable subsistence uses to continue on nearly all public lands, including most of those to be put in protective categories, was a key component of the successful campaign for ANILCA. But there were also a host of additional questions, like how to manage rich timber supplies in the national forests of southeast Alaska, and whether to allow petroleum development in the coastal plain of the iconic Arctic National Wildlife Refuge that lay to the east of the Prudhoe Bay oil development. The state (mostly but not completely aligned with industries seeking to develop these lands), the AFN, the Alaska Coalition, and the federal government (including each of the federal land management agencies) had a stake in all these issues, and each engaged closely in the congressional process.

To succeed in their twin objectives of protecting as much public land as possible and protecting Native subsistence hunting and fishing traditionally practiced on these lands, the Alaska Coalition and the AFN had to overcome a powerful congressional custom: one that gives a state's congressional delegation an informal veto over legislation that specifically targets public lands in that state. That is, officials elected to represent specific geographic areas are extremely reluctant to vote in favor of such targeted legislation over the opposition of the member from that area, for fear that the tables could be turned on them.

The landmark 1980 Alaska lands legislation was a very rare, almost unprecedented example of this custom being overridden. Although the Alaska congressional delegation had a lot of influence over its specifics, in the end they did not vote for it.

To overcome this, the Coalition, the AFN and their congressional champions emphasized the national interest in preserving these unparalleled landscapes. To

underscore it, they titled the bill the "Alaska National Interest Lands Conservation Act," now known by its acronym, ANILCA.

The Coalition mounted an effective campaign at the grassroots level to persuade voters across the nation to urge their congressional representatives to support a strong protection bill, bringing to bear lessons learned from past efforts to protect special places on public lands like "crown jewel" national parks. To capitalize on the burgeoning interest in protecting the environment, it also emphasized, much more than earlier campaigns elsewhere, the need to preserve complete ecosystems as unaltered as possible, while accommodating traditional subsistence practices. The counter efforts of its principal opponents, primarily the timber and minerals industries, proved much less effective.

The campaign quickened when, in early 1977, Jimmy Carter became president and, along with his Interior Secretary Cecil Andrus, made ANILCA a top priority. In the Spring of 1978, the House passed a bill championed by House Interior Committee chair Mo Udall (D-AZ) and the chair of the special subcommittee he had created, John Seiberling (D-OH), and supported by the Coalition. Seiberling's subcommittee had held numerous field hearings in cities in the lower 48 states and in Alaska communities, with the Coalition making sure the hearings were well attended and received extensive press coverage.

In the early fall, as expiration of the D2 withdrawals loomed, a considerably less ambitious bill emerged from the Senate Interior Committee under the leadership of Henry "Scoop" Jackson (D-WA), and heavily influenced by the two Alaska Senators, Ted Stevens (R) and Mike Gravel (D). A last-minute effort to craft a compromise bill, or at least extend the D2 withdrawals, was doomed when Senator Gravel threatened a filibuster. His obstruction irritated many Senators and led Stevens to complain about the risk of breaching the long tradition of the Senate's reluctance to approve a bill affecting only one state when both senators opposed it.

To maintain the status quo, the Carter Administration had been planning to make additional D1 land withdrawals before the D2 withdrawals expired in early December. But before it could do that, the state of Alaska filed claims to gain title to lands in areas earmarked for national park status in the bills Congress had been considering. This persuaded President Carter that stronger protective action was necessary, and so on December 1, he invoked a power Congress had conferred on presidents in the Antiquities Act of 1906 to establish national "monuments" so as to

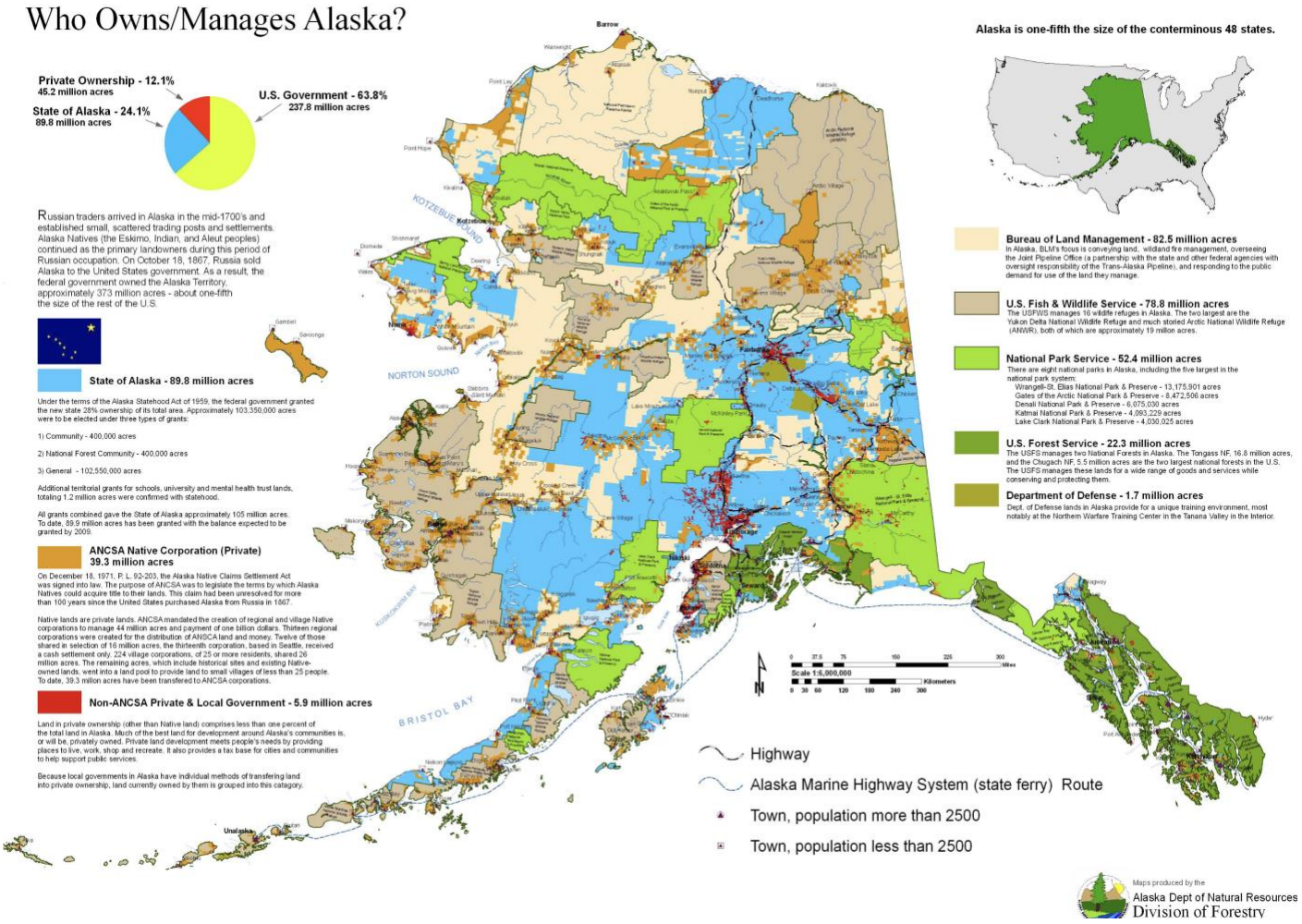
protect features of "historic or scientific interest" on lands owned or controlled by the national government.[42]

Carter's fifteen monument proclamations added strong protections to some 56 million acres of Alaska public land. Most of the monuments were put in the national park system, but more than 10 million acres were put in the national wildlife refuge system (the first-ever national monuments the Fish & Wildlife Service would administer), and 3 million acres in southeast Alaska were kept in the national forest system. Carter's monument proclamations contained eloquent, detailed descriptions of the ecological and cultural values being protected. Not long after this, Interior Secretary Andrus used his withdrawal authority under §204(e) of the Federal Land Policy and Management Act (FLPMA) to protect some 40 million additional acres the Administration had recommended for permanent protection. These dramatic events in late 1978 brought even more national attention to the future of Alaska lands and put the matter squarely back in front of the legislative branch.

There was considerably more drama to come in the 96th Congress that convened in early 1979. Eventually, dueling bills emerged from the House (more protective) and the Senate (less protective), but negotiations to reconcile the two versions could not be completed before the November 1980 elections. When Ronald Reagan won the presidency and the Republicans gained control of the Senate, further bargaining ended. The House bowed to the new political reality and accepted the Senate-passed bill, and on December 2, 1980, Carter signed ANILCA into law. It remains by far the most sweeping public lands protection bill in American history.

Here is an overview of Alaska land ownership:

[42] 34 Stat. 225 (1906); *Our Common Ground*, 253-62. The Antiquities Act's "national monuments" designation distinguished the protected lands from "national parks," as Congress jealously guarded its prerogative to use the latter. But the Act also gave the president some discretion to decide which federal agency should manage the monument.



PART II: What ANILCA Did and Did Not Resolve.

ANILCA's Title I laid out two congressional purposes. The first (in §101(a)) was

> to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural recreational, and wildlife values . . .."

Section 101(b) went on to underscore the congressional "intent" to "preserve" and to "protect" qualities that it identified in extraordinarily expansive terms, including

> "unrivaled scenic and geological values associated with natural landscapes;"

> wildlife populations and habitat "of inestimable value," including species "dependent on vast relatively undeveloped areas;"

> "extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems" to be kept "in their natural state;"
>
> "wilderness resource values and related recreational opportunities … within large arctic and subarctic wildlands and on freeflowing rivers."

The "intent" expressed also included "maintain[ing] opportunities for scientific research and undisturbed ecosystems" and "protect[ing] the resources related to subsistence needs."

ANILCA was a huge conservation victory. While confirming the 50 million acres of already-protected public lands, it put more than 100 million additional acres—coincidentally about the same amount of lands that the State of Alaska was awarded in the Statehood Act—into what ANILCA called "conservation system units," or CSUs.[43] These included

> Title II's additions of 44 million acres to the National Park System (managed by the NPS), more than doubling its size with ten new areas and additions to three existing ones.
>
> Title III's additions of 56 million acres to the National Wildlife Refuge System (managed by the FWS), nearly tripling its size with nine new areas and additions to seven existing ones.
>
> Title IV's establishment of a new national conservation area and national recreation area (both managed by the Bureau of Land Management) totaling two million acres.
>
> Title V's adding 3 million acres to the two national forests (managed by the USFS) and establishing two national monuments on Tongass National Forest lands.
>
> Title VI's additions of 25 free-flowing river segments to the National Wild & Scenic Rivers System, doubling the river miles then in the system.

[43] Section 102(4), 43 U.S.C. 1602(4), defines CSUs as including "any unit in Alaska" of the national park, wilderness, and other federal land management systems established, designated or expanded by ANILCA, "and any such unit established, designated, or expanded hereafter."

> Title VII's additions tripling the size of the National Wilderness Preservation System totaled 57 million acres; 32 million in the national park system, 19 million in the national wildlife refuge system, and 6 million in the national forest system.

The second express purpose of ANILCA —subsistence—is found in § 101(c):

> It is further the intent and purpose of this Act consistent with the management of fish and wildlife in accordance with recognized scientific principles . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

The subsistence protection is explored in subsection II(B) below.

The more than 150 million acres of national public lands protected by ANILCA encompass almost one-quarter of all lands owned collectively by the people of the United States, and a significantly higher percentage of all national lands protected from intensive resource exploitation, including more than 60% of national park system acreage, more than 85% of terrestrial national wildlife refuge system acreage, and over half of national wilderness system acreage. But it also left more than seventy million acres of public lands, those managed by the Bureau of Land Management, outside of CSUs.

A. ANILCA and the Politics of the Congressional Process

Although the Democrats were in control of the Congress the entire time ANILCA was under consideration, the Alaska Coalition's national campaign had resonated with the vast majority of Americans, including many Republicans. The final votes reflected wide bipartisan support. House had approved its strong bill in 1979 by a vote of 360-65, and the Senate its version by a vote of 78-14. It was the Senate version that became law after the 1980 election when, by voice vote, the House acquiesced in it.

The two Alaska Senators and its sole House member voted against the version of ANILCA that finally emerged from the Congress. As noted earlier, that made ANILCA a very rare exception to the deeply-held congressional custom that gives a state's congressional delegation an informal veto over legislation that specifically targets public lands in that state. The Alaska delegation did, however, have major influence in shaping ANILCA's terms. This was particularly true of Republican

Senator Ted Stevens, who had been Legislative Counsel of the Interior Department when Alaska became a state and then became the Department's Solicitor (general counsel) in the final months of the Eisenhower Administration, and of Congressman Don Young, who represented the state in the House for almost a half century, the longest serving Republican in congressional history.

Culminating nearly two centuries of national policymaking for public lands, ANILCA showed on a grand scale how the American political system could reconcile a complex mixture of interests to protect nature, traditional users, and the interests of future generations.

B. Protecting the Subsistence Way of Life of Rural (Predominantly Native) Alaskans

ANILCA's second purpose, the details of which are in Article VIII of the statute, 16 U.S.C. §§3111–26, is closely related to the first purpose of preserving "nationally significant" natural and related values. But while the first largely mimics protective public land legislation that applies in the rest of the nation, the second is unique to Alaska. As noted earlier, it reflected a strong collaboration between advocates for preservation and advocates for protecting Native Alaskan subsistence traditions.[44]

The subsistence protection had a complicated journey through the Congress. The Senate version of ANCSA had protected "native subsistence hunting, fishing, trapping, and gathering rights," but that language was removed after the state objected. It had two interrelated concerns. One was that its state fish and wildlife officials did not want to relinquish the authority they (like their counterparts in other states) exercised to license the taking of fish and wildlife when it was permitted on public lands. The second was the state's belief that it could not enforce a subsistence priority that was limited to Alaska Natives because that would be considered racial discrimination forbidden by the Alaska Constitution.[45] Given that ANCSA extinguished Alaska Native aboriginal hunting and fishing rights, the House-Senate Conference Committee report on ANCSA did note a congressional expectation that

[44] See footnotes 32-33, supra and accompanying text.

[45] The U.S. government could enforce such a priority, because the U.S. Supreme Court had decided that, as a matter of federal law, a preference for Native rights is not racial discrimination, but rather is justified by the "unique legal status" of Native Americans and Congress's obligation to them. Morton v. Mancari, 417 U.S. 535, 554-55 (1974). The state would seem to have a strong argument for enforcing such a congressionally established priority despite the state constitution. Cf. Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (federal Supremacy Clause precludes state interference with tribal fishing rights reserved by treaty with the United Sates).

the Interior Secretary and the state would "take any action necessary to protect the subsistence needs of the Natives."[46]

Over the next decade, Congress provided some federal protection to Alaska Native subsistence rights in laws like the Marine Mammal Protection Act of 1972 (which exempted certain Alaska Natives from its prohibition on taking marine mammals)[47]; the Trans-Alaska Oil Pipeline Act of 1973 (which imposed strict liability for any harm to subsistence resources of Alaska Natives or others)[48]; the Endangered Species Act of 1973 (which presumptively exempted subsistence uses by Alaska Natives and "any non-native permanent resident of an Alaskan native village")[49]; and the Fish and Wildlife Improvement Act of 1978 (which authorized the Interior Secretary to "assure the taking of migratory birds" and their eggs by "indigenous inhabitants of the State of Alaska" for "their own nutritional and other essential needs").[50]

The campaign to enact what became ANILCA presented an opportunity to broaden the protection for Native subsistence. ANILCA's congressional champions, with the strong support of the Alaska Federation of Natives and the Alaska Coalition (of conservationists and their allies), agreed to make subsistence protection a key provision. But while the original draft of what became Title VIII contained a "Native-only" subsistence preference, the final version was considerably more complicated. This was done at the insistence of the state for two reasons: The first was the state's desire to administer the subsistence preference so as to allow it to continue to issue licenses for hunting and fishing on public lands where such activities were permitted. Second, because the state asserted that Alaska law prohibited it from administering a Native-only preference, the preference needed to be extended to all rural residents, not just Native Alaskans (though the large majority of rural Alaskans are Native).

Nearly all of the public lands in Alaska, including most of the 150 million acres of CSU lands in the national forest, park and wildlife refuge systems, allow subsistence hunting and fishing. Many proponents of protecting subsistence see it as a critically important environmental justice issue.

[46] S. Rep. No. 92-581 (1971), p. 37.
[47] 16 U.S.C § 1371.
[48] 43 U.S.C. § 1653(a)(1).
[49] 16 U.S.C. § 1539(e)(1).
[50] 16 U.S.C. § 712(1).

As enacted into law, Section 801 of ANLCA (16 U.S.C. §3111) contains congressional findings. The first one explains, rather delicately, that continuation of the opportunity for subsistence uses is "essential to Native physical, economic, traditional, and *cultural* existence and to non-Native physical, economic, traditional, and *social* existence." (emphasis added) Other findings included ones explaining that often no practical alternative food supplies were available for rural residents, and that opportunities for subsistence take were being threatened by, among other things, an increasing population and accessibility of remote areas.

Section 803 (§3114) defines "subsistence uses" to mean "customary and traditional uses by" rural Alaskans of "wild, renewable resources" for consumption and various other purposes such as making handicraft articles for "customary trade." Section 804 (§3114) gives "the taking on public lands of fish and wildlife for nonwasteful" subsistence uses "priority" over other taking of fish and wildlife on public lands. But it also acknowledges that it may sometimes be necessary to restrict such subsistence takings in order to protect the viability of fish and wildlife populations.

Section 811 (§3121) provides that rural residents engaged in subsistence uses "shall have reasonable access to subsistence resources," including "appropriate use . . . of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes, subject to reasonable regulation."

A major question regarding the subsistence preference, particularly as it respects fishing, is to what extent the waters in the state are considered "public lands" to which Title VIII applies. This has produced continuing controversy and litigation dealt with in some detail in Section III(A), infra.

Other parts of Title VIII erect an elaborate superstructure of review and advisory bodies and process to implement the preference. For example, §810 requires pertinent federal land management agencies to evaluate the effects on "subsistence uses and needs" and consider alternatives when "determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition" of federal lands.[51] It prohibits any use of public lands that would "significantly restrict subsistence uses" unless the head of the managing agency determines that such a restriction is

[51] 16 U.S.C. §3120(a). In Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), the Supreme Court determined that §810's duty to consider the effects of certain federal actions on "public lands needed for subsistence purposes" did not apply to federal decisions to lease federal lands on the Outer Continental Shelf (OCS), because ANILCA §102 makes its provisions applicable only to "public lands *in Alaska*" (emphasis added) and thus excludes federal lands located on the OCS. See text accompanying fn. 59, infra.

> "(A) … necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources…."

16 U.S.C. §3120(a)(3).

Question: How much discretion does this leave the federal agencies, and how searching should judicial review of their judgments be? The court in Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223 (9th Cir. 1999) explored the meaning of this section in upholding two Forest Service timber sales despite objections from Native groups that they impaired subsistence uses. It concluded that the Forest Service could find the sales necessary because the local economy depended on a viable timber industry, and that the statutory determination of "the minimal amount of public lands necessary to accomplish the purposes of such use" does not require, the court said, "minimization of impact on subsistence. The purpose of the disposition was to sell timber."[52]

Section 805, 16 U.S.C. §3115(d), authorized the federal government to delegate responsibility for the program to the state of Alaska, so long as the state enacts and implements subsistence laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA. The working understanding of those that crafted it was that subsistence management would be a cooperative federalism regime that the state could accept by making the rural priority operative on all lands and waters in Alaska as a matter of state law.

In 1982, the state was certified by the Department to administer this subsistence preference on federal lands. Its efforts sparked much controversy and litigation, some by Native groups and some by non-rural-resident sport hunters. Then in 1989, the Alaska Supreme Court ruled that the Alaska Constitution prohibited discriminating on the basis of rural residency.[53] Although Congress enacted temporary legislation aiming to give the State time to amend its Constitution to

[52] The court rejected the application of the canon of construction that calls for ambiguities in legislation addressing Native Americans to be construed in their favor on the ground it did not apply to Title VIII because it favored all rural residents, not just Native ones. Id., at 1228-29, rejecting a contrary view taken in an earlier decision; People of Village of Gambell v. Clark, 746 F2d 572, 581 (9th Cir. 1984), *rev'd on other grounds sub nom* Amoco Production Co. v. Gambell, 480 U.S. 531, 555 (1987).

[53] McDowell v. State of Alaska, 785 P.2d 1 (Alaska 1989).

administer the rural subsistence preference, this has not happened. The Trump Administration has indicated it wants to "ensure to the greatest extent possible that hunting and fishing opportunities on Federal lands are consistent with similar opportunities on State lands."[54]

This has left the federal government with the responsibility to administer ANILCA's subsistence preference for rural residents. It initially took a narrow view of what constituted federal land to which the subsistence preference applied. It excluded most waters, which rendered the preference for subsistence fishing mostly meaningless. Alaska Natives challenged the exclusion in federal court, and then the Clinton Administration reversed course, taking the position that reserved water rights constituted enough of a federal property interest to justify applying the subsistence preference to waters in or bordering federal conservation units (such as units of the national park, forest, and wildlife refuge systems) in the state. The Ninth Circuit eventually upheld this approach after extensive litigation. Katie John v. United States, 247 F.3d 1032 (9th Cir. 2001) (en banc); John v. United States, 720 F.3d 1214 (9th Cir. 2013).[55]

This did not end the controversy. Numerous Alaska Native entities would like to amend ANILCA to replace the rural priority with Native priority, because for Native peoples, subsistence is a cultural tradition rooted in Tribal community life, and all Alaska Natives, whether rural or urban, should be able to be able to share this tradition.[56] Many sport hunters and anglers want to remove the rural priority altogether. Meanwhile, litigation continues over whether and to what extent the rural subsistence preference for fishing extends navigable waters, a matter explored further below.

Finally on subsistence, while the decision in Hoonah Indian Ass'n v. Morrison, discussed on p. 24, supra, appeared to relegate § 810 of ANILCA to a procedural step in the federal leasing/withdrawal/disposition process, the BLM in the Biden Administration showed that the process can have teeth. For many decades a road more than two hundred miles in length has been proposed across wild northern

[54] The Trump "Unleashing" Executive Order, supra n. 12, §3(b)(xxii).

[55] Robert Anderson, who served as Solicitor of the Interior Department from 2021 to 2025, has written extensively about the subsistence preference; e.g., Alaska Native Rights, Statehood, and Unfinished Business, 43 Tulsa L. Rev. 17 (2007); Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish and Gather after ANCSA, 33 Alaska L. Rev. 187 (2016); The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA, 32 Ariz. St. L.J. 845 (2019).

[56] See Anderson's articles in the preceding note and Monte Mills & Martin Nie, Bridges to a New Era: Part 2: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands in Alaska, 47 Columbia J. of Env'tl. L. 176 (2022).

Alaskan lands to connect the Ambler region believed to have considerable potential for hardrock mineral production with the highway connecting Fairbanks and the Prudhoe Bay oil region on the Arctic coast. (A map showing the proposed road is found on p. 52, infra.) Shortly before it left office, the first Trump Administration issued the proposed right of way (ROW) to cross BLM-administered land along the route. The Biden Administration first suspended and then, in June 2024, terminated the ROW partly because of legal defects it found in the § 810 subsistence analysis. After holding twelve public hearings on the issue as required by § 810(a)(1) & (2), BLM reported that it was "unable to determine that the [proposed road's] significant restriction of subsistence use for 30 or more communities . . . is necessary [and] consistent with sound management principles for the utilization of the public lands." It was the first time BLM (or any other agency in Alaska) has relied on § 810 to reject a requested disposition of public lands.[57]

Notes and Questions

1. How durable are these decisions? Both were made after exhaustive administrative processes, which supported the ultimate policy choices. Could a new administration simply review the record and make a different choice, or would it be required to undertake a new process and develop a new record? What about Congress?

2. The idea of giving rural residents a priority opportunity for taking fish and wildlife on public lands for subsistence purposes is not found outside of Alaska, although a number of treaties with Native Nations do protect their right to hunt and fish on some public lands.[58] An interesting exercise is to contemplate what public reaction might be to a proposal to give rural residents in the vicinity of a national park or other protected area of public lands in the lower 48 a right to engage in subsistence hunting in such an area.

3. As discussed in Part IV(A), infra, the Trump Administration has indicated it will lift so-called "D1" withdrawals of some 28 million acres that so far have prevented the State from selecting such lands under its statehood land grant. That could open the door to conveying some of these lands to the state, which would mean that ANILCA's subsistence preference would no longer apply to these lands. Land

[57] Section 810 also played a significant role in the Biden Administration's decision to maintain so-called D1 withdrawals for nearly thirty million acres of public land, discussed in Part IV(A), infra.

[58] Such treaties have given rise to considerable litigation over the years. See, e.g., Herrera v. Wyoming, 587 U.S. 329 (2019) (addressing the scope of an 1868 Treaty right of the Crow Tribe to "hunt on the unoccupied lands of the United States" under certain conditions).

retained in federal ownership would remain subject to the preference, but would also be available for mineral exploration and development as well as oil and gas leasing.

4. Alaska state policies can affect wildlife on Alaska public lands outside the subsistence context. For example, some state predator control practices, such as killing bear cubs and wolf pups in their dens, baiting bears with donuts, and shooting wildlife from helicopters, have provoked considerable controversy. Federal courts have concluded that ANILCA preserves federal authority to disallow state predator control practices on federal lands. See, e.g., Safari Club International and State of Alaska v. Haaland, 31 F.4th 1157 (9th Cir. 2022).[59] The Trump Administration has indicated it will reexamine federal policy in this area.

C. What ANILCA Says About Executive Authority to Establish New Protections for Public Lands in Alaska

ANILCA'S "Purposes" Section ends with this very long sentence in § 101(d):

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the state of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

This assertion that ANILCA "provides adequate opportunity" for satisfying Alaska's "economic and social needs" is not characterized as a purpose of the statute. Whether it should influence how ANILCA's protections are to be interpreted and applied by the executive branch, and by the courts in reviewing executive actions, is explored in Parts III(A) and (C) infra, in connection with the *Sturgeon* decisions and the Izembek Road controversy. The sentence's conclusion (beginning "and thus

[59] In the 1970s, an aggressive state program to kill wolves led to litigation over the federal government's power under the Federal Land Policy and Management Act to close BLM lands to such a program. See Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980).

Congress believes") is simply a prediction that future Congresses will not find it necessary to enact new legislation designating new conservation system units. The prediction does not bind future Congresses. In fact, ANILCA's definition of CSUs expressly contemplates that in the future new ones may be established and existing ones enlarged,[60] and in 1990 Congress put nearly 6 million acres of Tongass National Forest lands into the National Wilderness System.[61]

Further on in ANILCA, the authority of the executive to establish CSUs is addressed in what is commonly called the "no more" clause, 16 U.S.C. §1326. It made its first appearance in 1979, in the bill initially approved by the House. It has two parts. Subsection (a) limits the effectiveness of "future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the state of Alaska" to one year, unless Congress enacts a joint resolution approving it within that time.

Subsection (b) forbids "further studies" of all federal lands (defined in § 3102(2) to include all lands where title is in U.S. after ANILCA became law) for "the single purpose of considering the establishment of" a conservation system unit "or for related or similar purposes," unless Congress authorizes it. Unlike subsection (a), this subsection does not have a minimum acreage.

Despite the label "no more" that is often applied to this clause (a label not used in ANILCA), its meaning and effect is far from clear. For example, ANILCA does not define "withdrawal" as used in subsection (a). And subsection (b)'s prohibition on "further studies" for the "single purpose" of considering establishing a CSU or for "related or similar purposes" may have little application in the real world, because most if not all "studies" of federal land can readily be characterized as having disparate and multiple purposes.

In SE Conference v. Vilsack, 684 F. Supp. 2d 135, 142-46 (D.D.C. 2010), the plaintiff challenged a Forest Service plan for the Tongass National Forest that prohibited timber harvesting in a particular area as constituting a forbidden "withdrawal" under this clause. Noting the absence of any definition of the term in ANILCA, the court found it proper to look to related statutes.

> One such related statute is the Federal Land Policy and Management Act, which, like ANILCA, governs the management of certain federal lands. Under

[60] See note 43, supra.
[61] Tongass Timber Reform Act, § 202,104 Stat. 4426, 4429-30 (1990)

> that statute, a withdrawal is statutorily defined as a "withholding [of] an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j). Interpreting that provision, the D.C. Circuit described a withdrawal as an action that "exempts the covered land from the operation of public land laws." New Mexico v. Watkins, 969 F.2d 1122, 1124 (D.C. Cir. 1992); see also Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 761 n. 1 (9th Cir. 1986) ("A withdrawal withholds an area of federal land from sale, lease or use under the general land laws . . . in order to preserve a public value in the area or for a public purpose."). Public, or general, land laws "authorize the transfer of federal lands to the private domain." Sagebrush Rebellion, 790 F.2d at 761 n. 1. Putting the definitions together, then, a withdrawal exempts covered land from the operation of laws that otherwise authorize the transfer of federal lands to the private domain for private use.
>
> This definition accords with the way several other provisions of ANILCA use the term withdrawal. For example, in a provision discussing ANILCA's effect on withdrawals of land made prior to ANILCA's passage, Congress stated that withdrawn lands "shall not be deemed available for selection, appropriation, or disposition." 16 U.S.C. § 3209(a). The phrase "selection, appropriation, or disposition" echoes the phrase "settlement, sale, location, or entry" used in the Federal Land Policy and Management Act's definition of withdrawal. Furthermore, in an ANILCA provision regarding mineral leasing rights, Congress found that certain lands "are . . . withdrawn from all forms of appropriation or disposal under public land laws." 16 U.S.C. § 410hh-5. This construction mirrors the D.C. Circuit's description that a withdrawal under the Federal Land Policy and Management Act "exempts the covered land from the operation of public land laws." Watkins, 969 F.2d at 1124. The statutory evidence, then, supports the application of the Federal Land Policy and Management Act's definition of withdrawal to ANILCA.

In Alaska v. U.S. Dep't of Agriculture, 273 F. Supp. 3d 102, 124-25 (D.D.C. 2017), the state of Alaska challenged, as constituting an illegal withdrawal under 16 U.S.C. §1326(a), the Forest Service's national Roadless Area Conservation Rule (Roadless Rule) that generally prohibited significant roadbuilding and development on inventoried roadless areas on the national forests, including about 55%, or more than 9 million acres, of the Tongass National Forest, and 99%, or 5.4 million acres, of the Chugach National Forest. The court rejected the challenge, borrowing heavily from

the analysis in the *SE Conference* decision. It noted that the roadless rule explicitly permits mineral leasing, and while the rule does prevent the construction of new roads in conjunction with such leasing, the court found that "restrict[ing] the terms of surface occupancy of the land … is within the USDA's authority under the mineral leasing laws." Considering the agency's "broad discretion on this issue," the court concluded ANILCA was not violated. The D.C. Circuit dismissed the appeal on mootness and standing grounds and did not address the merits. 17 F.4th 1224 (D.C. Cir. 2021). The current status of the Forest Service's roadless rule in Alaska is described briefly in Part IV(B), below.

These court decisions, if followed, would indicate that the so-called "no more" clause is not an obstacle to vigorous protection activities. For example, as noted earlier, more than 70 million acres of public land in Alaska, all managed by the Bureau of Land Management in the Interior Department, are currently outside of CSUs. BLM has a good deal of authority under its general Organic Act, the Federal Land Policy and Management Act of 1976 or FLPMA, to manage its lands to protect natural qualities, including prohibiting roadbuilding in certain areas.[62]

PART III: Limitations on the Protections Afforded by ANILCA.

A. What federal lands are, or are not, subject to ANILCA's protections?

ANILCA generally applies to federal "land." Section 102(1) defines "land" to include "waters, and interests therein," and Section 102(3) defines "public lands" to mean "lands situated in Alaska which," after December 2, 1980, are owned by the Federal government, with certain exceptions having to do with State or Native selections under the Statehood Act and ANCSA.[63]

One important question is whether these protections extend to activities on waters considered navigable when Alaska became a state. Here's why: The U.S. Supreme Court decided in 1845 that upon their admission to the Union, newly-admitted states automatically gained ownership of the beds of waters that were at that time considered navigable.[64] The Court has applied that so-called "navigability for title"

[62] 90 Stat. 2744 et seq.; see *Our Common Ground*, 490-502; see also 585-601.

[63] See Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), fn. 51, supra, where the Supreme Court held that "in Alaska" excluded federal lands located on the Outer Continental Shelf.

[64] Pollard's Lessee v. Hagan, 44 U.S. 212 (1845). Justice McKinley's opinion for the majority applied a principle the Court had not previously endorsed, that new states were on an "equal footing" with existing states. McKinley reasoned that because the Court had earlier held that the thirteen original states owned the beds of

doctrine ever since. Its definitive modern decision on the subject is PPL Montana, LLC v. Montana, 565 U.S. 576, 580 (2012). There Justice Kennedy, writing for a unanimous Court, underscored that "navigability at statehood" can be determined in "discrete, identifiable segments" of water bodies, and that the fundamental question is whether they are "susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Id. at 592, quoting The Daniel Ball, 77 U.S. 557, 563 (1871).

In Alaska, evidence of the use of waterways at statehood may be difficult to establish. There are also unresolved questions about how to determine navigability for title on waterways that may be choked with ice and impassable for much of the year. In State of Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990), decided well before *PPL Montana*, the 9th Circuit found navigability for title on a stretch of Alaska's Gulkana River by citing evidence that around the time of statehood "guided fishing and sightseeing trips" on "watercraft customary for that time period" had produced a "substantial industry … for profit." *PPL Montana* undermined that reasoning, finding that the Montana Supreme Court had "erred as a matter of law in its reliance upon the evidence of present-day, primarily recreational use" of the river. Instead, Justice Kennedy wrote, evidence of navigability "must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood," and navigability "concerns the river's usefulness for `trade and travel' rather than for other purposes," although evidence of "recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood."

In the so-called Submerged Lands Act it enacted in 1953, Congress confirmed that states generally own the beds of waters that were navigable when they entered the Union, but also put some limitations on it. Among other things, it excepted "all lands expressly retained by or ceded to the United States when the State entered the

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navigable waters, see Martin v. Waddell, 1 U.S. 367 (1842), that principle meant new states likewise should gain such ownership. For a detailed argument that the Court's decision was heavily influenced by the growing controversy over slavery, and that McKinley, a slave-holder from Alabama, was laying the groundwork for limiting Congress's power to outlaw slavery in new states (making *Pollard's Lessee* a precursor of the Court's notorious 1857 *Dred Scott* decision, 60 U.S. 393), see Leshy, Are the U.S. Public Lands Unconstitutional? 69 Hastings Law Journal 499, 521-41 (2018). *Pollard's Lessee* is even more of an outlier because both before and after McKinley there used "navigability" as a touchstone for state ownership of submerged lands, the Court used it as a touchstone for determining the extent of federal regulatory authority. See, e.g., Gibbons v. Ogden, 22 U.S. 1 (1824); United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Sackett v. EPA, 598 U.S. 651 (2023).

Union," and also reserved its "powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation."[65]

Alaska contains more than 2,000 rivers and 3 million lakes, with waterways covering an estimated 14% of the state's total area.[66] Because public lands protected by ANILCA contain copious streams and lakes, if these waters and the lands submerged by them are owned by the State and not the U.S., those protections might be sharply limited. Among other things, it could mean that ANILCA's preference for subsistence fishing by rural residents would not apply to them. Because subsistence fishing (as distinguished from hunting and gathering) is generally regarded as the most important activity protected by the subsistence preference, this could matter a great deal. It is not surprising, then, that the scope of the subsistence fishing preference was heavily litigated in the lower federal courts in the 1980s and 1990s. It produced the so-called "*Katie John*" decisions recounted in the discussion of ANILCA's subsistence protection in section II(B) supra. There the Ninth Circuit ruled that the subsistence preference did apply to waters in which the U.S. had an ownership interest under the so-called *Winters* doctrine,[67] which holds that when the U.S. reserves land for a particular federal purpose, it also implicitly reserves waters associated with that land when necessary to carry out that purpose.[68]

The U.S. Supreme Court chose not to review those decisions. But some years later, it did take up a closely related question—whether the National Park Service could regulate a hovercraft operating on the Nation River in the Yukon-Charley Rivers National Preserve that Congress had established in ANILCA. That resulted in two unanimous decisions the Court reached over a four-year period. The second one is excerpted here.

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[65] 43 U.S.C. §§ 1311, 1313(a), 1314. The Alaska Statehood Act expressly made this Act "applicable to the State of Alaska," giving the new State "the same rights as … existing States thereunder." Pub. L. No. 85–508, 72 Stat. 339 (1958), § 6m.

[66] See Government Accountability Office, Alaska Land Management: Resolving Ownership of Submerged Lands (July 27, 2023); https://www.gao.gov/assets/gao-23-106235.pdf.

[67] See Winters v. United States, 207 U.S. 564 (1908).

[68] See, e.g., Alaska v. Babbitt (Katie John II), 72 F.3d 701, 703-04 (9th Cir. 1996); Robert T. Anderson, The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA, 51 Ariz. St. L.J. 845 (2019).

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■ JUSTICE KAGAN delivered the opinion of the Court.

This Court first encountered John Sturgeon's lawsuit three Terms ago. See *Sturgeon* v. *Frost*, 577 U. S. 424 (2016) (*Sturgeon I*). As we explained then, Sturgeon hunted moose along the Nation River in Alaska for some 40 years. He traveled by hovercraft, an amphibious vehicle able to glide over land and water alike. To reach his favorite hunting ground, he would pilot the craft over a stretch of the Nation River that flows through the Yukon-Charley Rivers National Preserve, a unit of the federal park system managed by the National Park Service. On one such trip, park rangers informed Sturgeon that a Park Service regulation prohibits the use of hovercrafts on rivers within any federal preserve or park. Sturgeon complied with their order to remove his hovercraft from the Yukon-Charley, thus "heading home without a moose." But soon afterward, Sturgeon sued the Park Service, seeking an injunction that would allow him to resume using his hovercraft on his accustomed route. The lower courts denied him relief. This Court, though, thought there was more to be said.

As we put the matter then, Sturgeon's case raises the issue how much "Alaska is different" from the rest of the country—how much it is "the exception, not the rule." The rule, just as the rangers told Sturgeon, is that the Park Service may regulate boating and other activities on waters within national parks—and that it has banned the use of hovercrafts there. See 54 U.S.C. § 100751(b) ; 36 C.F.R. § 2.17(e) (2018). But Sturgeon claims that Congress created an Alaska-specific exception to that broad authority when it enacted [ANILCA]. * * * In Alaska, Sturgeon argues, the Park Service has no power to regulate lands or waters that the Federal Government does not own; rather, the Service may regulate only what ANILCA calls "public land" (essentially, federally owned land) in national parks. And, Sturgeon continues, the Federal Government does not own the Nation River—so the Service cannot ban hovercrafts there. When we last faced that argument, we disagreed with the reason the lower courts gave to reject it. But we remanded the case for consideration of two remaining questions. First, does "the Nation River qualif[y] as 'public land' for purposes of ANILCA"? Second, "even if the [Nation] is not 'public land,' " does the Park Service have authority to "regulate Sturgeon's activities" on the part of the river in the Yukon-Charley? Today, we take up those questions, and answer both "no." * * *

[Justice Kagan then summarized the history recounted earlier, including the Statehood Act and its generous grants of land to the new State, ANSCA's resolution of Alaska Native claims, and the passage of ANILCA. She noted that the territorial experience set "the terms of future conflict," as she put it; namely "resource conservation vs. economic development, federal management vs. local control." She also noted that the State emerged from Statehood as a "formidable property holder," and that ANCSA made the Natives large landowners as well.]

We thus reach ANILCA, the statute principally in dispute in this case, in which Congress set aside extensive land for national parks and preserves—but on terms different from those governing such areas in the rest of the country.

Starting with the statement of purpose in its first section, ANILCA sought to "balance" two goals, often thought conflicting. 16 U.S.C. § 3101(d). The Act was designed to "provide[ ] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." *Ibid.* "[A]nd at the same time," the Act was framed to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Ibid.* So if, as you continue reading, you see some tension within the statute, you are not mistaken: It arises from Congress's twofold ambitions.

ANILCA set aside 104 million acres of federally owned land in Alaska for preservation purposes. * * * ANILCA calls each such park or other area a "conservation system unit." § 3102(4). * * * In sketching those units' boundary lines, Congress made an uncommon choice—to follow "topographic or natural features," rather than enclose only federally owned lands. § 3103(b). * * * In most parks outside Alaska, boundaries surround mainly federal property holdings. * * * But Congress had no real way to do that in Alaska. Its prior cessions of property to the State and Alaska Natives had created a "confusing patchwork of ownership" all but impossible to draw one's way around. C. Naske & H. Slotnick, Alaska: A History 317 (3d ed. 2011). * * * The upshot was a vast set of so-called inholdings—more than 18 million acres of state, Native, and private land—that wound up inside Alaskan system units.

Had Congress done nothing more, those inholdings could have become subject to many Park Service rules * * * That is because the Secretary, acting through the Director of the Park Service, has broad authority under the National Park Service Organic Act (Organic Act) to administer both lands and waters within all system units in the country. The Secretary "shall prescribe such regulations as [he] considers

necessary or proper for the use and management of System units." 54 U.S.C. § 100751(a). And he may, more specifically, issue regulations concerning "boating and other activities on or relating to water located within System units." § 100751(b). Those statutory grants of power make no distinctions based on the ownership of either lands or waters (or lands beneath waters). * * * And (of particular note here) the Park Service freely regulates activities on all navigable (and some other) waters "within [a park's] boundaries"—once more, "without regard to ... ownership." 36 C.F.R. § 1.2(a)(3). So Alaska and its Natives had reason to worry about how the Park Service would regulate their lands and waters within the new parks. None of the parties here have questioned the constitutional validity of the above statutory grants as applied to inholdings, and we therefore do not address the issue. Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 536–541.

Congress thus acted, as even the Park Service agrees, to give the State and Natives "assurance that their [lands] wouldn't be treated just like" federally owned property. Tr. of Oral Arg. 50. * * * The key provision here is Section 103(c) * * * [which] provides in full:

> "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after [the date of ANILCA's passage], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." § 3103(c).

[ANILCA defines "land" to mean] "lands, waters, and interests therein." § 3102(1) [and] * * * "public lands [to mean] "lands" (including waters and interests therein) "the title to which is in the United States"—except for lands selected for future transfer to the State or Native Corporations (under the Statehood Act or ANCSA). § 3102(2),(3). "Public lands" are therefore most but not quite all lands (and again, waters and interests) that the Federal Government owns.

* * * As explained in *Sturgeon I*, "Section 103(c) draws a distinction between 'public' and 'non-public' lands within the boundaries of conservation system units

in Alaska." Section 103(c)'s first sentence makes clear that only public lands (again, defined as most federally owned lands, waters, and associated interests) would be considered part of a system unit (again, just meaning a national park, preserve, or similar area). By contrast, state, Native, or private lands would not be understood as part of such a unit, even though they in fact fall within its geographic boundaries. Section 103(c)'s second sentence then expressly exempts all those non-public lands (the inholdings) from certain regulations—though exactly which ones, as will soon become clear, is a matter of dispute. And last, Section 103(c)'s third sentence enables the Secretary to buy any inholdings. If he does, the lands (because now public) become part of the park, and may be administered in the usual way—*e.g.,* without the provision's regulatory exemption.

We can now return to John Sturgeon, * * * [who] used to travel by hovercraft up a stretch of the Nation River that lies within the boundaries of the Yukon-Charley Preserve * * * [until the Park Service cited him for violating a Park Service regulation prohibiting the use of hovercraft on] waters "located within [a park's] boundaries," without any "regard to ... ownership." 36 C.F.R. §§ 2.17(e), 1.2(a)(3) ; see *supra,* at 1072. That regulation, issued under the Secretary's Organic Act authority, applies on its face to parks across the country. * * * Sturgeon protested that in Alaska (even though nowhere else) the rule could not be enforced on a waterway—like, he said, the Nation River—that is not owned by the Federal Government. * * * Sturgeon stopped using his hovercraft—but also brought this lawsuit, based on ANILCA's Section 103(c).

In *Sturgeon I*, we rejected one ground for dismissing Sturgeon's case, but remanded for consideration of two further questions. The [lower courts had ruled in favor of the Park Service, interpreting] * * * Section 103(c) to limit only the Service's authority to impose Alaska-specific regulations on such lands—not its authority to apply nationwide regulations like the hovercraft rule. But we viewed that construction as "implausible" * * * [because] ANILCA, we reasoned, "repeatedly recognizes that Alaska is different." (The Act "reflect[s] the simple truth that Alaska is often the exception, not the rule"). Yet the lower courts' reading would "prevent the Park Service from recognizing Alaska's unique conditions"—thus producing a "topsy-turvy" result. Still, we thought two hurdles remained before Sturgeon could take his hovercraft out of storage. We asked the Court of Appeals to decide whether the Nation River "qualifies as 'public land' for purposes of ANILCA," thus indisputably subjecting it to the Service's regulatory authority. And if the answer was "no," we asked the Ninth Circuit to address whether the Service, on some

different theory from the one just dispatched, could still "regulate Sturgeon's activities on the Nation River."

The Ninth Circuit never got past the first question because it concluded that the Nation River is "public land" * * * [and thus] again rejected Sturgeon's challenge * * * [and we again granted certiorari].

We first address whether, as the Ninth Circuit found, the Nation River is "public land" under ANILCA. * * * [The Court answered this question "no," on the ground the lands beneath the River's waters were owned by Alaska as a result of the navigability for title doctrine as reaffirmed in *PPL Montana*. While acknowledging that the U.S. may have some sort of property interest in the Nation River waters that could prevent them from being depleted under the reserved rights doctrine of Winters v. United States, 207 U.S. 564 (1908), that did not support the Park Service's regulation being applied in this case, which] is directed against the "sight or sound" of "motorized equipment" in remote locations—concerns not related to safeguarding the water. [In a footnote, the Court noted that the Ninth Circuit had relied on the reserved water rights doctrine in protecting opportunities for subsistence fishing in the *Katie John* cases, and cryptically said it was not disturbing those decisions because the subsistence fishing provisions of ANILCA were not at issue in *Sturgeon*.]

We thus move on to the second question we posed in *Sturgeon I*, concerning the Park Service's power to regulate even non-public lands and waters within Alaska's [CSUs].* * * If Sturgeon lived in any other State, his suit would not have a prayer of success [because of the Park Service's authority to regulate activities even on non-federal land inside Park boundaries]. * * * [But as the Court noted in Sturgeon I,] "Alaska is often the exception, not the rule." Here, Section 103(c) of ANILCA * * * provides that even when non-public lands—again, including waters—are geographically within a national park's boundaries, they may not be regulated as part of the park. And that means the Park Service's hovercraft regulation cannot apply there.

* * * Recall how Section 103(c) grew out of ANILCA's unusual method for drawing park boundaries. Those lines followed the area's "natural features," rather than (as customary) the Federal Government's property holdings. 16 U.S.C. § 3103(b). The borders thus took in immense tracts owned by the State, Native Corporations, and private individuals. And as you might imagine, none of those parties was eager to

have its lands newly regulated as national parks. To the contrary, all of them wanted to preserve the regulatory status quo—to prevent ANILCA's maps from subjecting their properties to the Park Service's rules. Hence arose Section 103(c).

* * * The fiction in Section 103(c) involves considering certain lands actually within the new national parks as instead without them. As a matter of geography, both public and non-public lands fall inside those parks' boundaries. But as a matter of law, only public lands would be viewed as doing so. All non-public lands (again, including waters) would be "deemed," abracadabra-style, outside Alaska's system units. * * * The effect of that exclusion, as Section 103(c)'s second sentence affirms, is to exempt non-public lands, including waters, from the Park Service's ordinary regulatory authority. Recall that the Organic Act pegs that authority to system units. The Service may issue rules thought "necessary or proper" for "System units." 54 U.S.C. § 100751(a). And more pertinently here, the Service may prescribe rules about activities on "water located within System units." § 100751(b). Absent Section 103(c), those grants of power enable the Service to administer even non-federally owned waters or lands inside national parks. See *supra,* at 1075. But add Section 103(c), and the equation changes. Now, according to that section's first sentence, non-federally owned waters and lands inside system units (on a map) are declared outside them (for the law). So those areas are no longer subject to the Service's power over "System units" and the "water located within" them. § 100751(a), (b). Instead, only the federal property in system units is subject to the Service's authority. And that is just what Section 103(c)'s second sentence pronounces, for waters and lands alike. Again, that sentence says that no state, Native, or private lands "shall be subject to the regulations applicable solely to public lands within [system] units." 16 U.S.C. § 3103(c). The sentence thus expressly states the consequence of the statute's prior "deeming." The Service's rules will apply exclusively to public lands (meaning federally owned lands and waters) within system units. The rules cannot apply to any non-federal properties, even if a map would show they are within such a unit's boundaries. Geographic inholdings thus become regulatory outholdings, impervious to the Service's ordinary authority.

* * * [To interpret 103(c) otherwise] would undermine ANILCA's grand bargain. Recall that ANILCA announced its Janus-faced nature in its statement of purpose, reflecting the century-long struggle over federal regulation of Alaska's resources. In that opening section, ANILCA spoke about safeguarding "natural, scenic, historic[,] recreational, and wildlife values." 16 U.S.C. § 3101(a). Yet it insisted as well on "provid[ing] for" Alaska's (and its citizens') "economic and social needs." § 3101(d). In keeping with the statute's conservation goal, Congress reserved huge

tracts of land for national parks. But to protect Alaskans' economic well-being, it mitigated the consequences to non-federal owners whose land wound up in those new system units. Once again, even the Park Service acknowledges that Section 103(c) was supposed to provide an "assurance" that those owners would not be subject to all the regulatory constraints placed on neighboring federal properties. See Tr. of Oral Arg. 50. But then the Service (head-spinningly) posits that it need only draft its regulations to cover both federal and non-federal lands in order to apply those rules to ANILCA's inholdings. On that view, limitations on the Service's authority are purely a matter of administrative grace, dependent on how narrowly (or broadly) the Service chooses to write its regulations. And ANILCA's carefully drawn balance is thrown off-kilter, as Alaskan, Native, and private inholdings are exposed to the full extent of the Service's regulatory authority.

* * *

ANILCA, like much legislation, was a settlement. The statute set aside more than a hundred million acres of Alaska for conservation. In so doing, it enabled the Park Service to protect—if need be, through expansive regulation—"the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." 16 U.S.C. § 3101(d). But public lands (and waters) was where it drew the line—or, at any rate, the legal one. ANILCA changed nothing for all the state, Native, and private lands (and waters) swept within the new parks' boundaries. Those lands, of course, remain subject to all the regulatory powers they were before, exercised by the EPA, Coast Guard, and the like. But they did not become subject to new regulation by the happenstance of ending up within a national park. In those areas, Section 103(c) makes clear, Park Service administration does not replace local control. For that reason, park rangers cannot enforce the Service's hovercraft rule on the Nation River. And John Sturgeon can once again drive his hovercraft up that river to Moose Meadows.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, concurring.

The Court decides that the Nation River is not parkland, and I join the Court's opinion because it offers a cogent reading of § 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 16 U.S.C. § 3101 *et seq* . I write separately to emphasize the important regulatory pathways that the Court's decision leaves open for future exploration.

The Court holds only that the National Park Service may not regulate the Nation River as if it were within Alaska's federal park system, not that the Service lacks all authority over the Nation River. * * * Properly interpreted, ANILCA § 103(c) cannot nullify Congress' purposes in enacting ANILCA. Even though the Service may not apply its ordinary park rules to nonpublic areas like the Nation River, * * * the Service may well have authority to regulate *out* -of-park, nonpublic areas in the midst of parklands when doing so is necessary or proper to protect *in* -park, public areas—for instance, to ban pollution of the Nation River if necessary to preserve habitat on the riverbanks or to ban hovercraft use on that river if needed to protect adjacent public park areas. Nothing in ANILCA removes that power. * * *

ANILCA reflects Congress' expectation that the Service will manage Alaska's parks with a particular focus on rivers and river systems. For instance, the agency must "maintain unimpaired the water habitat" for salmon in Katmai National Monument, preserve "the natural environmental integrity and scenic beauty of ... rivers" in Gates of the Arctic National Park, and "maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features." §§ 410hh(4)(a), (10); § 410hh–1(2); see also §§ 410hh(1), (6), (7)(a), (8)(a); § 410hh–1(1). Some provisions of ANILCA direct the Service to regulate boating in Alaska's parklands. See, *e.g.,* § 3170(a). Others command the Service to regulate fishing. See, *e.g.*, § 3201. Together, these provisions make clear that Congress must have intended for the Park Service to have at least some authority over navigable waters within Alaska's parks. * * *

The Service's default ability to regulate comes from the Organic Act. That Act gives the Service general authority to promulgate all regulations "necessary or proper" for managing park units, including power to regulate activities "on *or relating* to water located within [Park] System units." 54 U.S.C. §§ 100751(a), (b) (emphasis added). * * * [This would seem to give] the Service substantial authority over navigable rivers inside geographic park boundaries in order to protect the parklands through which they flow.

Assuming that the Service has such authority over out-of-park areas pursuant to its Organic Act, nothing in ANILCA § 103(c) takes it away. That section's first sentence explains that nonpublic lands are not part of Alaska's park units. See 16 U.S.C. § 3103(c). The second sentence then emphasizes that the Service cannot regulate nonpublic lands as if they were part of the park. Together, these sentences mean that the Service loses its authority to apply normal park rules to nonpublic

lands, and instead can apply only those rules that it can justify by reference to the needs of other, public lands. * * * [A] Service regulation tailored to apply to nonparklands in order to protect sensitive surrounding parklands—like a rule against putting a toxic substance in the Nation River to stop harms to the riverbanks—would * * * [seem to] be consistent with the Service's limited Organic Act authority over out-of-park areas, and it would not run afoul of ANILCA because it would not be applicable to public lands.

Notes and Questions

1. The next few questions concern CSUs managed by the National Park Service,[69] followed by a few concerning CSUs managed by other federal land management agencies. As was noted in the textbook *Federal Public Land and Resources Law*, "[a] substantial line of cases beginning with Camfield v. United States, [167 U.S. 518 (1897)] affirms that the Property Clause [of the U.S. Constitution] gives Congress authority to regulate activities occurring *off* federal lands if their effects can be felt on federal lands."[70] One question in any given situation is whether Congress has delegated the exercise of such authority to the federal land managing agency, which may vary from agency to agency and situation to situation.[71] With that in mind, is the Court here deciding only that, as Justice Sotomayor suggests, the Park Service "cannot regulate nonpublic lands as if they were part of the park," and leaving intact whatever authority it has to regulate activities on "nonparklands in order to protect sensitive surrounding parklands" without running "afoul of ANILCA because it would not be applicable to public lands"? Suppose, for example, the Park Service can show that hovercraft operation on the Nation River seriously and adversely affect wildlife behavior or other features and activities ANILCA protects on adjacent public lands and adopts a regulation specifically prohibiting hovercraft on the Nation River. Does the last paragraph of Justice Kagan's opinion call that approach into question when it states that the lands in question "did not become subject to new regulation by the happenstance of ending up within a national park" and that ANILCA §103(c) "makes clear [that] Park Service administration does not replace local control"?

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[69] For a general discussion of inholdings in National Park System CSUs in Alaska, last updated in 2017, see https://www.nps.gov/articles/aps-v13-i2-c3.htm. Samplings of complex ownership patters in the Wrangell/St. Elias National Park and Preserve and in the Anaktuvuk Pass area of the Gates of the Arctic National Park can be found here. https://www.nps.gov/wrst/learn/management/upload/LAND-STATUS-MAP.pdf; https://www.nps.gov/gaar/planyourvisit/anaktuvuk.htm.

[70] See Leshy, Fischman and Krakoff, Coggins and Wilkinson's Federal Public Land and Resources Law (Foundation Press, 8th edition, 2022), p. 161 (emphasis in original).

[71] See, e.g., id., at 161-70.

2. Suppose the boundary of the national park ended at the bank of the Nation River, so that none of the River is "within" the park. In her concurrence in *Sturgeon*, Justice Sotomayor points to the National Park Service's Organic Act, which gives the Park Service broad authority to protect park system lands throughout the nation. It arguably allows the Park Service to regulate activities on lands outside of but adjacent to a park where it can show a direct, serious adverse impact on park resources. If that is so, does it make sense to say that ANILCA prevents the Park Service from regulating the same activities on non-parklands lying within the park boundaries? And if the Park Service has authority to regulate activities on non-parklands to protect park lands, could it rely on evidence gathered in a handful of places in CSUs to support a regulation that would apply to all park system units in Alaska?

3. As noted earlier, Section 804 in ANILCA's subsistence protection Article VIII (16 U.S.C. § 3114) protects "the *taking on public lands of fish* and wildlife" (emphasis added). If anglers stand on federal lands onshore while fishing in waters where the State owns the bed, are they taking fish on public lands? Further, suppose the Park Service could show that hovercraft operation along the Nation River interferes with salmon spawning and thus substantially limits subsistence fishing opportunities.[72] The Court in *Sturgeon* expressly refrained from disturbing the *Katie John* cases, which relied on the reserved water rights doctrine to conclude that navigable waters inside CSUs were "public lands" for purposes of ANILCA, even though *Sturgeon* explicitly rejected the basis for those decisions. Are the *Katie John* cases still good law after *Sturgeon*, or has the Supreme Court sharply narrowed ANILCA's protection for subsistence fishing? The United States brought suit against the State of Alaska on this point after the State rejected the notion that the *Katie John* cases remained good law, or that Title VIII of ANILCA preempted contrary state law. The federal district court for Alaska found that the *Katie John* cases remained binding. United States v. Alaska, 2024 WL 1348632 (March 29, 2024), appeal docketed, No. 24-2251 (9th Cir.) (oral argument held June 23, 2025).

4. The other federal land management agencies have somewhat different Organic Acts (and the Forest Service and Fish & Wildlife Service manage many millions of acres of land in CSUs in Alaska). Each would need to examined to determine whether Justice Sotomayor's suggested approach would apply to them. It

[72] Recall that, like several other provisions in ANILCA, its protections for subsistence hunting and fishing by rural residents applies to all public lands throughout Alaska, not just those within CSUs. Section II(B), supra.

should also be noted that other federal laws may apply to limit activities being carried out on nonfederal land, including state-owned land. For example, well over for two decades an intense controversy has surrounded the proposed giant Pebble copper/gold mine on state-owned land north of Bristol Bay. The proposal, which threatened the huge Bristol Bay salmon fishery, triggered much opposition from Alaska Native people and conservation groups, and eventually the Army Corps of Engineers and the EPA vetoed the project under the federal Clean Water Act. The State and the mine developers have filed litigation challenging EPA's decision.[73]

5. *Sturgeon* would have turned out differently had the U.S. owned the bed of the river inside the CSU. See text accompanying fn. 52, supra. The Supreme Court has confirmed that where, prior to statehood, the U.S. took steps to reserve the beds of navigable waters for various purposes, that can prevent title from passing to the new state at statehood. Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). The Court has indicated this result must have been clearly intended; otherwise, title would pass to the state at statehood. In United States v. Alaska, 521 U.S. 1 (1997) (the so-called *Dinkum Sands* case), the Court held that the Interior Secretary's proposed withdrawal of public lands, including submerged lands under navigable waters, in 1957 in order to establish the Arctic National Wildlife Refuge prevented those lands from passing to the State at statehood two years later. The Court also held that the United States reserved land beneath navigable waters in the National Petroleum Reserve. In Alaska v. United States, 545 U.S. 75 (2005), the Court reached the same result regarding Glacier Bay National Monument in southeast Alaska.[74] As noted earlier (see text accompanying fn. 16, supra), the U.S. reserved some fifty million acres of public land in Alaska prior to statehood. Can *Sturgeon* be read as implying that the courts should give particularly close scrutiny to each of these reservations to determine if the U.S. still owns the beds of navigable waters within them?[75]

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[73] https://insideclimatenews.org/news/31012023/pebble-mine-alaska-epa-veto/.

[74] The majority noted, among other things, that efforts to protect the Alaska brown bear's food supply in estuarine waters was a factor influencing President Coolidge's 1925 use of the Antiquities Act to establish the monument. Dissenting Justice Scalia, scorning the majority's "Ursine Rhapsody" with characteristic acerbity, was not persuaded that Coolidge's action overcame the presumption in favor of title passing to the State. Glacier Bay's eponymous glaciers have retreated dozens of miles inward in the past two centuries.

[75] The 2023 GAO report cited in footnote 65 supra contains a helpful and comprehensive summary of the many different efforts made over the years to resolve ownership of submerged lands in Alaska. The Trump "Unleashing" Executive Order, supra n. 12, §3(b)(xxi) calls for an immediate review of waterways in the state apparently aimed at vesting the state with ownership of as many as possible. Several disputes over submerged land ownership are currently in various states of federal district court litigation in Alaska.

6. ANILCA's Title VI added segments of 26 Alaska rivers to the National Wild and Scenic River System (WSRS) Congress had established in 1968—thirteen within national parks, six within wildlife refuges and seven outside of parks or refuges. (It also designated twelve other rivers segments for study for possible inclusion in the System.) ANILCA § 606(a) says river segments included in the WSRS "shall not include any lands owned by the State or a political subdivision of the State," but shall apply to "minerals in Federal lands which constitute the bed or bank or are situated within one-half mile of the bank" of any such river segment.[76]

7. The Bureau of Land Management regulates hardrock mining on public lands it manages. It is quite common in Alaska for miners to extract gold and other minerals from or along streams. Along navigable rivers where the State owns the bed, BLM is considered to have general regulatory authority only above the highwater mark. Can BLM prohibit occupancy of lands above the highwater mark for the purpose of engaging in mining below the highwater mark, even if such a prohibition severely limits or effectively prevents mining from taking place on the State-owned land?

B. How Willing Should Federal Agencies or Courts Be to Find Exceptions in Managing Federal Lands in Alaska?

Justice Kagan's opinion in *Sturgeon* pays particular attention to differences in how Congress addressed federal lands protection issues in Alaska compared with elsewhere. As she put it, quoting Chief Justice Roberts' opinion for the Court in *Sturgeon I*, "Sturgeon's case raises the issue how much `Alaska is different' from the rest of the country—how much it is `the exception, not the rule.'" In fact, many national parks and other protected public land areas in the lower 48 also have substantial amounts of non-federally owned land within their borders. Put a bit differently, any differences in Alaska are much more of degree than kind. That suggests the courts should be cautious in reading ANILCA as creating significant exceptions to otherwise uniform national policies. Congress has the ultimate power to decide when it is appropriate to carve out exceptions for Alaska lands. Given the potential far-reaching implications of broadly reading *Sturgeon*, should Congress to

[76] A map of one Wild and Scenic River in Alaska showing state and Native ownership holdings can be found here: https://www.nps.gov/alag/planyourvisit/upload/Alagnak-Wild-River-Land-Status-MAP.pdf.

provide more guidance on how much the federal government can regulate activities on non-federal lands inside Alaska CSUs?

Congress in ANILCA generally followed the policies and practices for managing federal public lands that had evolved over the previous century in the lower 48 states. For example, it did not establish new federal agencies to manage Alaska federal lands, but rather continued instead to parcel out management to the National Park Service, the U.S. Forest Service, the Fish & Wildlife Service, and the Bureau of Land Management. And in practically every case Congress applied the same labels to these lands (e.g., Monuments, Parks, Refuges, Wilderness, Wild & Scenic Rivers) that had evolved in the lower 48.

But some parts of ANILCA did subject public lands in Alaska to somewhat different standards from those in the rest of the country.[77] One was the preference for rural subsistence uses. Another prominent one concerns the tens of millions of acres ANILCA added to the National Wilderness Preservation System. For example, "in recognition of the unique conditions of Alaska," 16 U.S.C. § 1315(a), Congress decided that (1) snowmobiles, motorboats and other means of surface transportation can be used in Alaska Wilderness areas to ensure that rural residents "engaged in subsistence uses shall have reasonable access to subsistence resources" on these public lands (Section 811); (2) the Departments of the Interior and Agriculture can build new public use cabins and shelters in Alaska Wilderness areas if necessary for public health and safety (Section 1315); and (3) temporary structures can be built, together with the use of equipment necessarily related to the taking of fish and wildlife, can be used in Alaska Wilderness areas (Section 1316). But Congress also specified that, except as otherwise "expressly provided for" in ANILCA, ANILCA-designated wilderness "shall be administered in accordance with" the Wilderness Act. 16 U.S.C. § 707.

ANILCA also includes detailed provisions governing mineral development and timber harvesting on parts of Alaska's national forests that differ from policies applied to national forests in the lower 48. See e.g., 16 U.S.C. §§ 502-04; 539a; 3170(b); and 94 Stat. 2399-2405. See also Southeast Alaska Conservation Council v. Watson, 697 F.2d 1305, 1310 (9th Cir. 1983) (while ANILCA § 503 reflected

[77] ANILCA established a few areas of national park system lands as "National Preserves," where sport hunting is permitted. 16 U.S.C. §1313. In 2015 the Park Service promulgated a rule that limited some sport hunting practices targeting bears and wolves in Alaska's Park Preserves; the Trump Administration overturned the restrictions in 2020 and the Biden Administration restored them in 2024. The "Unleashing" Executive Order, supra n. 12, §3(b)(xix), calls for rescinding the Biden restoration.

Congress's "clear intention that holders of valid mining claims shall be permitted to carry out activities related to exercising rights under those claims," Congress also "specified that any such activities shall be conducted `in accordance with reasonable regulations promulgated by the Secretary to assure that such activities are compatible, to the maximum extent feasible, with the purposes for which the Monuments were established,'" and the "`maximum extent feasible' standard is a strict one and demands strict compliance with environmental protection provisions set forth in ANILCA and in other applicable environmental statutes").

Of course, Congress has often devised different policies and rules for different areas of public land. It has, for example, long followed the practice of designating national parks, wilderness areas, conservation areas and recreation areas by individual statutes, which often contain some rules or policies applying only to that unit. But it is generally assumed that, except for those area-specific provisions, the general laws and regulations found in the organic acts for the park and wilderness and other such systems apply.[78] Does this longstanding practice suggest that the Court in the *Sturgeon* decisions was too eager to find that Congress had fashioned a different kind of approach for all the dozens of CSUs it established across the entire state of Alaska?

C. Are Land Exchanges a Major Escape Route Around ANILCA's Protections? The Saga of the Izembek Road.

For the last few decades, a controversy has surrounded efforts by the State of Alaska, King Cove Corporation and Agdaagux Tribe of King Cove to exchange lands for a federal land within the nearby 315,000-acre Izembek National Wildlife Refuge (established in 1960) and Wilderness area (so designated by ANILCA) on the Aleutian Peninsula. The purpose of the exchange is to allow a road constructed from King Cove to the community of Cold Bay. ANILCA specified the Refuge's purposes to include conserving its "fish and wildlife habitats in their natural diversity including, but not limited to, waterfowl, shorebirds and other migratory birds, brown bears and salmonoids." 16 U.S.C. § 303(3). A large lagoon in the heart of the Refuge contains one of the world's largest eelgrass beds, and was the first wetland area in the nation to be recognized as a "Wetland of International Importance" under the Ramsar Convention.

[78] See generally Fischman, The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation, 29 Ecology L.Q. 457, 592-612 (2002).

First proposed decades ago, the Izembek road has triggered deep and lasting controversy. Considerable evidence suggests that, at least initially, the primary reason behind the road was economic—to facilitate the movement of harvested fish from King Cove to a large airstrip near the village of Cold Bay. The justification later put forward for the exchange was to facilitate emergency medical evacuations from King Cove to the Cold Bay airstrip to allow for treatment elsewhere.

A provision included in the Omnibus Public Land Management Act of 2009 gave the Interior Secretary authority to do the exchange if it was found to be in the public interest.[79] After a lengthy public process, then Secretary Jewell concluded it was not in the public interest and rejected it. This exchange authority expired by its own terms in 2016.

Subsequently, the Trump Administration approved the exchange, relying on ANILCA's §1302(h), which provides, in pertinent part: "Notwithstanding any other provision of law, in acquiring lands for the purposes of this Act, the Secretary is authorized to exchange lands …." Conservationists challenged this decision in court, in part on the ground that §1302 provided no authority for it because its real purpose was to transfer federal land so the road could be built, and not to acquire land for ANILCA's conservation and subsistence purposes. In fact, they argued, the road's adverse impacts on the Refuge and the millions of migratory birds and other species that used it would undermine those purposes. They also relied on Section 1106(b) and (c) of ANILCA, see subsection C, below, which explicitly required presidential and congressional approval if any "application for the approval of a transportation . . . system . . . proposes to occupy, use, or traverse any" wilderness area, which the Izembek Road would do. Several dozen Alaska Native governments are on record as opposing the road.

The district court sided with the challengers, but a three-judge panel of the Ninth Circuit reversed, 2-1. The majority read §101(d), discussed on pp. 18-20, supra, as establishing as one of ANILCA's purposes the "satisfaction of the economic and social needs of the state of Alaska and its people." Challengers (supported by several *amici*, including ANILCA champion former President Jimmy Carter) urged rehearing en banc. In 2024 the 9th Circuit granted rehearing, vacated the panel decision, but then dismissed the case as moot after Interior Secretary Haaland withdrew Interior's previous approval of the exchange on several grounds, including

[79] 123 Stat. 1177-83 (2009).

that the Department's subsistence consultation and National Environmental Policy Act (NEPA) compliance had been inadequate.

Haaland stepped down before making a decision on the matter, but the new draft EIS the Biden Administration prepared on the decision made clear that any exchange must satisfy ANILC's two purposes: advancement of conservation and subsistence uses. Section 3(b)(xi) of President Trump's January 20, 2025 executive order instructs the Interior Secretary to "take all necessary steps" to "facilitate the expedited development" of the road. It has never been clear how such a road would be finance; none of the prior plans addressed the costs of constructing or maintaining such a road. Should financial constraints be considered by the Secretary?

Notes and Questions

1. While ANILCA explicitly identifies only two purposes (conservation and subsistence protection, laid out in §§ 101(a) and (d), as quoted on pp. 16-18, supra), does the Supreme Court's unanimous decision in *Sturgeon II*, supra, suggest that there is a third purpose, where Justice Kagan notes that Congress "insisted as well on `provid[ing] for` Alaska's (and its citizens') `economic and social needs` § 3101(d)"? Cf. Alaska v. Federal Subsistence Board, 544 F.3d 1089, 1091, 1098 (9th Cir. 2008) ("ANILCA serves a dual purpose: protecting and preserving the subsistence lifestyle and protecting and preserving wildlife." (citing 16 U.S.C. § 3101(b)–(c))). The answer could have far-reaching effects, by guiding how the executive and judicial branches interpret and apply its many different provisions affecting well over 150 million acres of land.

2. Note the split among the Alaska Native entities here, where a few Native entities support the exchange and the road, and several dozen other Native entities oppose it because of its effects on their subsistence opportunities and the precedent it could set. Such splits are not unusual; e.g., Native groups are on both sides of the controversy over the Ambler Road and petroleum development on the North Slope, noted further below. How should such differences bear upon the Interior Department's decision-making? Should Native groups work to resolve such differences wherever possible in order to enhance their influence on U.S. decision-making? Given the diversity of the Alaska Native community is a rough consensus even possible?

3. Four decades earlier, an Alaska federal district court set aside Interior's approval of another proposed land exchange (also grounded on ANILCA's §1302) involving Native land for public land. National Audubon Society v. Hodel, 606 F.

Supp. 825 (D. Alaska 1984). There, three Alaska Native corporations transferred various land rights they had in the Kenai and Yukon Delta National Wildlife Refuges in exchange for federal lands on St. Matthew Island, which had been established as a Wildlife Refuge in 1909, designated Wilderness in 1970, and made part of the Alaska Maritime NWR by ANILCA. The purpose was to allow the Native Corporations to lease the St. Matthew Island parcel to private entities to facilitate oil exploration and development in the Navarin Basin of the Bering Sea. (The exchange was good for fifty years, or so long as oil production continued.) The court found, among other things, that the record "demonstrates that, directly contrary to the Secretary's findings, overall national wildlife conservation and management objectives will not be advanced either in the short or long terms under the exchange." It concluded that the Secretary's "Public Interest Determination for the St. Matthew Island exchange" reflected "a clear error of judgment."

D. ANILCA and Access to or across Public Lands.

ANILCA Title XI has extensive provisions regarding, as its heading states, "transportation and utility systems in and across, and access into, Conservation System Units."[80] It begins with the congressional finding that "Alaska's transportation and utility network is largely undeveloped and the future needs for …[such systems] would best be identified and provided for through an orderly, continuous decision-making process involving the State and Federal Governments and the public."[81] Another finding is that this Act must provide "a single comprehensive statutory authority for the approval or disapproval of such systems" in order to "minimize the adverse impacts" of such systems on CSUs, by replacing "existing authorities" for approving such systems through Alaska public lands that are "diverse, dissimilar, and , in some cases, absent."[82]

Sections 1105-1106 create mechanisms and processes for approving new transportation or utility systems across Alaska public lands. For the most part, the President may approve such a system upon finding that it is "in the public interest," would be "compatible with the purposes" of the CSU, and "no economically feasible and prudent alternative route" exists. As noted earlier in the discussion of the

[80] 16 U.S.C. § 1102 expressly includes "roads" in the definition of such systems.
[81] 16 U.S.C. § 1101(a).
[82] 16 U.SC. § 1101(b) and (c). But Section 1103 introduces some ambiguity, providing: "Except as specifically provided for in this title, applicable law shall apply with respect to the authorization and administration of transportation or utility systems."

Izembek Road, where Wilderness areas are involved and in some other limited circumstances, both presidential and congressional approval is required.

Proponents of the proposed Izembek road argue that their reliance on ANILCA's §1302(h), rather than Title XI, is justified by the former's proviso that begins "Notwithstanding any other provision of law."

Questions. Is that disclaimer sufficient to override §1102(c)'s explicit intent to provide a "single comprehensive authority" for such a transportation system, and §1106's explicit requirement of presidential and congressional approval to traverse a wilderness area? The first Trump Administration also argued that the "notwithstanding" clause also meant that bedrock laws like the Administrative Procedure Act, NEPA and the Endangered Species Act did not have to be complied with in approving the exchange to allow the Izembek road. Section 910 of ANILCA, 43 U.S.C. 1638, provides that NEPA's EIS requirement does not apply to "withdrawals, conveyances, regulations, orders, easement determinations, or other actions which lead to the issuance of conveyances to Natives or Native Corporations …." Is the transfer of a right of way covered by this exception?

ANILCA §1110(a) allows, in CSUs and some other areas, the use of motorboats, airplanes, and snowmachines for "traditional activities" (where permitted by this or another law) and "for travel to and from villages and homesites." It makes such use subject to "reasonable" regulation to protect "the natural and other values" of the areas. Such use may be prohibited if the Secretary "finds" that it "would be detrimental to the resource values" of the area. Federal agencies have sometimes defined such "traditional activities" by rules applicable to specific places. For example, Park Service regulations applicable to a part of Denali National Park and Preserve say they include "hunting, trapping, fishing, berry picking or similar activities," but not recreational use of snowmachines.[83]

Section 1109 provides that nothing in Title XI "shall be construed to adversely affect any valid existing right of access." There is a rather rich case law on existing rights of access where public lands are involved. For example, R.S. 2477, a statute Congress adopted in 1866, provided, in its entirety, that "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Congress repealed this statute (and many others) in the Federal Land Policy and Management Act in 1976 (FLPMA), "subject to valid existing rights."

[83] 36 C.F.R. 13.950.

The statute raises many interpretive questions and has been extensively litigated, [84] including some brought by the state of Alaska. One, involving claims within the Wrangell/St. Elias National Park and Preserve, resulted in three decisions from the Ninth Circuit. Hale v. Norton, 437 F.3d 892 (2006); 461 F.3d 1092 (2006), and 476 F.3d 694 (2007).

Adding to the complicated law in this area, ANILCA contains, in 16 U.S.C. §1323 (the so-called "Melcher amendment") a direction to provide "such access to nonfederally owned land within the boundaries of the National Forest System" or to "nonfederally owned land surrounded by public lands managed by" the Interior Secretary under FLPMA, that the Agriculture or Interior Secretary "deems adequate to secure to the owner the reasonable use and enjoyment of," so long as the owner complies with "applicable rules and regulations.[85]

For a general introduction to public lands access issues, see Leshy, Fischman and Krakoff, *Coggins & Wilkinson's Federal Public Land & Resources Law*, chapter 5(1) and (b), pp. 385-422 (8th ed. 2022).

PART IV: A Potpourri of Other ANILCA Issues

A. Rescinding so-called "D1" Withdrawals

A good many of the D1 protective "withdrawals" of federal land made in the leadup to ANILCA have remained in place on nearly sixty million acres of BLM-managed land in Alaska. In the Alaska Land Transfer Acceleration Act of 2004, Congress required these withdrawals to be reviewed to determine which ones could be revoked. In 2006 the BLM issued a report recommending that withdrawals on approximately 50 million acres be considered for revocation through BLM's land use planning process, and withdrawals on nearly 7 million acres be maintained. At the end of the first Trump Administration, the Secretary of the Interior issued several public land orders that would have revoked some 28 million acres of the withdrawals. Shortly after taking office, the Biden Administration prevented the Orders from taking effect based on its determination that the Trump NEPA and

[84] See generally Southern Utah Wilderness Alliance v. BLM, 425 F.3d 735 (10th Cir. 2005).

[85] Subsection (a) applies to the national forest system, and it has been held to apply to the system nationwide; i.e., not limited to Alaska. Montana Wilderness Ass'n v. U.S. Forest Service, 655 F.2d 951 (9th Cir. 1981); but see United States v. Srnsky, 271 F.3d 595 (4TH Cir. 2001) (questioning this result in *dicta*). Subsection (b) applies "public lands managed [under FLPMA]" and because ANILCA defines public lands as lands "situated in Alaska," 16 U.S.C. 3102(3), courts and the BLM have been reluctant to apply it to govern access to BLM lands outside of Alaska. Montana Wilderness Association, supra, at 954.

subsistence compliance reviews were flawed. Following NEPA compliance, and after carefully examining the importance of these lands for subsistence uses, the Biden Administration announced in August 2024 that it will maintain withdrawals on 28 million acres, with some exceptions.[86]

The Trump II Administration has indicated it may lift some or all of these withdrawals, which would make them available for state selection and eventual ownership (which would remove them from ANILCA's subsistence protections), and otherwise open them to development that could threaten their natural and cultural values. Many Alaska Tribes have joined with conservation groups in supporting continuing the withdrawals.[87]

B. Alaska National Forests Roadless Area Review

As noted in Part II(C), above, Department of Agriculture's so-called Roadless Rule ruled out practically all road-building on the vast majority of Alaska's two national forests. The subsequent history of the Rule has been checkered. In 2003, the Department of Agriculture halted implementation of the Rule on the Tongass National Forest pending further study, but the courts ordered the rule reinstated. Village of Kake v. Egan, 795 F.3d 956 (9th Cir. 2015) (en banc). The Governor of Alaska petitioned to rescind the rule for the Tongass, and in 2020 the Forest Service agreed. The Biden Administration reviewed this decision and, after extensive public comment (including support for reinstating the rule from Native groups concerned about subsistence protections), reversed it, once again protecting the Tongass roadless areas. The preamble to the rule restoring it noted that Tongass roadless areas "represent the world's largest remaining, intact, old-growth temperate rainforest."[88] The Trump II Administration is reversing this decision.[89]

C. Wilderness Study Area Reviews Outside of National Forests

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[86] See Public Land Order, No. 7947; Rescission of Public Land Order Nos. 7899, 7900, 7901, 7902, and 7903; Alaska, 89 F.R. 70204 (Aug. 29, 2024); and Notice of Availability of the Record of Decision for the Alaska Native Claims Settlement Act 17(d)(1) Withdrawals Final Environmental Impact Statement, Alaska, 89 F.R. 70204-05 (Aug. 29, 2024).; https://www.blm.gov/programs/lands-and-realty/regional-information/alaska/d-1_withdrawals; https://www.blm.gov/press-release/biden-harris-administration-affirms-protection-28-million-acres-public-lands-alaska.

[87] See, e.g., https://www.pewtrusts.org/en/research-and-analysis/articles/2024/05/01/alaska-tribes-unite-around-conservation-of-public-lands.

[88] https://www.federalregister.gov/documents/2023/01/27/2023-01483/special-areas-roadless-area-conservation-national-forest-system-lands-in-alaska.

[89] "Unleashing" Executive Order, supra n. 12, §3(c); https://www.usda.gov/about-usda/news/press-releases/2025/06/23/secretary-rollins-rescinds-roadless-rule-eliminating-impediment-responsible-forest-management.

ANILCA contained a provision, 16 U.S.C. § 1317, that directed the Interior Secretary to review, by December 1985, all the lands NPS and FWS manage in Alaska that ANILCA did not include in the National Wilderness Preservation System (NWPS) as to their "suitability or nonsuitability for preservation as wilderness," and to report the findings to the President. It went on to require the President to report the Secretary's recommendations, and to provide his own recommendations, to Congress by December 1987.

The NPS and the FWS both recommended that the Interior Department ask Congress to add millions of acres of Alaska lands they manage to the NWPS, but Interior leadership scaled back these recommendations substantially. Since ANILCA became law, Congress has only added 280,000 acres of public land in Alaska to the NWPS, all national forest lands added in 1990.

ANILCA contained another provision, 16 U.S.C. §1320, that exempted land managed by BLM in Alaska from the wilderness review provisions of the Federal Land Policy and Management Act, but it went on to specifically authorize the Secretary to identify areas in Alaska "which determines are suitable as wilderness" and "from time to time, make recommendations to the Congress for inclusion of any such areas" in the NWPS. The Interior Department has taken various positions on wilderness study of BLM lands in Alaska, with Democratic Administrations favoring such studies and Republican Administrations disfavoring them. The last sentence of §1320 in essence says that Interior may or may not choose to protect BLM lands it recommends be included in the NWPS to protect their wilderness values. Until Congress acts on any such recommendation, BLM should manage the area in question "in accordance with the applicable land use plans and applicable provisions of law."

D. The Proposed Ambler Road

A proposed road extending across some 200 miles of wild lands on the southern side of the Brooks Range in northern Alaska (see map, p. 55, infra) would connect the so-called Ambler region, which is believed to have considerable potential for producing copper, zinc, lead, silver and gold, with the highway connecting Fairbanks and the Prudhoe Bay oil region on the Arctic coast.

ANILCA addresses the potential for an industrial access road to cross the Gates of the Arctic National Preserve in 16 U.S.C. §410hh(4). Its subsection (b) provides:

> (b) Congress finds that there is a need for access for surface transportation purposes across … the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road) and the Secretary shall permit such access in accordance with the provisions of this subsection.

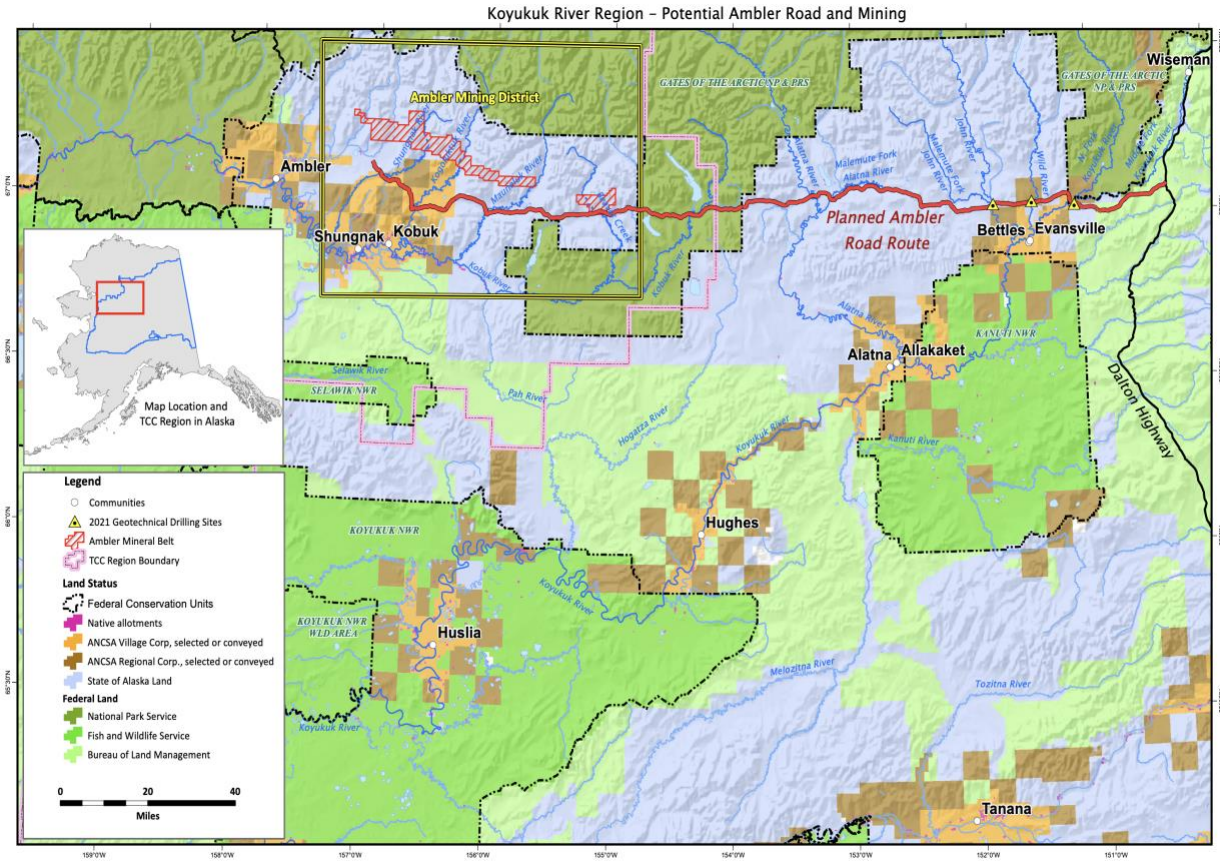
Subsections (c) and (d) direct Interior to follow a process and issue a right-of-way for the road "across the preserve."

But as shown in the map below, the proposed road must also cross BLM land to connect to the North Slope Haul Road. The BLM in the Biden Administration reversed a decision made in President Trump's first term and rejected the application to grant a right of way across its lands for the Ambler Road.

Road proponents argue, among other things, that ANILCA's mandate to issue a right of way across the Park implicitly prevents BLM from saying no to the Road. Some Tribes (Native groups are somewhat divided on the issue) and conservation groups counter than nothing in ANILCA exempts a proposed road from ANILCA's subsistence protections or the numerous other laws that govern such activities on BLM lands. The Trump II Administration has indicated it will revisit the matter of a right of way for the proposed road.[90]

Discussion questions: Is there ambiguity in subsection (b) as quoted above? On the one hand, it directs the Secretary to permit access "across … the … Preserve." On the other hand, the parenthetical that follows refers to access from the Ambler Mining District "to the Alaska Pipeline Haul Road." The Biden Administration focused on the "across the Preserve" language. If the Trump II Administration focuses on the parenthetical, what should a reviewing court do? Can an implication drawn from the parenthetical be enough to override Congress's explicit direction to permit access only "across … the … Preserve," and not to mandate a road across BLM land?

[90] "Unleashing" Executive Order, supra n. 12, § 3(b)(viii). See also https://www.hcn.org/articles/a-return-to-the-fight-against-alaskas-ambler-road/?utm_source=wcn1&utm_medium=email&utm_campaign=2025-03-28-Newsletter.



PART V: Other Contemporary Challenges for Public Lands in Alaska

A. Petroleum Production Controversies

As noted earlier, the discovery of a giant petroleum deposit on State-selected land at Prudhoe Bay on Alaska's North Slope has produced a huge amount of revenue for the state government. The amount of oil transmitted through the TAPS pipeline has, however, declined marked in the last few decades. At its peak in the late 1980s, about 2 million barrels a day flowed through it, but in recent years it has averaged less than 500,000 barrels a day. Ever since that discovery, the petroleum industry has campaigned to develop and transport more petroleum from Alaska's north to markets elsewhere.

The TAPS transports only liquid petroleum, but the Prudhoe Bay field also includes methane gas. The pipeline for oil was prioritized because it was more in demand, more lucrative and somewhat easier to transport. Proposals to build a gas pipeline were seriously considered in the early 1970s during the Arab oil embargo. One proposed route would have paralleled TAPS, while another was to go through Canada to the upper Midwest. But the economics involved were never promising enough to move it forward.

In the first decade of the 21st century, the State of Alaska unsuccessfully promoted, and even offered to help fund, a gas pipeline.[91] The Trump II Administration has endorsed the idea, and in March 2025 Interior Secretary Burgum announced his intention to revoke withdrawals of public lands in northern Alaska to allow lands to be conveyed to the state, to "help pave the way forward for" the natural gas

[91] https://en.wikipedia.org/wiki/Alaska_gas_pipeline.

pipeline.[92] Japan and other Asian countries have shown interest in participating in a project to build a gas pipeline from the north slope to the Cook Inlet in southern Alaska, where the gas would be liquified and shipped to Asia.[93] It is not clear whether this new interest will be sufficient to overcome the expense (estimated at $44 billion) and years of construction required to make such a pipeline operational (compared to exporters of liquified natural gas on the Gulf Coast that currently have infrastructure in place), as well as other complications likely to arise.[94]

B. Petroleum Leasing in the Arctic National Wildlife Refuge (Refuge)

Whether to include Refuge's Coastal Plain (a 1.57-million-acre area on the north side of the 19-million-acre Refuge) in the National Wilderness Preservation System and thus be off-limits to petroleum development was one of the most contentious issues as ANILCA was going through Congress. The Coastal Plain is wildlife-rich, including the summer calving ground of the large Porcupine Caribou Herd, but particularly then was also thought to be petroleum-rich, given its proximity to the Prudhoe Bay oil field. The State and its congressional delegation opposed Wilderness designation. In the end Congress compromised, but only a little. Section 1002 of ANILCA did not designate the Coastal Plain as Wilderness, but more important, it forbade oil and gas development there until Congress provided otherwise. 16 U.S.C. § 1003.

The State and the petroleum industry continued to push legislation to lease the Coastal Plain, but protection advocates, including vocal Alaska Native groups like the Gwich'in peoples (but not Kaktovik Inupiat Corporation, the local village corporation located on the north shore of the Coastal Plain), managed to defeat such proposals for nearly four decades. Leasing proponents did come close when, after the Republicans gained control of the House of Representatives in the 1994 elections, Congress included a leasing provision in a giant, multi-pronged legislative package it sent to President Clinton in December 1995. Clinton vetoed the bill,

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[92] See https://www.doi.gov/pressreleases/interior-secretary-takes-steps-unleash-alaskas-extraordinary-resource-potential; see also https://www.wsj.com/world/asia/trump-lng-pipeline-mike-dunleavy-alaska-governor-32858e9d.

[93] See, e.g., https://www.nytimes.com/2025/02/27/business/trump-tariffs-alaska-lng-japan.html; https://www.reuters.com/world/us/trump-says-japan-south-korea-want-partner-with-us-alaska-pipeline-2025-03-05/;." https://news.bloomberglaw.com/environment-and-energy/saudi-arabia-of-natural-gas-gives-trump-unprecedented-leverage. The Trump "Unleashing" Executive Order, supra n. 12, §2(d) calls for prioritizing development of Alaska's natural gas potential.

[94] For a critique of the proposed pipeline from a conservation perspective, arguing that the state's expenditure since 2010 of nearly half a billion dollars to promote it has been wasted, see Alaska's Pointless Pipe Dream (January 2025), https://heyzine.com/flip-book/812e283f53.html.

singling out several features he found particularly objectionable, including the one leasing the Coastal Plain, explaining his objection this way:

> Title V would open the Arctic National Wildlife Refuge to oil and gas drilling, threatening a unique, pristine ecosystem, in hopes of generating $1.3 billion in Federal revenues—a revenue estimate based on wishful thinking and outdated analysis. I want to protect this biologically rich wilderness permanently.[95]

Then came the first Trump Administration, with the Republicans in control of both Houses of Congress. The Tax Cuts and Jobs Act of 2017, which passed the Congress on a strict party line vote, contained a rider that opened the Coastal Plain to petroleum leasing. It mandated two lease sales by the end of 2024, each to offer at least 400,000 acres with the highest petroleum potential.

The first sale was held in January 2021, shortly before the Trump Administration left office. It was a bust. No major oil companies participated. Only half of the 22 tracts offered (which totaled a bit more than 1 million acres) drew any bids. The total amount of the high bids was $14 million, far less than proponents of leasing had forecast. Subsequently, BLM issued leases for nine tracts covering 437,000 acres. On seven, the lessee was a public corporation established by the State. The private entities holding the other two leases later relinquished them.[96]

Shortly after taking office, President Biden put a moratorium on all activity aiming to implement the leases, and in September 2021, the Interior Department cancelled the remaining seven leases on the ground that the process leading to them was flawed.[97] The Interior Department held the congressionally-mandated second lease sale in January 2025. It included more protection for wildlife and subsistence and attracted no bidders. The One Big Beautiful Bill Act, Pub. L. 119-21, 132 Stat. 62, 142 § 5104(b) (July 4, 2025) provides that the Secretary "shall conduct not fewer than 4 lease sales area-wide" in the 10 years after the date of enactment. The struggle over promoting petroleum development there will likely continue indefinitely.

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[95] https://defendingthearcticrefuge.com/wp-content/uploads/2022/08/Clinton-budget-veto-message-1995.pdf.

[96] https://crsreports.congress.gov/product/pdf/IF/IF12006.

[97] This decision was challenged in court, and in late March 2025 the Alaska federal district court held that the cancellation was legally flawed and set it aside, remanding the matter to the Trump Administration. Alaska Industrial Development and Export Authority v. U.S. Department of the Interior; https://www.documentcloud.org/documents/25868907-dalaska-3-24-cv-00051-slg-95-0/; https://alaskabeacon.com/2025/03/25/alaska-wins-lawsuit-that-could-open-arctic-refuge-to-oil-exploration/.

C. Management of the National Petroleum Reserve Alaska (NPRA)

In 1923, as the Navy was shifting from coal to oil as a primary fuel, President Harding established by executive order a Naval Petroleum Reserve on 23.5 million acres of public lands in northwestern Alaska. In 1976 Congress renamed it the NPRA, transferred it from the Navy to the Interior Department, and directed the president to prepare a study to "determine the best overall procedures" for exploring, developing, and transporting its petroleum resources.[98] Congress explicitly sought to strike a balance between petroleum development and "protection of environmental, fish and wildlife, and historical or scenic values" by authorizing the Secretary to promulgate such rules and regulations that as "he deems necessary and appropriate for the protection of such values within the reserve."[99] The Conference Report on this legislation called on the Secretary to "take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve."[100] The legislation went on to direct that "[a]ny exploration within . . . areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values consistent with the requirements of this Act for the exploration of the reserve."[101]

Based on this authority, in 1977 the Interior Secretary designated several areas in the NPRA as having significant subsistence and other values requiring such special protection. These included the Teshekpuk Lake Special Area, created to protect migratory waterfowl and shorebirds, the Colville River Special Area, created to protect the arctic peregrine falcon, and the Utukok River Uplands Special Area, created to protect critical habitat for caribou of the Western Arctic Herd. The first two were enlarged in 1998, and a fourth special area was established in 2004.

Between 1944 and 1981, the U.S. government drilled and then abandoned about 137 exploratory oil and gas wells in the reserve. In 1980 Congress authorized "an expeditious program of competitive leasing of oil and gas" in the NPRA to include "such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on" the NPRA's surface resources.[102] BLM held annual lease sales in the early 1980s,

[98] Pub. L. 94-258, §105 (1976), codified at 42 U.S.C. § 6505(b).
[99] 42 U.S.C. § 6503(b).
[100] H.R. Conf. Rep. No. 94-942, p. __ (1976).
[101] 42 U.S.C. § 6504(a).
[102] 94 Stat. 2964.

then paused until 1999, when it held a lease sale on nearly 4 million acres in the northeast part of the NPRA. Subsequently, it held lease sales in both the northeast and the northwest parts of the NPRA. In 2003, a committee of the National Research Council published a report that urged caution, noting the permanent and irreversible environmental damages that petroleum development in the reserve could cause.[103]

In 2006, the Bush administration attempted to lease land in the habitat around Teshekpuk Lake, but a court ruled in favor of conservation groups who had sued to prevent the leases.[104] The litigation forced BLM to create a new plan for the entire reserve. The final record of decision for the entire region was signed by the Secretary in February 2013. All told, between 1999 and 2019, BLM offered almost 60 million acres in the NPRA for leasing. As of October 2012, nearly 1.4 million acres had been leased; some 870,000 in the Northeast region, and about half-million acres in the Northwest region.

The Trump I Administration approved a major development plan by ConocoPhillips, which held several leases in the area, for its so-called Willow Project, but the Alaska federal district court enjoined its implementation pending further study.[105]

In October 2023 the Biden Administration announced a new decision approving, with new more restrictive conditions, Conoco Phillips' Willow Project. The Alaska district court refused to enjoin its implementation.[106] At the same time, the Biden Administration also set in motion a rulemaking aimed at substantially restricting future petroleum development in the NPRA.[107] That rulemaking was completed in April and took effect on June 6, 2024. The details may be found here.[108] In January 2025, it released a new report on subsistence use protections in the NPRA.[109]

In March 2025 Interior Secretary Burgum announced his intent to make "up to 82%" of the Reserve "available to leasing" while also "expanding energy development

[103] National Research Council. *Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope*. Washington, D.C.: National Academies Press, 2003.
[104] Audubon Alaska v. Norton, https://www.nytimes.com/2006/09/26/washington/26alaska.html.
[105] Sovereign Inupiat for a Living Arctic v. BLM, 516 F. Supp. 3d 943 (D.Ak. 2021).
[106] Sovereign Inupiat for a Living Arctic v. BLM (Dec. 1, 2023).
[107] https://www.doi.gov/pressreleases/interior-department-substantially-reduces-scope-willow-project. See also https://eplanning.blm.gov/public_projects/109410/200258032/20075029/250081211/2023 Willow MDP Record of Decision.pdf. See also https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A
[108] https://www.blm.gov/about/laws-and-regulations/NPR-A-Rule.
[109] https://www.blm.gov/press-release/interior-department-takes-steps-protect-subsistence-western-arctic.

opportunities" there.[110] The One Big Beautiful Bill Act, Pub. L. 119-21, 132 Stat. 62, 143-44, § 5105 (July 4, 2025) directs the Secretary to "restore and resume" oil and gas leasing under Trump I FEIS from June 2020, and to "conduct not fewer than 5 sales" of at least 4 million acres each within 10 years after the Act's enactment.

Notes and Questions

Broadly speaking, the language in Congress's 1976 legislation quoted above sought to strike a balance between developing petroleum in the NPRA and protecting the various natural values found there. It also authorized the Interior Secretary to designate within the NPRA areas containing "any significant subsistence, recreational, fish and wildlife, or historical or scenic value." The Secretary has since done that. And it also instructed the Secretary to insure that "exploration" within such areas "shall be conducted in a manner which will assure the maximum protection of such surface values consistent with the requirements of this Act."

That "maximum protection" language might be compared with other statutes directing the Interior Department to protect public lands, such as the directive in FLPMA to prevent "unnecessary or undue degradation" of the public lands (43 U.S.C. §1632) and the provision in the 2009 legislation confirming BLM's National Landscape Conservation System that directs the Secretary to manage the system "in a manner that protects the values for which the components of the system were designated" (16 U.S.C. § 7202(c)).

Because that "maximum protection" language is limited to "exploration," suppose the Interior Secretary authorizes exploration, and it results in identifying commercially valuable deposits of petroleum. If the lessee then prepares a plan for developing these deposits and asks Interior to approve it, what standard should Interior apply in reviewing it to protect these other values?

[110] Interior Department Press Release, supra note 92, implementing the Trump "Unleashing" Executive Order, supra n. 12, §3(b)(ix),(x),(xii-xv).§§ 3(b)(i)-(vii), (xx).

PART VI: Comparing Native Land and Organization Issues in Alaska to Those Elsewhere in the United States

A. State-chartered Village and Regional Native Corporations versus Alaska Tribal Sovereign Entities

Professor (and former Interior Solicitor) Robert Anderson noted that "ANCSA was silent on the status of Native powers of self-government," and that the Supreme Court "would later interpret the silence as fatal to the treatment of Native corporation lands as Indian country."[111] That 1998 Court decision held that the lands transferred to Alaska Native Corporations under ANCSA were not "Indian country."[112]

As originally enacted, ANCSA forbade Native shareholders in the Native corporations from selling their stock for twenty years. In 1988, Congress changed this to prohibit the sale of stock unless the shareholders voted to amend their corporation's articles of incorporation to remove restrictions on stock sales. No Alaska Native corporations have done so to my knowledge.

Anderson summarized the status of the Native corporation model this way in his 2019 article:

> The major change [in ANCSA] came when the Native community persuaded Congress in 1988 to indefinitely extend the federal restrictions on the sale of corporate stock, which were set to expire in 1991. Congress explained in its findings that "Natives have differing opinions as to whether the Native Corporation, as originally structured by … [ANCSA], is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values." . . . [Although Congress has made some changes in stock holdings,] the basic structure of state-chartered corporate land-ownership under the federal scheme adopted by Congress in ANCSA remains intact. Native corporations are now authorized to issue new stock to Alaska Natives born after 1971, and many have done so, although apparently only in the form of life-estate stock. It thus appears that ANCSAs structure will remain intact.[113]

[111] Robert T. Anderson, The Katie John Litigation: A Continuing Search for Alaska Native Fishing Rights after ANCSA, 51 Ariz. State L.J. 845, 857 (2019).
[112] Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 534 (1998).
[113] Anderson, supra n. 112, at 859-60.

After Congress extinguished aboriginal title through ANCSA in 1971, most attention in the Native community was devoted to the complex task of establishing state-chartered Native corporations in order to select and receive the 45 million acres of land and billion dollars provided in the Settlement. The village corporations were largely operated by tribal government leaders who would thereafter wear at least two hats: governmental leader and corporate officer. Many tribal leaders and community members were critical of ANCSA's failure to protect Native subsistence practices on non-ANCSA lands and to acknowledge a tribal role in implementing Native affairs related to land and subsistence.[114] This led to a concerted push to affirm the sovereign status of Native tribes and a continued effort to assert and improve ANILCA's rural subsistence priority.

On the tribal status front, the Department of the Interior in 1993 confirmed and acknowledged the sovereignty of over 220 Alaska Native village governments.[115] In a landmark decision, the Alaska Supreme Court, relying on the 1993 list's preamble as well as subsequent congressional action, affirmed the governmental status and inherent powers of the listed tribes.[116] The listed tribes are distinct from the corporations created to implement ANCSA.[117] With the question of tribal status settled as to the exercise of inherent powers, the more vexing questions relate to the scope of their powers and their geographic reach.

In 2024 Anderson issued a Solicitor's Opinion (M-37079) that substantially reversed an Opinion of his predecessor (M-36975) to clarify that Alaska Native Villages could exercise governmental jurisdiction over some lands, including Alaska Native Allotments, and over non-members. The Opinion relied in part on the Violence Against Women Reauthorization Act of 2022, which recognizes and affirms "the inherent authority of any Indian tribe occupying a Village in [Alaska] to exercise criminal and civil jurisdiction over all Indians present in the Village" and also over

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[114] See Thomas Berger, Village Journey, fn. 33, supra p. 12.

[115] List of Federally Recognized Tribes, 58 Fed. Reg. 54364 (Oct. 21, 1993). See Cohen's Handbook, supra § 13.01[4][a], p. 866-67.

[116] John v. Baker, 982 P.2d 738 (Alaska 1999) (determining that a tribe had inherent authority over tribal members and thus could resolve a child custody dispute with a non-member of that tribe); Douglas Indian Association v. Central Council of Tlingit and Haida Indian Tribes of Alaska, 403 P.3d 1172, 1174–75 (Alaska 2017) (Alaska tribes have sovereign immunity).

[117] Confusingly, the Alaska Native Corporations have sometimes been identified as "tribes" by Congress to deliver services or administer appropriated funds pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5304(e). The Supreme Court in Yellen v. Confederated Tribes of the Chehalis Indian Reservation, 594 U.S. 338 (2021), ruled that Alaska Native Corporations were "Indian tribes" entitled to CARES Act Funds because the definition of tribe used in the statute to deliver covid relief funds included Native corporations as well as tribal governments.

non-Indians in some circumstances.[118] Promptly after the National Indian Gaming Commission approved a Class II Indian gaming ordinance for the Native Village of Eklutna, it was challenged in federal court, and the Governor of Alaska asked that the Anderson Solicitor's Opinion be withdrawn. Two lawsuits were also filed – one was dismissed on based on tribal sovereign immunity, while the State of Alaska's suit challenging the Department's action remains pending.

Notes and Questions[119]

1. The complexities of land ownership and regulatory authority where Native Alaskans are involved can be dizzying, and of course this can make the politics of Native issues in relation to lands very complicated. The 200 plus villages that were formed pursuant to ANCA also are home to tribal governments, and some of the villages also have established (mostly in the 1970s & 80s) state-chartered municipalities. Moreover, borough (akin to counties) governments extend over the most populated areas of the state, with most of the rural areas located in what is known as the "unorganized borough." One of the wealthiest governments in Alaska is the North Slope Borough, which was established in the 1970s and taxes the value of the oil transported through the Trans-Alaska Pipeline. See *Mobil Oil Co. v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974).

2. As we have seen, Title VIII of ANILCA regulates subsistence uses on federal public lands. The State has jurisdiction over all land, including Native corporation land, unless otherwise preempted by federal law. Native corporation lands are neither public lands nor are they considered Indian country subject to tribal jurisdiction. Native allotments (parcels held by individual Natives under the 1906 Native Allotment Act, see p. 10, supra) are Indian country under federal law. See 18 U.S.C. § 1151(c) and the Anderson Opinion. So, can tribes assert jurisdiction over allotments to the exclusion of the State? Could a tribe and Native corporation agree to tribal jurisdiction over the corporation lands? Could a federal agency with adjacent land join the agreement and share management with the tribe in order have a geographically cohesive management regime?

3. Estimates of the amount of land held by Native Regional versus Native Village Corporations vary; one from 2000 estimates that the former own 26 million acres,

[118] 25 U.S.C. § 1305(a) & (d).

[119] The law firm Landye Bennett Blumstein maintains a website compiling useful information about ANCSA, found here, https://ancsa.lbblawyers.com/gao-13-121.

and the latter 16 million acres.[120] Regional corporations own the subsurface to all Village corporation land. State law applies to these lands, but ANILCA has "land bank" provisions (amended in 1988 by Pub. L. 100-241 § 11) that exempt undeveloped or unleased Native corporation land from state or local real property taxation, adverse possession, or loss through bankruptcy proceedings. 43 U.S.C. § 1636(d). Some Native village corporations have transferred their surface ownership to the local tribal government because they prefer to operate under a tribal model. What happens to the land bank protections when that is done?

4. Some of the most contentious litigation arose from section 7(i) of ANCSA, 43 U.S.C. § 16106(i), which provides that "70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it . . . shall be divided annually" among all twelve Regional Corporations according to the number of Natives enrolled in each region. Administration of this section immediately became embroiled in litigation over the scope of resources covered and relations between the Village and Regional corporations.[121] Over $2 billion was shared between 1982 and 2016, so there was much to fight about. In Bay View, Inc. v. United States, 278 F.3d 1259 (Fed. Cir. 2001), the court ruled that Congress's exclusion of certain resources (net operating losses) from distribution under 7(i) was not an unconstitutional taking, and that the federal government does not have a trust responsibility to ANCSA corporations.

5. There can be further complications. In addition to the village and regional corporations and 220 plus tribes, Alaska Natives since the early land claims battles of the 1960s relied on non-profit associations formed by the tribes in villages to consolidate service delivery. These non-profits also may exercise delegated authorities on behalf of the tribes. A recent dispute involved the Copper River Native Association (CRNA). The facts of the dispute reveal the complex (but effective) manner which Alaska Native organizations have made use of various tools to serve their people and also provides some insight into the life of Alaska Native communities.

> Ahtna' T'Aene Nene', known in English as Copper River Native Association (CRNA), is a tribal organization formed as an Alaska nonprofit corporation in 1972. CRNA's articles of incorporation explain that it "is the historic

[120]https://www.nrcs.usda.gov/sites/default/files/2022-10/Land%20Ownership%20in%20Alaska%20-%20Fact%20Sheet.pdf.

[121] See Aaron M. Schutt, *ANCSA Section 7(I): $40 Million Per Word and Counting*, 33 Alaska L. Rev. 229, 230-31 (2016).

successor of the Chief's Conference whose name is lost in antiquity, the traditional consultative and governing assembly of the Athabascan people of the Copper River Region from time immemorial." The articles also express an intent that CRNA "have all the rights, duties, powers, and privileges of this historic assembly."

CRNA's members are federally recognized tribes within the region. At the inception of this case the member tribes included the Native Village of Kluti-Kaah, the Native Village of Tazlina, the Gulkana Village Council, the Native Village of Gakona, and the Native Village of Cantwell. Each member tribe's council elects a representative to CRNA's board of directors. Directors and officers must be Alaska Natives, be enrolled in a member tribe, and physically reside in the region.

CRNA is an "inter-tribal consortium" under the Indian Self-Determination and Education Assistance Act (ISDEAA). It provides a variety of services on behalf of the federally recognized tribes that comprise it. According to the chair of CRNA's board of directors, the member tribes each "passed Tribal government resolutions authorizing CRNA to receive the Tribe's federal health care funds and provide health care services to their Tribal members." Many of these services are funded through the Alaska Tribal Health Compact, a self-governance compact authorized by ISDEAA between the federal government and certain Alaska Native tribes or tribal organizations acting on their behalf, including CRNA. Funds distributed under the compact provide a substantial portion of CRNA's budget. Pursuant to one such agreement, CRNA established a "Senior Citizens' Program" to provide elders in CRNA's area with "nutrition services, ... shopping assistance, passenger assistance, transportation, outreach and advocacy, information, and referral services."

Yvonne Ito was hired by CRNA as the Senior Services Program Director in January 2018. CRNA terminated Ito's employment in May 2019. Ito then sued CRNA, bringing a single claim of breach of the implied covenant of good faith and fair dealing in her employment contract. CRNA moved to dismiss her complaint under Alaska Civil Rule 12(b)(1), arguing the court lacked subject matter jurisdiction because CRNA was entitled to tribal sovereign immunity under 25 U.S.C. § 5381(b), the rights-and-responsibilities provision of ISDEAA, and as an arm of its member tribes. [The court determined that CRNA was an arm of the tribe and immune from suit.]

Ito v. Copper River Native Association, 547 P.3d 1003, 1007–08 (Alaska 2024). The court held that the Association was entitled to sovereign immunity.

Each of the twelve Native regions in Alaska has a similar non-profit entity that provides economies of scale to carry out various services and functions for the tribes in the respective regions. The ANCSA regional corporations were formed based on the geographic areas served by twelve existing Native associations identified in ANCSA. 16 U.S.C. § 1606(a). Those associations, in turn, had been formed at the direction of the members of the individual tribes in the villages. Given their role in advocating for the settlement of land claims in the 1960s, it's not surprising that the non-profits also carry out important advocacy functions reflective of the tribal communities' priorities in each region.

6. ANCSA provided that 100 shares of stock in a village corporation and 100 shares in a corresponding regional corporation would be issued to all Alaska Natives alive on the date of enactment, December 18, 1971. Subject to limited transfers allowed by law, 43 U.S. C. § 1606, Native corporation stock remains in the control of the Native community. Consider two possibilities: (1) a Native corporation removes the restrictions, and the stock becomes available on the open market; or (2) the original shares remain restricted per the status quo.

In the first scenario, individual shareholders could off to sell their stock, or a wealthy entity could attempt to purchase enough stock to take over control of the corporation. That possibility was the primary motivation for amendments indefinitely extending the restrictions. In the second scenario, the original stock will continue to pass on descendants of Natives through devise or intestate succession. In either case, an increasing number of individuals will own small portions of the original shares. What will that mean for corporate control and governance? ANCSA's amendments allow corporations to issue additional stock that carries limitations, e.g., it can be life estate stock with no voting rights, but allow participation in revenue sharing. Native corporations are very adept at crafting legislative solutions to provide options for more individuals to participate in corporate benefits while maintaining their essential character as Native institutions.

PART VII: Conclusion

The discussion in Parts II-VI above raises a number of important issues about the protection of public lands in Alaska that are of immediate relevance. As of this writing, the state, the Trump II Administration and developers (like petroleum,

hardrock mining, logging and related interests) all seem to be on the same page. But some of the items on their agenda are in or will face litigation, with uncertain outcomes in court.

These interests could seek from the current Congress greater certainty for their desired developments to advance. Their congressional wish list[122] could include items like the following:

> --- Subsidies and legislative approval of a right of way across public land to allow timely construction of the natural gas pipeline from the North Slope to the Cook Inlet or somewhere else in southern Alaska where it would be liquified and shipped to Asia, before Asian demand for such gas dries up as the energy transition proceeds.
>
> --- Fixes to allow Conoco-Phillips' Willow project and other petroleum developments in the NPRA to move forward, and also the Ambler Road to open up the southern Brooks Range to hardrock mining.
>
> --- Fixes for the Izembek road, and for ending Forest Service roadless area protections and D1 withdrawals.

The current state of affairs puts most Native Alaskans and public land protection advocates on the defensive, but they could be expected to oppose such legislative fixes. Also to be considered in this mix is the evolving legal and political status of Alaska Natives since 1980 which, among other things, has produced some tensions between Native corporations and Native sovereigns. Should political winds shift, the wish list of actions by Congress or the executive for congressional action desired by public land protection advocates and their allies could include things like:

> --- amending Title VIII of ANILCA to strengthen subsistence protections, including reversing *Sturgeon*'s holding limiting its application in navigable waters, and clarifying that ANILCA has only two purposes: conservation and protecting rural subsistence opportunities.

[122] In a January 2016 letter to Alaska Senator Lisa Murkowski, then Chair of the Senate Energy & Natural Resources Committee, the Resource Development Council for Alaska, representing the perspective of the petroleum, mining, forestry and related industries, assembled a rather lengthy list of what it called "suggestions for improvements" to ANILCA. https://www.akrdc.org/anilca-comments.

--- expanding or designating new Conservation System Units on public lands, including in the NPRA in northwestern Alaska, and clarifying that the "no more" clause does not restrict executive authority.

--- amending ANILCA to eliminate the argument made by Izembek road proponents that land exchanges involving CSUs need not follow the process outlined in Title XI.

Congress could also address whether other adjustments in pertinent laws are needed in light of changing conditions in the 45 years since ANILCA was enacted, the biggest change being the rapid Arctic warming. Among its many effects are undermining ANILCA's protections as permafrost melt and other effects threaten biodiversity in ways not previously contemplated, and open up much more of the Alaska coastal areas to development as ice disappears from the Arctic Ocean, making transpolar shipping more commercially viable, and thereby making large parts of Alaska much more available for commercial enterprises.

Given all this, it is easy to predict that the next few years will not be dull insofar as protecting Alaska public lands is concerned.[123]

[123] Leshy, "The Cloudy Future of Alaska's Magnificent Public Lands" (A.B.A. Sec. of Env't, Energy, & Res., Nat. Res. & Env't Vol. 40, No. 3, forthcoming Winter 2026), makes a case that, because of their stupendous scale and breathtakingly gorgeous, largely intact natural features, protecting Alaska public lands ought to command much more national attention.