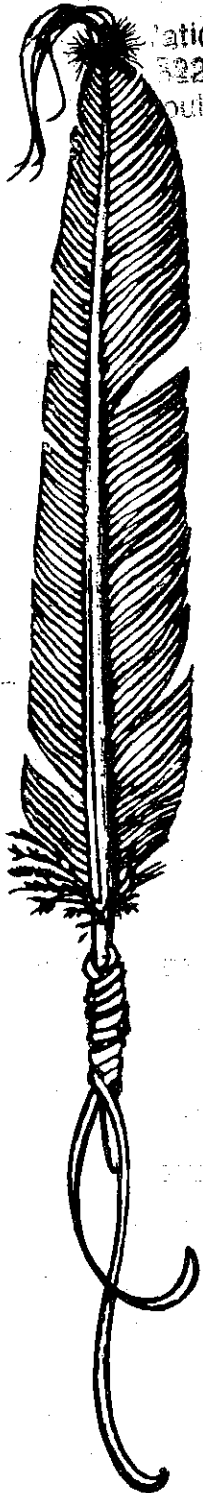


NARF

HIGHLIGHTS

Native American Rights Fund

Summer 1986



National Indian Law Library
522 Broadway
Boulder, CO 80302

Alaska Native Tribes Battle Discrimination

Bob Anderson and
Lare Aschenbrenner
NARF Staff Attorneys

From the purchase of Alaska in 1867 to the Alaska Native Claims Settlement Act (ANCSA) in 1971, Federal officials have generally taken the position that Alaska Native tribes have the same legal status as tribes in the lower 48. Since 1971, however, the Interior Department has waffled on this issue and occasionally argued that ANCSA impliedly extinguished at least some tribal rights.

The position of the State on the other hand has been perfectly clear. The State maintains that aside from the Metlakatla Tribe, there are no "tribes" in Alaska and that even if there were, their governmental power was extinguished by ANCSA. As a result, for the past 26 years the governmental authority of Alaska tribes has been challenged at every turn and they have been the constant subjects of discrimination and oppression.

Alaska Natives are demanding that their inherent rights be recognized and respected. This battle to achieve equality with their sister tribes to the South is now being renewed in Washington as Congress considers amendments to ANCSA before the Native protections in it expire on December 18, 1991. At the same time, overly restrictive regulations which deny Native subsistence rights are being battled in the courts.

**Standing
Firm for
Justice**

The Alaska Native Claims Settlement Act was passed in 1971 to settle the aboriginal claims of Alaska's Aleuts, Eskimos and Indians. Federal law recognizes the right of Native people to use and occupy traditional areas free of outside interference until their aboriginal title has been extinguished. By the late 1960's Native land claims had clouded the title to most of Alaska and created a barrier to the development of oil on the North Slope. ANCSA settled these claims and removed that barrier.

ANCSA was fundamentally different from earlier Native land claim settlements in several respects. It established a complex landholding system with title vested in Native corporations rather than tribes. The lands of these corporations are not held in trust by the federal government nor protected against alienation as are tribal lands in the lower 48. Rather, over 200 Native corporations created by ANCSA obtained unrestricted title to the lands they received. Aboriginal hunting and fishing rights, which are generally protected by treaty in the lower 48, were extinguished by ANCSA, but with the expectation that the State of Alaska and Secretary of Interior would protect the subsistence needs of Natives. With respect to the 200 Native tribes whose land claims were being settled, ANCSA is strangely silent.

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Photography:
© James H. Barker

The 15 years which have passed since ANCSA was adopted have provided sufficient time to evaluate its effects on the three great concerns of Alaska Natives—land protection, subsistence and tribal self-government.

The Danger to Native Land Ownership

The danger to continued Native land ownership has arisen because of the unique terms of ANCSA. Although ANCSA settled the aboriginal land claims of Alaska Native tribes, the 44 million acres received in the settlement were not placed in tribal ownership. Rather, they were transferred to the newly created corporations with the stock held by individual Natives who were alive on December 18, 1971. To protect Native ownership during an interim period, sale of stock was prohibited for 20 years, during which time all undeveloped land was also immune from taxation. On December 18, 1991, however, the shares become freely transferrable and shortly thereafter all land becomes subject to taxation.

Thus, after 1991 Native Corporations and their land will be in jeopardy of being taken over by non-Native interests. Further, unlike tribal lands in the lower 48, lands acquired by Native corporations under ANCSA are presently subject to loss through judicial sale for bad debts, adverse possession and condemnation, and developed lands are presently subject to taxes and therefore in danger of loss through tax foreclosure. In addition, Native stock is presently being lost to non-Native ownership through inheritance and court decrees in divorce and child support proceedings.

NARF HIGHLIGHTS

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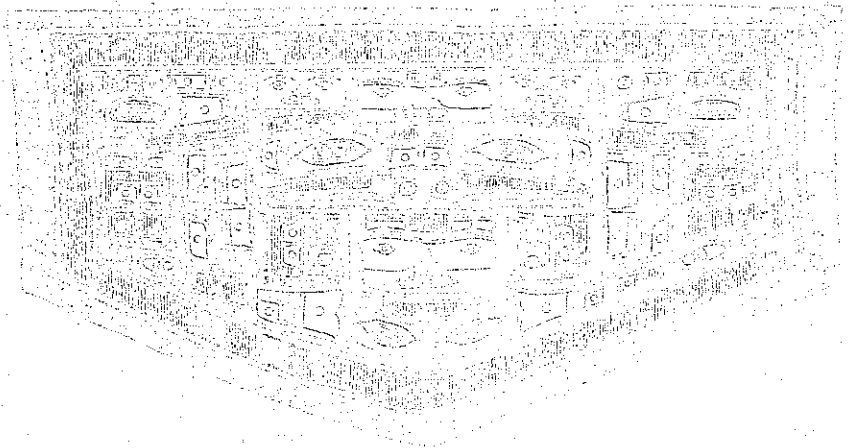


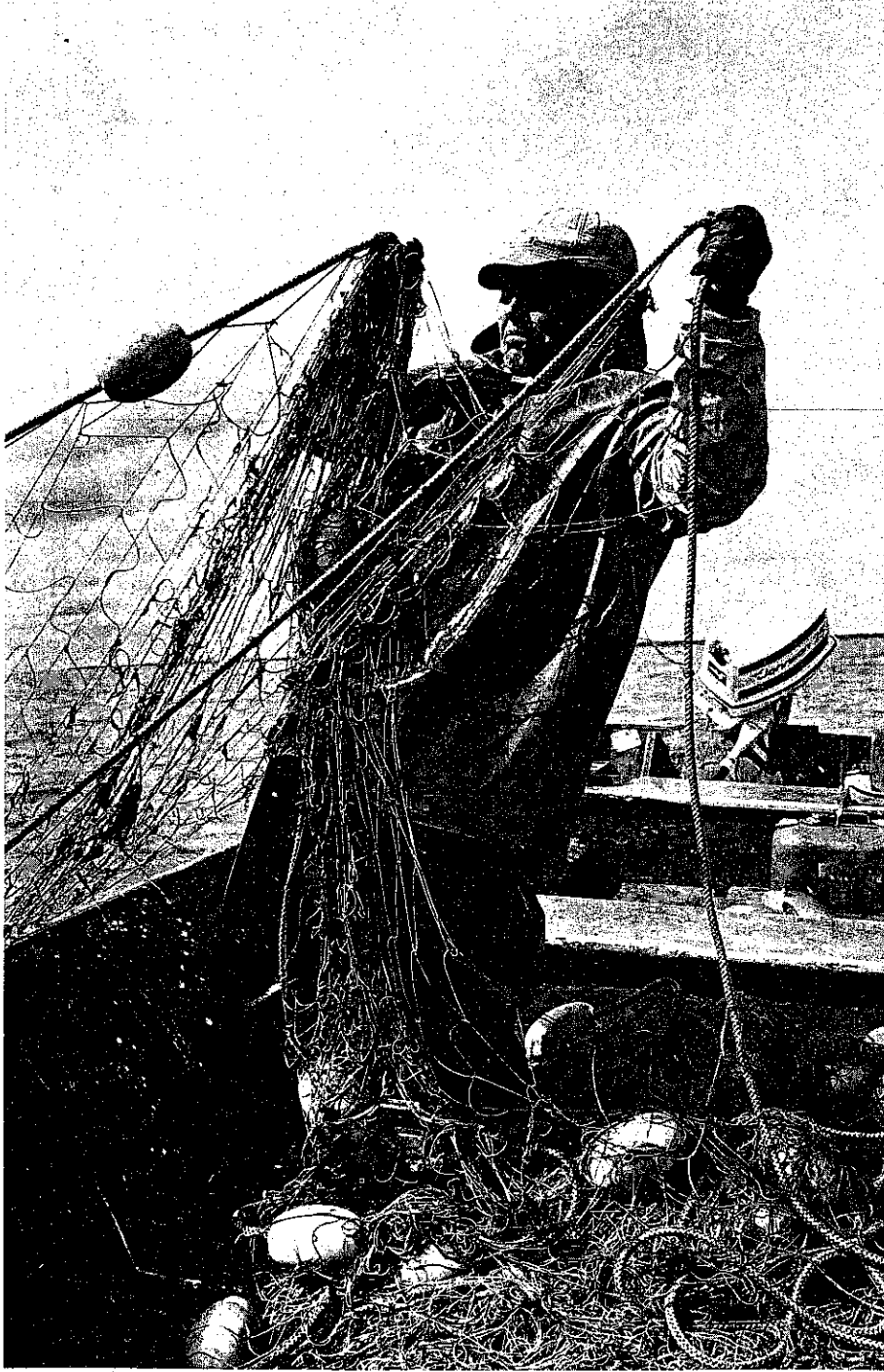
Returning home from a successful seal hunt Tununak, Alaska

The Danger to Tribal Self-Government

The uncertainty regarding Native powers of self-government has arisen from the state's position that aside from Metlakatla, there are no "tribes" in Alaska and the Department of the Interior's failure to fulfill its trust responsibility to protect tribal self-government in the Bush. The State contends that there never were tribes that exercised powers of self-government similar to tribes in the lower 48, and that even if there were, ANCSA impliedly terminated them. Further, the State argues that even if tribal powers

were not extinguished by ANCSA they can not be exercised because, aside from the Metlakatla's Reservation, there is no "Indian Country" and therefore no territorial jurisdiction within which to exercise them. The State admits that there are some 200 Native "entities" out in the Bush that may call themselves tribes and even act like tribes. According to the State, however, they are nothing more than social clubs with membership based on race and utterly lacking in governmental powers—with the sole exception of rights granted by the Indian Child Welfare Act of 1978.





Charles Hanson fishing on the Yukon Alakanuk, Alaska

The Danger to Native Subsistence Rights

Arbitrary regulatory restrictions which deny Native customary rights to hunt, fish and trap are the direct result of the failure of both the state and federal governments to enforce Native subsistence rights under the Alaska National Interests Land Conservation Act (ANILCA) of 1980. At the same time, these governments refuse to acknowledge the authority of Alaska Native tribes to regulate and protect subsistence harvests within their territorial jurisdictions.

For Alaska Natives, the subsistence activities of hunting, fishing and trapping are not just economic necessities, they are a way of life. The activities associated with subsistence—learning the necessary skills, preparing the equipment, hunting, fishing, preparing what is caught or taken, sharing the take with others—are so much a part of their lives that they use them to define themselves.

Despite their central role in Native life, ANILCA extinguished aboriginal hunting and fishing rights. Congress expected that the State of Alaska and the Department of Interior would assure that Natives could continue their subsistence way of life. Neither the State nor Interior lived up to this expectation. In recognition of this failure, in 1980 Congress passed ANILCA which gave rural Alaskans (primarily Natives) priority rights to hunt and fish for subsistence purposes. Thus, ANILCA partially restored the subsistence rights which ANILCA extinguished. The State and federal governments, however, have failed to enforce the subsistence priority of ANILCA. The state's failure is due primarily to its innate hostility to Native subsistence rights and obvious preference for sport and commercial interests. The federal government's failure is inexplicable as well as inexcusable.

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The State fights Native efforts to exercise their powers of self-government every step of the way, on every conceivable issue and in every available forum. Thus, the usual and ordinary powers of tribal government, which are taken for granted in the lower 48, and hotly contested in Alaska. The issues include, for example, whether tribes can establish

courts, pass zoning ordinances, issue adoption decrees, tax, regulate hunting and fishing, etc. Meanwhile, the Department of the Interior stands blithely aside, refusing to take a stand on any of these issues thereby violating the express policy of the Administration to support tribal self-government, not to mention its trust responsibility to Alaska Natives.



Bringing in firewood Bethel, Alaska

Proposed Amendments Provide Limited Protections

At the request of the Alaska Federation of Natives (the statewide Native organization primarily representing Native corporations), nearly identical bills have been introduced this year in each house of Congress to amend ANCSA, H.R. 4162 and S. 2065. Although subsistence is not addressed in either Bill, they do provide essential but limited protection against several of the dangers to continued Native land ownership.

The key provision of the proposed legislation is the section which provides that corporate lands may be transferred freely to a "qualified transferee entity" upon a vote of the shareholders. The primary purpose of this section is to authorize the transfer of corporate assets to tribal governments, but nowhere is the term "tribe" used. As we have seen, the State main-

tains that there are no "tribes" in Alaska. The express authority to transfer corporation lands to Native "tribes" would provide the ultimate protection to Native ownership, provided that the tribal status of Alaska Native tribes was clarified and confirmed. Tribally owned land would be protected for two reasons. First, sovereign immunity would prevent lawsuits against tribes unless they had clearly consented to be sued. Second, the Indian Nonintercourse Act, 25 U.S.C. 177, precludes the transfer of tribal land absent the express consent of Congress. Pending bills must be amended to make clear that Alaska Native "tribes" are the intended recipients of corporate lands so that they will have these two substantial protections.

Another major complaint with the ANCSA scheme is that children born after December 18, 1971 received no stock and thus have been

essentially left out of the settlement, even though they are members of the tribes on whose claims the settlement was based. Transfer of corporate land to "tribes" would not only protect it perpetually, but allow for participation by all tribal members no matter when born.

The Tribal Legislative Package

The Alaska Native Coalition, comprised of Native governments from throughout the state, has recently developed its own legislative package. It would strengthen the land protections in the pending bills and basically put Alaska Native tribes on a par with tribes in the lower 48. First and foremost, this legislation confirms the tribal status and governmental powers of Alaska Native tribes. This nullifies the State's contention to the contrary and insures that lands transferred from Native corporations to

Native tribes would have the same protection as lands owned by Indian tribes elsewhere in the United States. This means that such lands would be covered by the Indian Nonintercourse Act and protected by tribal sovereign immunity. Accordingly, such land could not be lost through improvident sales, tax foreclosures, judicial sales for bad debts, inheritance, divorce or child custody decrees, adverse possession or condemnation. In short, tribal land ownership could not be lost by any means whatsoever—voluntary or involuntary—except through an Act of Congress.

The legislative package of the tribes also defines the territorial jurisdiction of Alaska tribes. The area over which Indian tribes may exercise their governmental powers is called "Indian Country." Indian Country as defined in 18 U.S.C. 1151, includes Indian Reservations, Allotments and Dependent Indian Communities. The boundaries of the reservation of the Metlakatla Tribe—the only reservation in Alaska—may be readily ascertained, along with the locations of the 14,000-plus Native Allotments. The boundaries of dependent Indian communities in Alaska have not, however, been located. Indeed, their very existence is disputed, albeit erroneously, by the state.

The tribal proposal confirms the existence of "Indian Country" in Alaska and defines the territorial boundaries of "dependent Indian communities." It ties a "dependent Indian community" to the "traditional tribal boundaries" of all Alaska Native villages entitled to lands under various provisions of ANCSA and specifically confirms that lands surrounding the villages are in fact Indian Country.

NARF attorneys in Alaska and Washington, D.C. along with other tribal advocates have played a major role in assisting the Alaska Native Coalition develop its legislative proposals, and are now engaged in the critical lobbying effort in Congress.

Litigation

While the proposed legislation could resolve issues of greatest concern for Alaska Natives, litigation is also pending which may render the need for some provisions of the proposed legislation unnecessary. NARF is now assisting several villages in litigation on major issues and other cases are being prepared.

John v. State is a NARF case which charges the state with failing to afford two upper Ahtna Athabaskan women their subsistence fishing priority rights under federal law. The plaintiffs, aged 70 and 83, were born and raised at the small village of Batzulnetas on the upper Copper River where fishing was the mainstay of their people's traditional and customary means of support. Shortly after its admission to the Union in 1959, the State closed the upper Copper to fishing. Since then the plaintiffs and their people have been barred from fishing at Batzulnetas despite the fact that downstream users are permitted to take millions of salmon for sport and commercial purposes. The State denies that barring our clients from their traditional fishing site offends their subsistence priority. The complaint asserts that Native subsistence has priority and thus subsistence fishing may only be restricted after downstream commercial and sports users are suspended, and then only if it is necessary to conserve the resource.

Akiachak v. Notti is a NARF case which squarely presents the question of the legal status of Alaska Native tribes. Specifically, it challenges the State's contention that there are no federally recognized tribes in Alaska; that even if there are ANCSA impliedly extinguished their governmental power; that Alaska tribes are racial rather than political institutions; and that it would violate the state and federal constitutions for the State to aid or deal with such tribes on a government-to-government basis. On March 3, 1986 the Federal District Court in Anchorage issued a preliminary injunction in favor of the Native Village of Akiachak—holding that "Native village councils . . . are beyond any question federally recognized quasi-governmental entities." A final ruling on all these issues is expected this summer.

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In another positive development, the Alaska Legal Services Corporation (ALSC) has become a powerful advocate for Native rights. On behalf of coastal Native villages heavily dependent on marine mammals for subsistence, ALSC has obtained federal court injunctions against oil lease sales until their effect on subsistence is determined. ALSC also represents Alaska Natives who have had their federally guaranteed subsistence rights blatantly violated by state and federal officials in cases involving the customary taking of moose and sheep. It also represents a village government in southeast Alaska in a major case involving the critical "Indian Country" issue. NARF has worked closely with ALSC and other tribal advocates on subsistence and other vital Native rights issues.

Conclusion

It is no exaggeration to say that the state of Indian law in Alaska is over 100 years behind the lower 48. For the last 26 years the rights of Alaska Native governments have been continuously violated and denied by the state. Although disappointing, this is not surprising. From *Worcester v. Georgia* to *U.S. v. Washington*, history is replete with notorious examples of state violations of Native rights. Alaska is just the latest chapter. Indeed, the United States Supreme Court's observation in 1886 in *United States v. Kagama* that "the people of the State where [Natives] are found are often their deadliest enemies" rings particularly true in certain quarters of the 49th state. NARF is committed to assisting Alaska Native tribes in ending these years of oppression. This will not happen this year nor perhaps in this century but justice will prevail. As the great Felix Cohen put it, "when . . . we fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for what Las Casas and Vitoria and Pope Paul III called the integrity of salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth."

(The following profiles of two members of NARF's Board of Directors from Alaska was excerpted from the Boulder DAILY CAMERA, Nov. 4, 1985. The section is part of a newspiece about NARF's activities in Alaska by CAMERA staffwriter, Gab Y. Huey.)

Alaska Natives see way of life change

By GAH Y. HUEY
Camera Staff Writer

Both men exhibit quiet, contemplative demeanors. Ask them about life in Alaska and what they hope for Alaska Natives, and their expressions change. An occasional smile appears. Caleb Pungowiyi and Chris E. McNeil Jr., both Alaska Natives, talk freely about their experiences and goals for their changing world.

Pungowiyi, an Inupiat, and McNeil, a Tlingit, were in Boulder last week for the semi-annual meeting of



Chris McNeil



Caleb Pungowiyi

Daily Camera

the Native American Rights Fund's 13-member Steering Committee.

Pungowiyi was elected to the committee last February, while McNeil serves as chairman.

Pungowiyi, 43, lives in Nome, in the northwestern part of Alaska with his wife Mina, 35, and two daughters.

Pungowiyi describes his village of 3,200 people as a "metropolitan town" compared to most villages, which have a population of 100 to 900.

The president of Kawerak Inc., a non-profit organization which administers a variety of educational and developmental programs and services, lives a subsistence lifestyle much like his ancestors.

A majority of Alaska Natives within the Bering Strait still hunt and gather for food and supplies, he said.

"Your grocery store is nature," he said.

Although Alaska Natives still live a subsistence lifestyle, modern technology also has crept in, Pungowiyi noted.

"We're entering the 20th century at a very fast pace," he said, and many

homes have conveniences like electricity, fuel, heat and modern furnishings.

But modern technology also brings problems, he said. "At the same time, we run into the problems of maintenance and the need to have the money to buy gasoline and fuel oil."

McNeil, 37, was born in Juneau, Alaska, the son of an Alaska Tlingit and a Canadian Nishga fisherman.

He is the general counsel and one of five vice presidents of Sealaska Corp., a Fortune 750 timber and fishing enterprise that is one of the 13 Native-owned corporations created under the 1971 Settlement Act.

McNeil has lived in Seattle, Wash., for two years now with his wife Mary, 35, a Winnebago from Nebraska, and one son and daughter.

He describes his former home as an urban city with a population of 25,000 that is oriented toward commercial fishing.

McNeil was named in December by Esquire Magazine in its 1984 Register of "The Best of the New Generation: Men and Women Under Forty Who are Changing America."

"Alaska Native peoples vary tremendously in their viewpoints on many issues. However, for all of them—like Native American people in the rest of the United States—it is vital that the powers of tribal self-government be upheld and that Native land is protected. It is critical that they have excellent representation on these complex matters having major impact on their lives and their futures, both for themselves and their children."

Chris McNeil, Jr. (Tlingit)
May, 1986

Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

NARF's attorney staff of 16 currently represents almost 70 Native American tribal communities and villages in 26 states. In addition to the national headquarters in Boulder, Colorado and an office in Washington, D.C., NARF has recently established an Anchorage, Alaska office. That two-attorney staff office specifically handles issues of concern to Alaska Native Villages and subsistence people.

The Native American Rights Fund's \$3 million annual budget is supported by tax deductible contributions as well as private and federal grants. To a large extent, we rely on a broadly-based national donor base for core support of our program. Please contribute today so that our presence is assured on behalf of the urgent needs of Native Americans throughout the United States. \$10 donors are mailed the quarterly newsletter at no charge.

For further information regarding legal assistance, contributions, or other inquiries contact: Information, c/o NARF, 1506 Broadway, Boulder, Colorado 80302; Phone (303) 447-8760.

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