

# Subsistence defies easy, quick answers

by Robert E. Price  
for the Tundra Times

There has been considerable comment in the *Tundra Times* as well as in other newspapers on the subsistence issue, and I offer to your readers several observations on that issue based on 20 years of experience as an adviser on Alaska Native law to the federal and state governments.

## OPINION

The perspective of the Alaska Natives on the subsistence issue should be the Alaska Natives. You have a history of several thousand years of subsistence in Alaska. This history has been the basis of which you shaped your culture.

There should be no one who has a greater right to subsistence than yourselves. This does not mean, however, that you should reject coalitions with non-Natives who also rely upon subsistence if that is a necessary political consideration. However, these non-Natives should be their own spokesmen for their subsistence rights.

The question of subsistence was disregarded by Congress when it passed the Alaska Native Claims Settlement Act in 1971. This was a mistake. The usual practice in federal Indian settlements, whether by treaty or statute, is the preservation of hunting and fishing rights of the Indian.

The Alaska Native leaders at the time did not appreciate the dangers inherent in ANCSA. There was an undue emphasis on business corporations and money in ANCSA. The continual concern to Alaska Natives since 1971 has been one more amendment to ANCSA to correct this problem.

Of course, this is hindsight, and I do not intend any criticism of Alaska Native leaders of that era. It is unfortunate that there were not other Alaska Native spokesmen at the time who would have argued for a more traditional settlement.

One of the reasons for the singular provisions of ANCSA was the hurry for the settlement by the oil industry in its haste to build the oil pipeline. There was no real opportunity for Alaska Natives in the villages to discuss the settlement.

It is impossible to imagine an Alaska Native village relinquishing its subsistence rights in exchange for rights over land and money. The real value of the land to the village is the basis it provides for a subsistence economy.

It is precisely this rush to settlement on the subsistence issue which you should avoid at the present time. It is better to endure a situation which may be unsatisfactory for a short time than to pursue a solution which may not bear the test of time.

The McDowell decision points out one of the main problems with the subsistence provisions of the Alaska National Interest Lands Conservation Act. The hunting and fishing rights of American Indians are federal rights. I know of no other group of American Indians that has state hunting and fishing rights, whether in the phraseology of rural residents or something else.

A state has no legal authority on such Indian matters unless this is authorized by Congress. The problem with subsistence rights in ANILCA is the same as the other problems in ANCSA. There was a departure from traditional solutions of American In-

dian problems. The McDowell decision was not a racist decision of the Alaska Supreme Court, but a decision of a state court which was unable to justify an awkward solution to an American Indian problem in terms of customary principles of state and federal jurisprudence.

The subsistence provisions of ANILCA are defective in a number of respects and need correction in any event if there is to be a federal guarantee of your subsistence rights. Congress never appropriated enough money to make the administrative system function properly. There was not enough federal oversight of state implementation of ANILCA.

The terminology of the law is vague. The state and federal governments have not even been able to agree on the basic definition of "rural residents."

There is a legal question whether ANILCA even applies to navigable waters, which are above state submerged lands. This means that such fish as salmon, the main basis of subsistence for many villages, may not even be covered by ANILCA. The provisions for federal management of fish and wildlife in the event of state noncompliance with ANILCA provisions are also vague.

The resolution of the subsistence

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issue in a way satisfactory to you requires an amendment by Congress to ANILCA. This does not mean that an amendment to the Alaska Constitution is not also necessary. ANILCA required laws by both Congress and the Alaska Legislature, and any amendments to ANILCA may require a similar approach.

There are other options available to you which I have not yet read about in articles about proposed legislation. For example, have you considered subsistence rights which would be held by villages rather than by individuals? The villages would then determine their own subsistence needs as well as the participants in the subsistence harvest.

Villages could authorize non-Natives to hunt and fish for subsistence. This would preclude the "rural resident" solution of ANILCA. Annual quotas could be set by governmental boards in which there is representation of the villages.

This would be similar to the Alaska Eskimo Whaling Commission. A village approach would conform itself to the present subsistence practice in most villages. The village approach to Alaska rural government is described in more detail by Thomas Morehouse in a 1989 publication by the Institute of Social and Economic Research with the title *Rebuilding the Political Economies of Alaska Native Villages*.

In conclusion, Alaska Natives were confronted with the same situation that they confronted in 1971 with ANCSA, but which they did not resolve at that time. It will take the time and effort of the Alaska Natives themselves at this time to resolve the issue.

*Robert E. Price is a consultant to the state on Alaska Native law issues. He was employed as an attorney with the state Department of Law from 1967-71 and 1981-85 and was the regional solicitor in Alaska for the Department of the Interior from 1971-75.*