

**A dissertation submitted to the Department of Environmental Sciences and Policy of
Central European University in partial fulfillment of the
Degree of Doctor of Philosophy**

**Fate Control and Human Rights:
Land, Governance and Wellbeing in America's Arctic**

**Mara KIMMEL
December, 2015**

Budapest

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A handwritten signature in black ink, reading "Mara Kimmel". The script is cursive and fluid, with the first name "Mara" and last name "Kimmel" clearly distinguishable.

Mara KIMMEL

THE CENTRAL EUROPEAN UNIVERSITY

ABSTRACT OF DISSERTATION submitted by: Mara KIMMEL
for the degree of Doctor of Philosophy and entitled: Fate Control and Human Rights:
Land, Governance and Wellbeing in America's Arctic.

December, 2015

Alaska Native tribes lack territorial authority over lands transferred under the 1971 Alaska Native Claims Settlement Act. The loss of territoriality means that indigenous governments face unique obstacles to self-governance that do not affect other local governments in Alaska or indigenous tribes in the continental United States. This dissertation relies on archival and legal research to analyze how these obstacles developed. Using legal and interpretative policy analysis, this research reveals four specific impacts that occur when local governments lose the authority to govern the lands and resources upon which their communities depend. First, governments lose the capacity to govern for their community's food security. Second, Alaska tribes cannot seek to regulate environmental quality. Third, Alaska tribal governments are unable to create policies that promote resilience to climate change. Finally, the capacity for tribal governments to protect public safety is restricted because of the lack of territorial authority. These losses create obstacles to the capacity of tribal communities to govern for the wellbeing of their community that are compounded by complex systems of state and federal governance. These obstacles hinder the ability of Alaska Native tribes to exercise the right of self-determination and the capacity to promulgate policies that promote fate control and other Arctic human development goals.

This dissertation uses qualitative research methods to examine the two-fold response to the loss of territoriality. First, using participant observation and key-informant interviews, this dissertation presents a case study of how one tribal organization is working to build systems that “hold people up instead of holding them back” through promoting shared governance and co-management of water quality and climate change science. The Yukon River Inter-Tribal Watershed Council (YRITWC) is an international, inter-tribal consortium of Alaska Tribes and Canadian First Nations that seeks to support its member tribes in asserting the sovereign right to co-govern the water quality of the Yukon River basin. Second, using archival research and observation, this dissertation assesses the responses of the state and federal governments to the efforts of Alaska tribes to increase self-governance, including legislative approaches to expand territorial and non-territorial tribal authority.

This dissertation concludes that the loss of territoriality impedes the ability of tribes to exercise the human right of self-determination, and that states and federal governments have a commensurate obligation to recognize those rights. This dissertation also concludes that the loss of land based governance impacts on the capacity of local tribal governments to promulgate policies that promote human development and wellbeing. To remedy the impacts to human rights and human development, this dissertation suggests integrating adaptive co-management regimes that structurally share power and authority with Alaska tribes.

Keywords: fate control, human rights, property rights, land rights, local governance, human development, indigenous rights, Arctic, self-determination, self-governance, co-management.

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LIST OF ABBREVIATIONS

AHDR – Arctic Human Development Report

ANCSA – Alaska Native Claims Settlement Act of 1971

ANILCA – Alaska National Interest Lands Conservation Act of 1980

ANC – Alaska Native Corporation

ILOC – Indian Law and Order Commission

IRA – U.S. Indian Reorganization Act of 1934

UN DRIP – United Nations Declaration of the Rights of Indigenous Peoples

YRITWC – Yukon River Inter-Tribal Watershed Council

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PREFACE

*If I were Jewish, how would I find my home?
I am Spokane. I step into the river and close my eyes.*

— Sherman Alexie, Inside Dachau

I am an outsider to the experiences I describe in these pages. I am not Alaska Native, and yet for the last thirty years, I have been drawn to the issues of and struggles for justice and rights that Alaska Natives face. My adopted state, Alaska, is home to indigenous peoples fiercely proud of the landscapes they come from, and who define themselves as much by where they are today as from the lands upon which their ancestors walked. I know that I am a visitor in these lands. I am part of a culture that settled here, that disrupted ancestral ties, that displaced. In spite of that, or perhaps because of it, the notion of home, of place, resonates deeply inside of me. I have never known what being tied to a specific landscape feels like, how it could inform my identity and culture. Because my Jewish ancestors have had to flee every land they have ever walked upon, I don't know who my great-grandparents were, where they lived, the lands they worked and walked upon. "Almost every man can open his eyes in the morning in a land in which he had his beginning and his heritage. We [Jews] can't" (Uris 1961).

It is the lack of cultural connection to a physical world and place that motivates my passion to examine that connection closely. To witness how place can mean so much to a people, to a community. To understand land as a source of strength, of pride, of justice, and of heritage. Land as a path to self-understanding. Land as a tie to the past and a hope for the future. And those ties, those relationships, have been transformed by the events described in this research.

My passion for justice and rights has its roots in dining room table talks growing up and is expressed in my life's work. When I first moved to Alaska in the mid-1980s, I gained a new

sense for the concept of social justice, particularly as I moved through my graduate studies. Part of my Masters studies involved an internship with a non-profit Alaska Native regional organization, where I was helping with land use planning when the Exxon Valdez ran aground three miles from one of its villages, and a massive oil spill immediately became an existential threat. The issues of rights and justice suddenly became tangible, testing and making real my ideals as we fought to make sure communities would have a seat at the tables where decisions were being made about their futures.

I enrolled in law school to gain skills to support this effort. When I returned to Alaska and began practicing law, my focus expanded and I started to work with newcomers to Alaska—immigrants and refugees who had fled violence and persecution, seeking safety and sanctuary and a new place to call home. My notions of right and justice once again deepened through the experiences and incredible stories of resilience and survival that people shared with me.

I have been honored to work alongside Alaska's oldest and newest peoples. I have worked as an ally in the struggles to have the ancient ties between peoples and lands recognized and affirmed in legal and policy arenas. I have fought for the rights of people fleeing persecution to seek a new homeland for themselves and their families. The idea of home and of place, of a right to a secure and just life, has been the common theme running through my work.

When I first embarked on the path towards my PhD, I knew I wanted to frame my studies around issues of place and the relationship between land and community. I set out to understand how changes in land tenure and governance have impacted the ability of tribes throughout Alaska to adapt to environmental and economic changes. The research included interviews with tribal members, attorneys and activists. As a result, I gained a clearer impression of the realities facing tribes as they seek to evolve through the loss of the right to govern their indigenous lands,

lands they continue to occupy today. I also learned of the extraordinary and indefatigable efforts by tribes and tribal organizations to assert rights to self-determination and self-governance. It was my objective to develop a research project that could benefit these efforts in ways that drew upon my legal training.

My research led me to the Yukon River Inter-Tribal Watershed Council (YRITWC), an international indigenous organization created in 1997. The YRITWC is a unique organization, and is one of very few, if not the only, international indigenous treaty based organization. Since its formation in 1997, the YRITWC has initiated a number of programs designed to bring about its vision that one day people can once again drink water directly from the river.

The YRITWC agreed that if I became part of their team of legal advisors, I could write about its efforts as part of my PhD work (see appendix 2). Using my legal skills enabled me to ensure that my research had meaning for the communities I would be working with, and that I could participate in "transformative processes that assist communities in ways that meet their needs" (Brayboy et al. 2012). The creation of governance strategies is such a process, and the community members of the YRITWC were driving the development of this strategy in order to best protect their own fates and futures. Their work in this arena remains, as of this writing, an unfinished story but one that offers inspiration and lessons that I try to convey in these pages. It is work that combines the pursuit of justice and rights, and land and governance, in ways that are central to Alaska peoples, but with lessons that are universal to all people, everywhere. It is about identity and home.

Now we have reached the point where it is time to observe the journey home. It is time to step into the River and close our eyes.

CHAPTER 1. ALASKA AS AMERICA'S ARCTIC: CHALLENGES AND OPPORTUNITIES OF A TRANSFORMING ECONOMY AND ENVIRONMENT

The land does not belong to us – we belong to the land

- *Wilbur Itchoak, a whale hunter from Barrow, Alaska, as passed through his nephew Karlin*

The right and ability to govern lands and peoples is foundational to governments, no matter how large or small in area or population. In Alaska, however, tribal governments lack territorial authority over lands transferred under the 1971 Alaska Native Claims Settlement Act. The loss of territoriality means that indigenous governments face unique obstacles to self-governance that do not affect other local governments in Alaska or indigenous tribes in the continental United States. This dissertation identifies four specific impacts that occur when local governments lose the authority to govern the lands and resources upon which their communities depend. First, governments lose the capacity to govern for their community's food security. Second, Alaska tribes cannot seek to regulate environmental quality. Third, Alaska tribal governments are unable to create policies that promote resilience to climate change. Finally, the capacity for tribal governments to protect public safety is restricted because of the lack of territorial authority. These losses create obstacles to the capacity of local governments to govern for the wellbeing of their community. In Alaska, these losses compound the impacts of centuries of colonialism on the capacity of Alaska Native tribes to exercise the right of self-determination and the ability to promulgate policies that promote fate control and other Arctic human development goals.

This dissertation examines two ways in which tribes are responding to the loss of territoriality. First, it looks at how local communities are building systems that “hold people up instead of holding them back.” Alaska tribes are creating innovative approaches to increase non-

land based governance. These approaches build on systems of adaptive co-management that would institutionalize sharing governance authority between sovereigns. This dissertation examines one such effort, the work of the Yukon River Inter-Tribal Watershed Council. The YRITWC is an international, inter-tribal consortium of Alaska Tribes and Canadian First Nations that seeks to support its member tribes in asserting the sovereign right to co-govern the water quality of the Yukon River basin. Second, this dissertation examines the responses of the state and federal governments to the efforts of Alaska tribes to increase self-governance. It reviews legislative approaches to improving tribal capacity, and examines on-going litigation over the scope of tribal authority.

This dissertation concludes that the loss of territoriality impedes the ability of tribes to exercise the human right of self-determination, and that states and federal governments have a commensurate obligation to recognize those rights. This dissertation also concludes that the loss of land-based governance impacts on the capacity of local tribal governments to promulgate policies that promote human development and wellbeing. To remedy the impacts to human rights and human development, this dissertation suggests integrating adaptive co-management regimes that structurally share power and authority with Alaska tribes.

1.1. INTRODUCTION

Alaska is increasingly finding itself at the center of a transforming world, no longer dismissed as a far-flung frontier. Climate change and globalization are altering the fates and futures of small communities throughout the state and drawing national and global attention to America's only Arctic state. Alaska Native villages are confronted daily with a variety of challenges that are direct results of these transformations. Residents of Newtok, Kivalina, and Shishmaref, three Alaska Native communities located along Alaska's western coast are facing

existential threats as the lands they occupy are rapidly eroding into the sea (Bronen and Chapin 2013, 9321). The northern villages of Point Hope and Wainwright are among the closest communities to the site of the first U.S. offshore oil drilling activities slated to begin in late summer, 2015 (Yardley and Olsen 2011; Benton 2015). Communities along the Yukon River watershed in the center of the state are facing the prospects of increasing mining activities, decreased fisheries, and melting permafrost that is changing the river's course and landscape (Dube et al. 2012; Lomax et al. 2012). These examples are a small sample of the types of challenges facing small, rural and remote communities throughout Alaska.

In this era and region of rapid transformation, the ability of local governments throughout Alaska to respond to changing economies and environments matters. While researchers and policy makers are increasingly focused on the impacts of these changes on the natural and human environment, there is a lack of understanding ways in which governance rights and authority are part of the changing terrain. As a result, the issue of governance capacity is largely neglected as a component of how the north is changing and the tools communities have to respond to those changes. The right to self-government is a right that is articulated in international human rights law, and is seen as a vital component to human development in the Arctic region. Similarly, given the focus of this research, the right to self-governance is a principle embodied in the Alaska State Constitution.

Despite the principles of local governance that are articulated at all of these levels — international, regionally (circumpolar) and domestically, power sharing between sovereigns remains insufficient to support its practice. This is particularly the case in Alaska, where tribal governance is impeded by the recent loss of legal authority to govern the territory and resources upon which communities depend as a result of a 1998 U.S. Supreme Court decision. The lack of

territorial authority is unique to Alaska tribes. Non-tribal local governments throughout Alaska retain land based authority, as do indigenous tribes in the continental United States. This obstacle creates very specific barriers to local governance capacity, and to the ability of Alaska tribes to assert their human right to self-governance and build capacity to support human development within their communities.

This dissertation focuses on Alaska, where indigenous tribes have lost territorial authority under a legal framework that prioritized economic development and private property rights as a pathway to self-determination. The failure to account for the impacts of such policies on the rights of local communities to continue to self-govern has had consequences on tribal territorial sovereign authority. My research identifies four such consequences: the lack of ability of Alaska tribes to manage environmental quality, food insecurity for tribal members, the limited ability of tribal governments to cope with climate change, and the lack of tribal governance capacity to respond to threats to community public safety.

This dissertation examines these experiences within an Alaskan context, but the relevance of the research can apply globally. Alaska provides a lens through which to examine what happens when local governments can no longer govern lands and resources upon which their people depend. This question is increasingly relevant for communities around the world who are facing physical displacement due to large scale development projects or climate caused migration. The transformation between a community and its lands can also be altered through the process of colonialism and decolonization. As governments and economies change over time, so do property rights regimes. Often, customary land rights may be replaced by private property regimes. This dissertation examines what happens to governance authority when a prime source of that authority – the ability to control the land – is gone. What are the specific

outcomes of the loss of territoriality that a community must deal with? How do these outcomes impact the ability of local governments to assert the right of self-determination and promote their own wellbeing? What is the best way to respond to those transformations in order to protect the capacity of local governments to continue to meet their obligations to their citizens? While these questions are examined in the context of Alaska within these pages, they are questions that every community facing an altered relationship with their lands must wrestle with.

The response by Alaska tribes is two-fold: first, tribes have sought to reacquire lands capable of supporting tribal sovereignty; and second tribes are increasingly asserting non-territorial authority over activities that impact on the wellbeing of their community members. The combination of territorial and non-territorial authority will be critical to the ability of local governments to navigate through the on-coming changes resulting from transforming environmental and economic conditions.

Similarly, this research is vital for policy makers to better understand the ways in which land ownership differs from land governance, as illustrated by the experiences of tribes in Alaska. The lack of understanding about this distinction resulted in policies that hinder the capacity of communities to promote policies to protect wellbeing. The capacity to govern for wellbeing is a vital component of human development in the north, and is likewise integral to the right of indigenous peoples to exercise collective self-determination. The need for strong and capable local government is particularly acute in Alaska, where rural villages that have been transformed by colonialism are now trying to equip themselves to address a rapidly changing environment and economy. These challenges are exacerbated by the great distances between these communities and the seats of power of their respective nation-states. These distances mean

that local governments are often left out of crucial governance decisions that affect the wellbeing of their communities.

This question of the capacity of tribal governments to effectively face these changes is timely as communities are equipping themselves to deal with an opening Arctic. At the same time, tribes are emerging from centuries of transformation to their people, cultures, languages and lands caused by colonialism. Given this loss of territorial authority, what are tribal governments able to do to ensure that their communities can survive and thrive in the face of rapid change? At a 2014 meeting of the Alaska Municipal League, a consortium of local governments in Alaska, an Indigenous Researcher and Policy Analyst with the First Alaskans Institute identified the need to create “systems that hold our people up instead of holding them back” and proposed that the way forward involves two related steps: one, determine what local communities can do that they do not need permission for and two, ensure that state and federal policies be reformatted to support the efforts of communities to self-govern for their wellbeing (Wark 2014). This framework guides the organization of my case study and analysis.

1.2. BACKGROUND

Alaska is the largest and one of the most recent of the United States, stretching east from Canada, west towards Russia, and north deep into the Arctic Circle. Statehood, however, has been a mixed blessing for the more than two hundred Alaska Native tribes. Though they gained access to the American economy and have, in many material ways, been the beneficiaries of governmental programs, statehood meant the displacement of indigenous governance over Alaska’s land and resources.

Alaska Natives remain critically dependent on traditional lands and resources for their survival despite the transfer of sovereign authority over these lands to the U.S. government and

the State of Alaska. Alaska Native Corporations own twelve percent of Alaska's lands as a result of federal legislation settling indigenous land claims. As described in this dissertation, the unique nature of this settlement transformed the relationship between Alaska Native communities and the lands they have occupied for millennia – a system of corporate ownership has replaced tribal governance. This eclipse of traditional governance correlates with impacts on the human development and wellbeing of tribal communities, and challenges the ability of tribes to exercise the right of self-determination. This dissertation examines the nature of these barriers, and the subsequent efforts of indigenous communities to overcome those barriers.

Alaska enjoys abundant natural resources, spectacular natural beauty, and extraordinary cultural diversity. The state covers an area one-fifth the size of the continental United States. As America's only Arctic state, Alaska holds immense geo-political and economic value, and promises to grow in importance as ice flows diminish, resources become accessible and transportation routes open. The Arctic is projected to hold thirteen percent of the world's undiscovered oil, and thirty percent of the world's undiscovered gas resources, and there are vast quantities of minerals including iron ore and nickel (Wilson Center n.d. 3). The changing climate brings opportunities for increased marine transport as the north is ice-free for longer and longer periods of time. Once a remote region, the north is coming into greater global focus. From an Alaskan perspective, the changes in environmental conditions, economic opportunities and geostrategic importance bring both benefits and costs. Increased access to oil and gas resources could be a boon to a state that derives 90% of its overall revenues from these resources (Alaska Arctic Policy Commission 2015, 6). Local communities "recognize that oil, gas and mining industries offer meaningful employment, stable cash economies and reliable municipal

revenues that support clean water, sanitation, health clinics, airports and other infrastructure necessary for strong, safe and healthy communities” (Alaska Arctic Policy Commission 2015, 6).

On the other hand, local communities often lack the governance capacity necessary to ensure their own wellbeing, particularly in times of great environmental and economic change. This is particularly true, as documented in these pages, for the more than two hundred indigenous tribes scattered throughout Alaska (more than half of the total 550 tribes throughout the United States). These communities endure economic poverty and suffer some of the highest rates of unemployment in the United States, and contend with exceptionally high costs of living. In a cruel paradox for a state where the economy prospers so mightily from oil wealth, these communities “more closely resemble villages in developing countries than small towns” one might find throughout the U.S. or Europe (Indian Law and Order Commission 2013, 35).

Climate change and globalization is transforming Arctic economies and environments. These changes challenge Arctic residents, scholars and policy makers to examine whether communities have the necessary capacity to ensure the wellbeing of their residents. This research focuses on one aspect of this capacity: self-governance. In the Alaskan Arctic, this issue takes a unique twist in that indigenous communities lack the ability to assert their authority over the lands they occupy. I set out to examine how the loss of territorial governance affected the ability of indigenous communities to exercise the right of self-determination and build human development capacity for their people and communities.

1.3. OVERVIEW OF THE RESEARCH PROBLEM AND APPROACH

Tribes, like other local governments on the front lines of dramatic climate and economic changes, depend on their governance authority to protect their citizens. The ability of Alaska tribes to assert inherent sovereign powers over lands that they have used and occupied for

millennia is significantly limited compared to tribes elsewhere in the United States (Banner 2007), and to other local governments in Alaska. Using a variety of qualitative research methods, this dissertation identifies the ways Alaska tribes are different, describes why, and reveals the resulting impacts to tribal governance and the capacity to protect tribal members and promote human development within communities.

As described in depth in subsequent chapters, the Alaska Native Claims Settlement Act of 1971 (ANCSA) terminated tribal territorial governance authority, transferring ownership rights to commonly held lands and resources from traditional community structures to modern corporate entities (43 U.S.C.A. § 1601). The severance of governance authority over lands the tribes occupy is unique to Alaska. In general, federal Indian law recognizes that indigenous tribes retain “attributes of sovereignty over both their members [personal jurisdiction] and their territory [geographic jurisdiction]” (Case and Voluck 2012). Colonialism curtailed the extent of that sovereignty, leaving U.S. Indian tribes as “domestic dependent sovereigns” where the capacity to assert sovereign powers over the lands they occupy and their tribal members is limited by what Congress allows (Cohen 2005). This dependence on the U.S. Congress by indigenous governments created a unique political relationship between Indian tribes and the U.S. government whereby tribes retain both personal and geographic jurisdiction over their members and reservation lands and resources but the scope of that jurisdiction is subject to the will of Congress (Case and Voluck 2012).

While these general principals may have initially applied to indigenous tribes in Alaska, this changed in 1971 because of the radically different style of land settlement between Alaska Natives and the U.S. Government. From the date of purchase in 1867 when Russia sold the territory to the United States, the Treaty of Cession made only a vague reference to tribes,

directing that “such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes” (Case and Voluck 2012).

Although the Treaty of Cession brought Alaska Natives within the reach of federal law, it did not settle aboriginal land claims to the new territory. Tribes throughout the state continued to assert their sovereign rights to lands they had traditionally used and occupied, and these rights were repeatedly acknowledged, although not settled, over the next century of federal involvement in the Territory. For example, the 1884 Organic Act, which established federal control in the Territory of Alaska provided that “the Indians . . . shall not be disturbed in the possession of any lands actually in their use or occupancy or now claimed by them, but the terms under which such person may acquire such lands is reserved for future legislation by Congress” (Case and Voluck 2012). The status quo of aboriginal title was later preserved in the 1912 Territorial Organic Act (Linxwiler 1992).

The 1959 Alaska Statehood Act further complicated the issue when the federal government agreed to cede 105 million acres to the new state as part of the grant of statehood (Linxwiler 1992). The Act protected the on-going claims of Alaska’s aboriginal peoples by having the new State disclaim any rights to lands held by Alaska Natives under claim of aboriginal title. The Act also declared that any state land selections must be “vacant, unappropriated, and unreserved” at the time of selection (Linxwiler 1992). This provision stymied state land selections until ultimately, the U.S. government declared a land freeze when the amount of land being claimed by various tribes and the state exceeded the actual amount of acreage in the state (Linxwiler 1992).

The discovery of oil in northern Alaska provided the impetus to finally settle indigenous claims to the land. The prospect of great oil wealth was looming, but a major obstacle to

bringing the oil to market was the land freeze and the inability of the state to finalize its land selection, which included the recently discovered oil fields (Linxwiler 1992). From the perspective of the oil industry and Congress, there was great urgency to finalize land claims quickly and with as little litigation as possible. Tribal leaders in Alaska looked at the economic and social status of Native peoples to the south and what they saw alarmed them. Despite the promise of the federal government to safeguard the lives and lands of Indian people, rampant poverty kept these communities in a cycle of dependency and despondency. Alaska tribal leaders sought to avoid this same fate, and to put their own people on a path to self-sufficiency. A new, unique and innovative path was embarked upon, one that eschewed the creation of reservations in favor of vesting Alaska Natives with the means to develop their own economies. Aided by the oil industry, tribal leaders eventually secured passage of the Alaska Native Claims Settlement Act in 1971 (ANCSA) (43 U.S.C.A. § 1601 et seq.).

The Alaska Native Claims Settlement Act represented a dramatic departure from the typical style of land settlement the federal government engaged in with tribes in the continental U.S. Congress intended that the land settlement should be rapid, certain, and in conformity with the real economic and social needs of Alaska Natives and to avoid creating “permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska” (43 U.S.C.A. § 1601 section 2).

In ANCSA, the United States government agreed to transfer fee simple title to 44 million of Alaska’s 365 million acres of land. In exchange, the tribes formed state chartered corporations to take title to this land (43 U.S.C.A. § 1601 et seq.). As implemented, ANCSA created twelve

regional corporations (and two-hundred plus village corporations) that each own title to land (43 U.S.C.A. § 1601 et seq.).¹ Each Alaska Native Corporation (ANC) is chartered under the laws of the State of Alaska and subject to state regulation and control. Rights to use the land are likewise reserved to the ANCs to determine, and the ANCs have the ability to exclude access to the lands.

Almost thirty years after ANCSA became law, in 1998, the U.S. Supreme Court ruled on the unresolved issue of whether tribes could regulate and tax lands conveyed to a tribe under ANCSA. ANCSA did not specifically reserve any governance rights in traditional lands to the tribes who had existed on these lands for millennia, leaving the issue of self-governance unsettled (Case and Voluck 2012). In *Alaska v. Village of Venetie Tribal Government*, the Supreme Court determined that because lands conveyed pursuant to the Alaska Native Claims Settlement Act became “fee simple” (privately owned) lands, these lands were no longer to be considered to as “dependent Indian communities” capable of supporting tribal jurisdiction (522 U.S. 520 1998). The Court held that ANCSA severed tribal territorial jurisdiction over ANCSA lands and “left [tribes] as sovereign entities for service purposes, but as sovereigns without territorial reach” (522 U.S. 520 1998). The result is that ANCSA lands are beyond the reach of tribal control, and remain within the purview of the state to regulate as they do any private landholdings (Case and Voluck 2012). Tribes have no right to regulate, tax, or otherwise engage in management of fish and game resources on what were traditionally tribal lands in Alaska (Case and Voluck 2012).

My research examined the impacts of the loss of “territoriality” (governance control over land) on the capacity of tribes to govern for the wellbeing of their members. Using a variety of qualitative methods, I sought to deepen understanding of the connection between land,

¹ ANCSA created twelve land-owing regional corporations, but a thirteenth was formed to settle monetary claims with Alaska Natives living out of state.

governance and wellbeing, and to develop theories regarding the ways in which they interrelate. My research approach was adapted from critical indigenous research methodologies and grounded theory (Brayboy et al. 2012; Glaser, B. and Strauss, A. 2010; Thornberg and Charmaz 2012). Using these methods, I selected a case study through which to examine those relationships and began to work with the Yukon River Inter-Tribal Watershed Council (YRITWC), an indigenous organization of Alaska Native communities living within the fourth largest watershed in North America whose vision is to clean up the River to a point where tribal members can once again “drink water directly from the Yukon River.” Through this case study, I gathered data through archival research, semi-structured interviews, and participant observation (Gerring 2007; Jorgensen 1989; Roulston 2010; Yin 2009).

In order to understand how Alaska tribes respond to the loss of territorial authority over lands and resources they have traditionally governed, my literature review focused on the three variables embedded in tribal authority: land, governance and community wellbeing. As described in the literature review, land rights determine the extent of a government’s authority, a notion called “territoriality.” Governments use their sovereign authority to promote the wellbeing of their constituents. In the Arctic, wellbeing includes the ability to control one’s own fate (AHDR 2004). The literature review enabled an exploration of the connections between land, governance, and wellbeing.

My analysis revealed emerging themes throughout my research (Gibbs 2007) that led me to identify the specific losses to governance authority that result from a lack of territoriality (Glaser, B. and Strauss, A. 2010). By identifying these specific forms of loss, I was able to refocus my legal and policy analyses (Yanow 2007). Throughout this iterative process, I continued to participate in the YRITWC’s development of strategies to respond to the loss of

territoriality, deepening my understanding of how the loss of territorial authority impacts on tribal governance and human development capacity.

My analysis revealed that the capacity of small communities to exercise self-governance depends on a combination of both territorial and non-territorial authority. As Alaska demonstrates, local communities can no longer solely rely on territoriality to support exercising governance authority. Alaska's tribes lost the ability to govern lands upon which they reside under ANCSA. Likewise, as governance in the north is reconfigured to integrate local communities more fully, co-management models that do not necessarily rely on geography are becoming the norm in constructing power sharing agreements between sovereigns. The new reality for local governance, that authority is now rooted in both territorial and non-territorial authority, must be reflected in how public policies at other levels of government are configured. State, federal and international governments must adopt a "rights-based" approach when working with local communities. In the case of Alaska, this requires recognizing tribes as governments and sovereigns, not as stakeholders, if the twin goals of human development and self-determination are to be realized for local governments.

1.4. OVERVIEW OF THE CHAPTERS

My research goal was to deepen understanding of the relationship between land rights, governance and wellbeing to better inform public policies that conform to human rights principles and facilitate human development processes for local governments. Chapter two of this dissertation describes the four major objectives I identified as necessary to meet my research goal, and the mix of research methodologies I employed. Four linked objectives provided a pathway for conducting this research: (1) assess the current legal capacity of status of Alaska Native communities to self-govern; (2) identify the broad range of effort tribes are undertaking to

strengthen their legal control over lands and resources upon which communities depend for their wellbeing; (3) focus that assessment on one case study that documents the efforts of the Yukon River Inter-Tribal Watershed Council to increase indigenous governance within the watershed; and (4) develop a policy approach capable of addressing the obstacles facing communities seeking to enhance their self-determination in times of transformative economic and environmental changes. This last objective reflects participatory action research wherein the research produces “knowledge and action directly useful to a group of people” for the purpose of “building power with/by those people” (Gatenby and Humphries 2000, 89).

My research methodology used a mix of qualitative methods to generate better understanding of the relationship between land, governance and community wellbeing (Thornberg and Charmaz 2012). These methods allowed me to generate theories about the types of losses communities experienced because of the lack of territoriality and propose a framework to develop public policy that promotes both human rights and human development for indigenous communities in Alaska (Allen Hart 2011; Yanow 2000; Corbin and Strauss 2008; Yanow 2007).

Chapter three introduces the concepts that are fundamental to a deeper understanding of the relationship between land, governance and wellbeing. Specifically, I look at the literature on “territoriality” and how that concept generally applies in indigenous communities throughout the United States in order to contextualize a legal analysis of how this notion applies to Alaska tribal communities. I examine the evolution of property rights regimes in the U.S. and how private property rights emerge as a favored regime only to be challenged by common property systems. This chapter describes how the term “wellbeing” as a component of human development has been recently applied in an Arctic environment, setting up for a subsequent in-depth analysis of

how the proposed indicators for wellbeing fail to account for the unique lack of territoriality in indigenous Alaska. Finally, this chapter introduces the idea of self-determination as a collective human right in order to understand how the lack of territoriality inhibits the ability of Alaska tribes to fully exercise that right.

Chapters four and five describe the changes in land rights and self-governance experienced by Alaska Native tribes to provide a context and background to support my analysis. Chapter four provides a history of Alaska Native land rights, building on the notion of property rights introduced in the literature review. This chapter describes the history of the Alaska Native Claims Settlement Act (ANCSA) as a unique approach to settling indigenous land claims. It describes ANCSA as a policy derived in a time where civil rights and economic development were seen as integrally related to each other, and the subsequent reliance on replacing common property rights with private, individual ownership in order to achieve public policy goals. That displacement, however, had fatal consequences for tribal territoriality and the capacity of Alaskan Native tribal governments to govern community wellbeing.

Chapter five deepens the case study by examining the complex systems of governance and territoriality in Alaska. The chapter begins by describing the evolution of local governance as a defining principle in Alaska to more specifically contextualize subsequent descriptions of fate control and self-determination as international policy goals. This chapter integrates archival research and policy analysis to assess the status of tribal governance in Alaska and provide a history of the federal legislation and litigation that resulted in the loss of territoriality for Alaska Native tribes. The chapter likewise describes examples of ways in which tribes have overcome the impacts of this loss through adaptive governance regimes established in a smattering of

federal legislation such as the 1972 Marine Mammal Protection Act (16 U.S.C. 31 1972) and the 1980 Alaska National Interest Lands Conservation Act (16 U.S.C. 51 et seq. 1980).

Chapter five then introduces the primary findings of this research. The loss of territoriality resulted in four specific consequences for the capacity of Alaskan tribal governments to govern wellbeing. Throughout my research, different themes of loss emerged during my interviews and participant observation. Although they are distinct, all are tied together because all result from the loss of territorial authority over traditional lands and resources in the wake of the Alaska Native Claims Settlement Act.

The remaining chapters adopt an analytical approach suggested by Kyle Wark, Indigenous Researcher and Policy Analyst with the First Alaskans Institute. Mr. Wark described the need to build “systems that hold our people up instead of holding them back” in responding to the persistent impacts of colonialism in rural Alaska. Mr. Wark identified two approaches to bring about that vision: first, identify what local people can do within the current legal and political structures that exist (and what might be necessary to target for change), and second, identify how other governments can support local tribal governments (Wark, presentation to Alaska Municipal League, November 20, 2014, Anchorage, Alaska).

Chapter six presents my case study. This chapter examines the natural and cultural history of the Alaska Yukon River watershed. It describes the Yukon River Inter-Tribal Watershed Council, an intertribal organization representing 55 Alaska Native tribes living along the Yukon River, and explains the organization’s efforts to protect the water quality of the Yukon River.

Chapter seven re-focuses the analysis to examine how the federal and state governments are responding to the loss of tribal territoriality. It reviews proposed federal legislation designed

to overcome some of the impacts of the loss of tribal territoriality. It examines on-going litigation that is testing the limits of tribal governance in Alaska. Finally, this chapter describes some possible policy approaches to cooperation between sovereigns in Alaska.

Chapter eight concludes this research with an analysis of the loss of territoriality and governance through the lenses of human rights and human development. The loss of sovereign authority over lands is increasingly recognized as an impediment to the ability of local, indigenous communities to assert the right of self-determination. This right is an international, collective human right of indigenous tribes, and one that has corresponding obligations of state and federal governments to recognize. Similarly, the lack of territoriality obstructs the capacity of tribal governments to promulgate policies that promote human development for their communities and members. This chapter concludes that in the future, tribal governance will likely depend on a combination of both non-territorial and land based authority that fits within co-governance frameworks. These frameworks create institutional opportunities for integrating local communities into resource decisions, but those communities must be integrated into governance frameworks as rights holders, not stakeholders. Such an approach is consistent with international human rights law and human development principles. Finally, this chapter identifies how this research may be relevant to similar circumstances and contexts beyond Alaska, where land rights remain insecure due to threats of relocation or simply because land claims are an unfinished business in many parts of the world.

1.5. SIGNIFICANCE OF THE STUDY

This research is significant in that it illuminates nuances in policy-making processes that have not been previously understood or accounted for. The first is the difference between land ownership and land governance, and identifies the consequences of that distinction. Sovereigns

govern lands and have authority to tax and regulate activities on those lands. Landowners have particular rights to benefits that flow from their ownership of land, but they lack the ability to tax and regulate uses on those lands. Alaska illustrates what happens when a sovereign government loses governance authority over lands, and how that loss is not compensated by the creation of a land-owning mechanism. This lesson is instructive for communities who are facing transformations in their relationship with the lands they occupy, either through displacement or relocation or reconfiguration of property rights regimes.

The distinction between land sovereignty and land ownership is pivotal to the capacity of tribes to govern the fates and futures of their communities. The ability of a community to govern the lands they occupy and the resources upon which they depend is a foundational concept of sovereignty. The relationship between a sovereign and the lands they occupy can be transformed by a variety of factors. In the Arctic, as in other areas of the developing world, colonialism has fundamentally transformed the nature of this relationship (See, for example, Berger 1988; Berger 1985; Case and Voluck 2012; Banner 2007; Banner 2005; Kohn and McBride 2011). Recently, changing environmental and economic conditions are likewise impacting on the abilities of communities to continue to govern lands they occupy (Einarsson et al. 2004; Brunner and Lynch 2010; Poelzer and Wilson 2014). For example, climate change is forcing communities to consider physical relocation (Bronen and Chapin 2013; Bronen 2011). Globalization is likewise necessitating a change in the ways that local communities are able to protect their own interests against international market pressures, especially if they live on or near oil or mineral resources.

Recognizing the impacts of climate change and globalization, many scholars are calling for transforming the way we conceive of governance into ways that layer authority amongst local, regional, national and international actors (*see* for example, Adger, Brown, and Tompkins

2006, 9; Adger 2001, 921-931; Paavola and Adger 2005, 353-368). Although much of the literature and reports describe the need to integrate local people into larger decision-making processes, there is a lack of scholarship on the right of local governments to participate in these processes as governments. In addition, the literature overlooks the critical role that property rights play in self-governance. This dissertation fills those voids.

This study is rooted in the experiences of Alaska Native tribal governments. While the style of settling aboriginal land claims is somewhat unique to Alaska, the lessons learned are more broadly applicable. Around the globe, local communities are struggling to secure and codify their rights to customary and traditional lands (United Nations Permanent Forum on Indigenous Issues 2014; Susskind and Anguelovski 2008). Similarly, communities are facing the threat of relocation due to climate change (Bronen 2011; Peninsula Principles 2013). This research is relevant to those experiences in that it highlights the importance of considering the legal status of governance during land claims and relocation processes (Peninsula Principles 2013, 10(f)). Consideration of land governance authority should be among the issues contemplated by policy makers and community leaders when developing policies, practices and procedures that can better ensure community self-determination and human development and wellbeing.

This research likewise identifies a distinction between “rights holders” and “stake holders” that also has consequences for governance. This difference is not well understood in the context of local decision-making processes and is often glossed over. Alaska again provides a great example of this distinction. Because tribal governments lost their land based authority, they are often integrated into public processes as stakeholders with as much say as any other stakeholder. However, tribes are sovereign governments and under U.S. and international law

are entitled to a greater role in decision-making processes, a role that reflects their status as governments with a right to participate in decision-making – as rights holders. Indigenous governments have a right, protected by international human rights law, to engage in self-governance. This right typically extends to recognizing tribal capacity to govern for community wellbeing, except this capacity is curtailed for tribes in Alaska where tribes are limited to being stakeholders in processes that impact upon their members. This is evident in the numerous policy reports written about the Arctic and about environmental governance that continually utter the phrases like “local involvement” or the like and argue that future decision makers must take local needs into account in order to craft better public policy. However, none of these reports describe what that means and how we will get there. Likewise, rarely if ever do these reports understand the different legal status that tribal governments have by virtue of international law. This dissertation identifies this distinction, and characterizes tribes as rights holders in order to distinguish them from stakeholders. The latter term used to define people with an interest in the process and outcome, but not necessarily with a right to participate in that process.

This research aims to help policy makers to understand the difference between a community who is *committed* by virtue of aboriginal and future legal rights to self-governance, and to land and place, and groups that are *involved* in decisions based on their interest in a given issue. The two are not the same, and the distinction between peoples with a right to engage in processes versus people with an interest in engaging is relevant for how decision making should be structured to accommodate the two moving forward.

1.6. DEFINITIONS

The terms listed here in bold are used repeatedly throughout this dissertation. They are much more fully described in the literature review, but the following section provides a brief introduction.

Human development, a concept discussed in depth in Chapters 3 and 8, is defined as the process of enlarging people's freedoms and opportunities and improving their wellbeing (ul Haq 2003). **Wellbeing** is defined in the Arctic Human Development reports as the capacity communities have to (1) **fate control**—the ability to “guide one’s own destiny”; (2) cultural integrity – to “belong to a viable local culture”; and (3) maintain contact with nature – to interact “closely with the natural world” (Einarsson et al. 2004, 11).

Land rights is a term used to describe the rights and responsibilities individuals and communities have to real property (land). As described in Chapters 3 and 4, the construction of land rights into **property rights regimes** reflects cultural views towards land and resources and orders relations between community members (Bromley 1989; Bromley 1991). In western (non-indigenous) systems, these rights are typically organized to maximize the rights of individuals to “own” a piece of property in **fee simple** status – meaning that a land owner has the right to sell or “alienate” the land, to use the land in any way they choose (subject to regulation by the sovereign), to rent the land, to develop it, and to exclusively possess it (Black's Law Dictionary).

The term **sovereign** references the supreme political authority that a government has to regulate its internal affairs without foreign dictation (Black's Law Dictionary). **Sovereignty** is the possession of that power as a self-sufficient source of authority and a manifestation of “self-determination” (Black's Law Dictionary). **Sovereignty** is also a term used to describe the authority of tribal governments throughout the United States to govern their own communities.

As described in this dissertation, particularly in Chapters 3 and 5, this sovereignty has been constricted through the process of colonialism, and tribes within the U.S. are now considered to be **domestic dependent sovereigns**. That means that the extent of their legal authority to govern their lands and their people is exclusively up to the U.S. Congress to determine (Case and Voluck 2012). However, Congressional action and authority is balanced against the internationally recognized right of **self-determination**, which is the right of “all peoples . . . [to] freely determine their political status and freely pursue their economic, social and cultural development (United Nations 1961). The right of self-determination is considered a human right in international law due to the fact that the right is enumerated in a variety of international human rights treaties, including the International Covenant of Economic, Social and Cultural Rights and the International Covenant of Civil and Political Rights (Thurer and Burri 2008, para. 10). These notions are fully explored in Chapters 5, 7 and 8.

The term **Alaska Native** refers to the first peoples of Alaska. This dissertation also references **indigenous** peoples and communities to describe the aboriginal peoples living in what became the United States prior to occupation by European colonizers. The word **tribe**, as it is used here, is a legal term that describes the form of self-government within Alaska Native communities that predates and persists through the imposition of colonial western government structures. **Traditional knowledge** refers to the knowledge communities possess by virtue of living within their environments for thousands of years that is transmitted through practices and stories, through artifacts and cultural rites and underlies a way of life (Alaska Native Science Commission).

1.7. SUMMARY

Alaska tribes lost the legal authority to govern traditional lands and resources as a result of the 1971 Alaska Native Claims Settlement Act. Using a variety of qualitative methods, this dissertation analyzes how that loss occurred, and identifies the specific consequences of that loss. Tribes no longer are legally capable of managing fish and game resources, rendering their communities food insecure. The lack of a land base over which to govern means that Alaska tribes cannot enforce public safety laws or regulations. The lack of regulatory authority that flows from the loss of territoriality means that tribes cannot promulgate policies designed to make their communities more resilient to the impacts of a changing climate. And finally, the lack of lands under tribal governance means that tribes cannot seek to regulate air or water quality on their lands in the same way that tribes in the continental United States are able to do.

These consequences have negative impacts on the ability of tribes to assert their right to self-determination, a right recognized in international human rights law. It likewise inhibits the capacity of tribes to govern for the wellbeing of their communities, limiting their capacity to ensure human development in their communities. Recognizing these consequences, tribes have set out to seek innovative ways around these obstacles and this research examines one such approach as taken by the Yukon River Inter-Tribal Watershed Council. Similarly, tribes around Alaska are working with state and federal agencies to change laws and policies in ways that would support increasing tribal governance. These approaches require expanding both territorial and non-territorial authority for tribes.

Although this study is focused on the experiences of tribes in America's Arctic, the lessons learned are applicable globally. For example, communities in various parts of the world are facing the very real possibility of having to relocate due to climate change displacement. As

the experiences recounted here demonstrate, it is vital that when considering relocation, issues of land governance must become a part of the calculation of where and how to relocate. Will relocated communities be able to continue to govern themselves and if this is the goal, what should their relationship with their new lands be? As this research shows, it is not sufficient that communities “own” the lands they occupy, there must also be some provision for continued governance if these communities are to continue to ensure their own wellbeing. Likewise, the question of ownership as opposed to governance must be considered in communities who are seeking to secure land rights, such as is on-going in many areas of the developing world where governments are negotiating with indigenous groups over customary land rights.

This dissertation defines the particular types of loss that result when a local government can no longer control its lands and resources. In so doing, this research enables a deeper understanding of the relationship between land, governance and wellbeing and provides a better lens through which to create public policies that ensure rights of self-determination and the capacity of communities to govern their fates and futures.

CHAPTER 2: RESEARCH METHODOLOGY: AN EXAMINATION OF TRIBAL RESPONSES TO THE LACK OF TERRITORIAL AUTHORITY.

Alaska villages remain dependent on wild lands and resources for their wellbeing, relying on fish and wildlife resources for their food, clean water sources. At the time I began my research, the Alaska Native community was immersed in a struggle to protect their right to harvest wild resources for subsistence. Watching this effort unfold raised the question as to how this issue would be different if Alaska Natives had a right to govern fish and game resources. I knew in general terms that tribes lacked this right because of the loss of territorial governance authority caused by ANCSA. I wanted to know if tribal governments and tribal advocates were doing anything, or could do anything, to regain this lost authority so that they could better protect their right to subsistence.

In order to ensure that my research would be useful to the communities I aspired to work with, I sought an on-going project where I could apply my legal skills and my experiences working with village communities. I pursued transformative research methodologies because after 25 years of living and working in Alaska, I had concluded that the rights of indigenous tribes in Alaska to engage in self-governance were insufficiently incorporated and not meaningfully integrated into statewide policy conversations regarding lands and resources. My experiences working with Alaska Native governments illuminated the unequal power that tribes had to control their own fates and futures as an outcome of colonialism, and through these experiences, I became very aware of issues of bias and privilege that I and other non-Natives brought into a variety of situations in which the inherent rights of Alaska tribes were the topic of conversation (Lorenzetti 2013). I wanted my research to become integrally connected to, not abstractly reflective of, the work being done around the State of Alaska to improve tribal self-governance and self-determination (Lorenzetti 2013, 455-56).

Through my archival research, I discovered the Harvard Project on American Indian Economic Development (HPAIED). This project involved both scholarly and activist research on issues of economic development in "Indian Country" and they published case studies from around the United States documenting innovative examples of tribes that were successfully engaged in self-governance. One of those studies featured the innovative work of an intertribal, international organization that was in the midst of developing a governance strategy to increase their rights to participate in the governance of the Yukon River basin.

My research goal was to generate theories about the relationship between land rights, governance and wellbeing that could better inform the creation of public policies designed to promote good development practices in Alaska. Theory relates themes or concepts to each other in a way that explains some phenomena (Corbin and Strauss 2008). I sought to identify connections between territoriality (land plus governance) and wellbeing in order to explain how the two concepts influence each other. I wanted to deepen understanding of how the lack of territoriality for Alaska tribal governments impacts on their capacity to govern for their community's wellbeing. I also sought to create a public policy framework that is more responsive to human development and human rights for indigenous tribes in Alaska.

This study used a mix of qualitative methodological approaches to examine the relationship between land rights, governance and wellbeing in indigenous communities in Arctic Alaska. My approach is informed by and rooted in Critical Indigenous Methodologies (see section 2.1.2 below) and the framework suggested by Wark (2014) who suggested that local responses to colonialism require building systems to keep people up rather than tear them down, and that to do so, we need to first determine what can local people do on their own, without

changes to law or policy, and second what state and local policies should be implemented to achieve that vision?

Out of those questions, I developed five linked objectives that are depicted in Figure 2.1. First, in order to assess the consequences of colonialism on the capacity of tribes to self-govern, I sought to conduct a legal and historical analysis of the current state of tribal territoriality in Alaska (whether and to what extent tribes can assert authority over lands and resources upon which they depend). Second, to understand what local communities are doing on their own behalf to increase their capacity to control their own fates and futures, I sought to identify the broad range of effort tribes are undertaking to strengthen their legal control over lands and resources upon which communities depend for their wellbeing. Third, I narrowed that focus to better illustrate some of the obstacles facing tribes through a case study that documents the efforts of the Yukon River Inter-Tribal Watershed Council to increase indigenous governance within the watershed. These two objectives respond to Wark's suggestion that local communities are taking matters into their own hands in order to ensure better wellbeing for their communities. Fourth, I researched and documented state and federal policies on tribal self-governance and fifth, I develop a policy approach capable of addressing the obstacles facing communities seeking to enhance their self-determination in times of transformative economic and environmental changes. The fourth and fifth objectives respond to Wark's idea that federal and state systems have a responsibility to support local governance and capacity.

FIGURE 2.1: OBJECTIVES



2.1. RESEARCH APPROACH: GROUNDED THEORY AND CRITICAL METHODOLOGIES

2.1.1. *Grounded Theory*

Grounded theory is inductive and iterative, and leads to constructing theory (Thornberg and Charmaz 2012). It uses an inductive method where research begins with an individual case from which concepts develop (Thornberg and Charmaz 2012). It is iterative in that researchers move back and forth between data collection, analysis and conceptualization to generate theories that explain the relationship between the categories emerging within the data (*see* Eisenhardt 1989; Thornberg and Charmaz 2012). Grounded theory research frames the process of both data collection and analysis (Thornberg and Charmaz 2012, *see below*).

A grounded theory approach works well with a case study as it allows the overlap of data collection with data analysis (Eisenhardt 1989, 538). Throughout my study, I continually collected and coded data, and through this iterative process, themes of connection and

interdependence emerged that helped me to better understand why the capacity to govern wellbeing was so tied to land rights. Although each of these concepts – governance, wellbeing and land – are each the subject of much study, there is a lack of scholarship tying the three together. Using a grounded theory approach allowed me to dig deeply into both my data and my literature review to validate these emergent connections between the three and identify “similarities in phenomena not normally associated with each other” (Eisenhardt 1989, 544).

2.1.2. Critical Indigenous Methodologies

My overall research approach drew on principles of Critical Indigenous Research Methodologies (Brayboy et al. 2012; Trinidad 2011; Tuck 2009). Critical Indigenous Research Methodology (CIRM) is rooted in indigenous knowledge systems and is distinctly focused on meeting the needs of the communities involved with the study (Brayboy et al. 2012). Recognizing the self-determination and inherent sovereignty of indigenous peoples, CIRM requires a different way of understanding not only what knowledge is, but how it is gathered, presented and then used.

CIRM arose in response to the need to reclaim the idea of research for indigenous communities and reflects “that indigenous communities have for centuries engaged in empirical research, developed and refined as an integral process of living through engaged observation, both for survival and continued growth.” (Brayboy et al. 2012). CIRM rejects research practices that place study and knowledge outside of the communities “such that community members became objects to be studied and the knowledge produced fails to reflect indigenous values.” (Brayboy et al. 2012). Tuck (2009) argues that research should transform how stories are reported and ultimately used, and draws a distinction between “damage centered research”

(documenting the "contemporary brokenness of communities") and "desire based" scholarship (an "antidote" to counteract the perceptions of these communities as damaged or broken).

The dynamic of the "outside researcher" coming into communities and taking away information without giving anything in return has been a feature of life in rural Alaska. I witnessed this phenomenon firsthand while working with communities impacted by the 1989 Exxon Valdez Oil Spill, and I was determined not to conduct my doctoral research in this manner. Therefore, I adopted a critical methodological approach to my research question that integrates Brayboy's "4 Rs" framework: relationality, responsibility, respect and reciprocity (2012). "Relationality" in research requires fostering relationships between researchers, communities and the topic of inquiry, integrating cultural protocols into the methodological approach. This leads to "responsibility" on the part of the researcher to fulfill the obligations of those relationships first and foremost. "Respect" thus emerges from the process of building and engaging in those relationships. Finally, "reciprocity" means that "as we receive from others, we must also offer to others" (Brayboy et al. 2012).

Moreover, my research was informed by the concepts embodied by Critical Indigenous Pedagogy of Place (CIPP). Trinidad (2011) describes CIPP as a methodological approach rooted in both critical pedagogy and ideas of place and culture, "rooted in Native epistemology, connection to place, and the practices and responsibilities nurtured through place" (Trinidad 2011, 185). Like CIRM, CIPP provides communities with the means and space to address the specifics of their own experiences, in their own languages and relying on their own histories that develops a narrative of collective identity and empowers and transforms communities as they move toward social justice (Trinidad 2011). Combined with grounded theory, this critical

methodological approach became the basis for the way in which I selected my case study, collected and analyzed my data (see Objective 3, described in section 2.4 below).

2.2. ASSESSING THE CURRENT STATUS OF TRIBAL TERRITORIAL SOVEREIGNTY OVER TRADITIONAL LANDS AND RESOURCES

In order to understand the impact to tribal governance authority caused by the loss of territoriality, it is critical to understand the actual legal capacity that Alaska tribes have to exercise territoriality. Moreover, in identifying the contours of tribal legal authority, it is then possible to more concretely determine what governance capacities they lack. Both questions require researching their legal history and conducting a legal analysis.

2.2.1. An Archival History of Alaska Native Land Claims

This research depends on understanding the legal history of land rights and governance in indigenous Alaska. Researching the historic records behind the creation of the law and policy around land and governance can produce a rich and nuanced understanding of this evolution (Esterberg 2002). Esterberg (2002) sounds a cautionary note regarding historical research that is clearly of concern to this study: in addition to examining historical documents for what they say, the issue of language and conflicting meanings must also inform the analysis.

I conducted legal research to determine the rule of law regarding the right of U.S. indigenous peoples to self-govern, and then focus on how that is similar or different in Alaska, and why. Legal research methods involve identifying the legal issues involved with the research question (Allen Hart 2011, 21). My research question embedded two primary legal questions: (1) what is the extent of property rights that Alaska Native tribes have over their traditional lands; and (2) how does the scope of property rights inform the scope of governance authority over those lands?

Using a variety of archival sources, I focused my research on the history and implementation of the 1971 Alaska Native Claims Settlement Act. I reviewed legal and policy materials produced in advance of the passage of ANCSA, including federal reports compiled to present a variety of settlement options. I examined the case law and legal interpretative materials including law review articles and Indian Law treatises (Case and Voluck 2012; Strommer and Osborne 2005; Cohen 2005). I reviewed State of Alaska documents such as public statements made by public officials regarding their position on tribal sovereignty and governance, state reports, and other documents such as the 1999 Millennium Agreement, and subsequent documents (Indian Law and Order Commission 2013; Commission on Rural Governance and Empowerment 1999). The issue of property rights and land ownership emerged as my first conceptual category when examining these documents.

Reviewing literature is important to generating theories as it allows for a comparison of data from a case study to both similar and conflicting literature (Eisenhardt 1989, 532). My literature review focused on property rights scholarship, adaptive and local governance strategies, and human development literature. These theoretical frameworks helped me to identify the ways in which land rights and governance interact in a legal sense, in other words how the allocation of specific property determines whether and to what extent a community can self-govern. I also used the literature and theoretical frameworks to help me to tentatively identify codes as starting points for analysis of my data (Gibbs 2007; Corbin and Strauss 2008).

2.2.2. A Legal Analysis of the Evolution of Tribal Land Rights and Governance in Alaska

After conducting my legal research, I analyzed the scope of tribal governance authority in Alaska and the impact of the loss of territoriality on that scope. Legal analysis processes are far less defined than other social science research methodologies, and some legal scholars argue that

formal analytical methodology within the field of legal studies is “virtually non-existent” (Epstein and King 2002, 11). Conducting a legal analysis is outcome oriented, a tool attorneys use to bolster their arguments in favor of their clients (Benchmark Institute 2014). Although it is not a methodology widely recognized in social science research, this analytical approach has value to my research in that it is vital to my ability to identify the legal consequences of the lack of tribal territoriality.

“Legal analysis” consists of three steps: identify the relevant facts, determine which law(s) applies, and apply the facts to the law (Benchmark Institute 2014). The first step in a legal analysis is a determination of which facts are “legally significant” to the question at hand (Benchmark Institute 2014). Here, the significant facts include that federal law recognized tribes as sovereign governments in 1994, and the Alaska Supreme Court likewise acknowledged that Alaska tribes are sovereign governments in 1999. The other significant “fact” was that tribal governments in Alaska lack territorial sovereignty over lands conveyed under the Alaska Native Claims Settlement Act.

The second step of this analysis was to determine the law regarding what governance authority tribes in Alaska do have. This issue is highly dynamic, and subject to frequently changing laws and regulations. For example, during the timeframe of this research, there were a variety of legal events of extreme relevance to my ability to determine the state of the law and change the legal status of tribal governance. Specifically, these events include:

- The federal court system confirmed authority of U.S. management authority over water quality on federal lands, rejecting the State of Alaska’s argument that they had the authority to manage water resources (*Katie John v. United States*, 720 F.3d 1214 (2013))
- The federal court system upheld the right of Alaska tribes to seek to put land back into trust status, which could reassert the rights of tribes to govern traditional lands and resources (*Akiachak Native Community v. U.S. Department of Interior*, 935 F. Supp. 195 (D.D.C., 2013))

- Pursuant to the *Akiachak* decision, the Department of Interior initiated a rule making process to promulgate regulations to taking land back into trust status (25 C.F.R. 151 Final Rule, Land Acquisitions in Alaska; *see also*, 79 FR 2468)
- The U.S. Congress amended the Violence Against Women Act of 2013 to allow Alaska tribes to assert jurisdiction over domestic violence crimes
- The Alaska Supreme Court issued a decision confirming the jurisdiction of Alaska Native tribes over a very narrowly defined area of self-governance (*Simmonds v. Parks*, 329 P.3d, 995 (Alaska 2014))
- The U.S. Congress considered a bill to allow Alaska Natives to engage in shared governance (the Alaska Native Subsistence Co-Management Act of 2014).

The third step applies the law to the facts to provide a legal analysis, which became the foundation for the conclusions. I was able to determine how Alaska tribes lost the right to govern their own lands and resources and identify with some precision the nature of this loss. This process allowed me to understand what communities are doing to overcome the obstacles to self-governance.

2.3. DOCUMENTING EFFORTS TO STRENGTHEN SELF-GOVERNANCE OVER LANDS AND RESOURCES BY TRIBES

Despite the gaps in governance capacity, Alaska villages remain dependent on wild lands and resources for their wellbeing, relying on fish and wildlife resources for their food and clean water sources. At the time I began my research, the Alaska Native community was immersed in a struggle to protect their right to harvest wild resources for subsistence (see Chapter 5). Watching this effort unfold raised the question in my mind as to how this issue would be different if Alaska Natives had a right to govern fish and game resources. I knew in general terms that tribes lacked this right because of the loss of territorial governance authority caused by ANCSA. I wanted to know if tribal governments and tribal advocates were doing anything to regain this lost authority so that they could better protect their right to subsistence.

Beginning from this very general inquiry, I began attending public meetings that addressed one or more of these topics. These meetings included: two meetings of the Tribal Leaders Summit (2012 and 2013), the annual conferences of the Alaska Federation of Natives (2010, 2011, 2012, and 2014), an annual convention of the Tanana Chiefs Conference (2013), public hearings on proposed federal regulations regarding placing lands into trust (2013), and a seminar on co-management held by the Alaska Bar Association (2014).

From attending these meetings, I identified initial key informants to interview and further inform the scope of my research question and methodology. Ultimately, I interviewed ten people involved in various ways with the issue of subsistence and land rights. The goal of these interviews was to dig deeper into what was happening within the Alaska Native community to increase their authority over natural resources. These interviews were informally structured and designed to be conversational in nature. I selected my initial key informants purposively, and then expanded my informants through the process of snowball sampling (Kolb 2008; Esterberg 2002). I interviewed two tribal rights attorneys, the mayor of a northern Alaskan borough, a tribal administrator in a village close to my home community, two scholars, two directors of two Alaska Native organizations, two Alaska Native activists, a vice president of a village Native corporation and a lands and resources manager of a remote tribe. My goal in each of these interviews was to identify how each informant viewed the relationship between land rights and community governance, and what that informant perceived to be the impacts of ANCSA on tribal governance.

When coding my field notes from these initial interviews and my observation of public meetings, I relied on a framework analysis (Gibbs 2007, 44). I identified three dominant concepts through this analysis: land rights, governance and wellbeing. At this early phase of my

research, my goal in reviewing and coding my notes was to familiarize myself with the range of issues involved with the current efforts by tribes to increase their self-governance (Gibbs 2007, 44). I also used the interview process to find a project with which I could become involved and offer my legal skills to assist in the efforts to improve self-governance in keeping with the principles of Critical Indigenous Research Methodology (Brayboy et al. 2012).

In order to ensure that my research would be respectful and reciprocal, I sought to find an on-going project where I could apply my legal skills and my experiences working with village communities could be an asset. One of those studies featured in the Harvard Project on American Indian Economic Development was the innovative work of an intertribal, international organization that was in the midst of developing a governance strategy to increase their rights to participate in the governance of the Yukon River basin.

2.4. THE YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL: A CASE STUDY IN SELF-GOVERNANCE

This dissertation allows for this theory to develop through a case study. Case studies “investigate a contemporary phenomenon in-depth and within its real life context” (Yin 2009). They offer the opportunity to take a deep look at a given phenomenon in order to develop an understanding of the mechanisms of causation between the variables being studied which can then be applied to a larger realm of cases (Gerring 2007). When constructed in a careful manner, case studies allow “one to peer into the box of causality to locate the intermediate factors lying between some structural cause and its purported effect” (Gerring 2007).

I chose a case study methodology, as my aim was to generate theories about the connections and relationships between territoriality and wellbeing. Case studies can be used to generate novel theory and uncover new ways of explaining phenomena (Moore, Lapan, and Quartaroli 2012, 243; Eisenhardt 1989, 535, 546). Building theory from a case study allows for

a “sharpening of constructs” by tying the emergence of theories back to the evidence in a highly iterative process (Eisenhardt 1989, 541). This process helps to validate these emerging theories, which can then be tested against other case studies and against complimentary and contrasting literature (Eisenhardt 1989, 541).

This research presents a single case study: an examination of the efforts of the Yukon River Inter-Tribal Watershed Council to increase their role in water quality management in the Yukon River basin. This case study is bounded geographically to the Alaska side of the Yukon River watershed for two very vital reasons. First, the law regarding indigenous land and resource rights is very different between Alaska and Canada. My focus examined only the Alaska side of the border because the issue of “territoriality” is much more complicated than it is with the First Nations. As described in subsequent chapters of this dissertation, in Alaska, the two concepts bound up in the notion of territoriality – land rights and governance – are easy to disaggregate and therefore facilitate an analysis of what happens to territoriality when one of those pieces is missing. Second, as a member of the legal team, my participation was limited to developing a legal strategy for the Alaskan tribes. Other attorneys were engaged to develop a partner strategy on the Canadian side. This division of labor reflects the distinction between the legal state of tribal territoriality as it exists between the U.S. and Canada.

The case study is likewise bounded temporally to the period of 2012-2013. This two-year time period was the span between the 2011 Biennial Summit where delegates directed YRITWC staff to develop a water rights governance strategy, and the 2013 Biennial Summit during which that strategy was presented and adopted (Moore, Lapan, and Quartaroli 2012). My study period corresponded with the development of the water rights governance strategy as

defined by the YRITWC staff and leadership. Although I did not begin my participant observation until 2012, I relied on documents and direction from the 2011 Summit.

Case studies are particularly relevant for examining “why” or “how” questions (Yin 2003). This case study illuminates what happens when a community’s ability to govern is divorced from its land base. It thus facilitates developing theories regarding (1) why the communities along the Yukon River seek to assert their rights to self-governance by identifying the consequences of the lack of territoriality; and (2) how they intend to do so given the plethora of obstacles to asserting jurisdiction over lands and resources. In addition, focusing on the single setting (the work of a single organization, the YRITWC) helped to identify the complex dynamics and interrelationships between land, governance and wellbeing (Eisenhardt 1989) and allowed me to generate theories about the relationship between these three variables.

This case study provides insights into the impacts of severing land governance from the land’s owner. In this way, it is useful for communities that might face a similar fate due to transformations in property rights regimes as governments shift land policies, or those communities facing relocating to a piece of land over which they have no traditional claim to govern. These insights apply far beyond Alaska. For example, several small island nation-states face displacement and as they search for lands to resettle, one of the questions they will face is their future relationship to the new lands they might occupy. Will they occupy them as a sovereign with all of the attendant governance authority, or simply as a landowner with rights of ownership but not governance? Similarly, the issue of the authority of communities to govern their lands will arise when governments are negotiating how to codify customary land rights with communities. This case study elucidates why these questions are important in terms of the

ability of governments to ensure the wellbeing of their citizens even as the lands beneath them shift.

The Yukon River Inter-Tribal Watershed Council is an international indigenous organization created in 1997. The Yukon River watershed is the fourth largest watershed in North America, originating in British Columbia, Canada, and terminating in the Bering Sea (Brabets, Wang, and Meade 2000) (see Figure 2.2). The Watershed Council is constituted by seventy indigenous communities, 55 of which are located in Alaska. Their vision is be able to drink the water directly from the Yukon River (Yukon River Intertribal Watershed Council , About Us). Their governing principles are contained in an Accord that recognizes principles of cooperation and consultation and sets forth governance procedures (Yukon River Intertribal Watershed Council , About Us). The Accord establishes a 14 person Executive Committee, 7 from Canada and 7 from Alaska. In addition, the Accord directs that the YRITWC hold a biennial Summit where all those delegates present will have decision-making authority as a board of directors (Yukon River Intertribal Watershed Council , About Us).

FIGURE 2.2. MAP OF THE YUKON RIVER WATERSHED



Source: (U.S. Geologic Survey , nda).

Since its inception, the YRITWC has operated a number of projects designed to clean up the Yukon River in order to achieve their vision of being able to drink the water directly from the river. At the biennial summit in August of 2011, the YRITWC initiated a Water Rights/Water Governance Project (“YRITWC Governance Project” or “Project”). The goal of this project was to develop a governance strategy to enable member communities to assert their sovereign water rights over water quality management.

This governance project became my case study. As a case study, the project responded to my research question which necessitated understanding (1) why Alaska communities along the Yukon River asserting their sovereign rights to govern water quality and (2) how are they doing so given the legal obstacles to asserting tribal jurisdiction over lands and resources. I had the

opportunity to not only observe the development of the governance strategy, but to participate as a member of the legal team advising the staff and leadership of the YRITWC. I served in this capacity from March 2012 to September 2013.

This case study was consistent with my methodological approach (CIRM and grounded theory). I sought to ground my research methodology and outcomes in “transformative processes that assist communities in ways that meet their needs” (Brayboy et al. 2012). The creation of governance strategies is such a process, and the community members of the YRITWC were driving the development of this strategy in order to best meet their needs for clean water. Consistent with the notion of reciprocity embodied in CIRM, I participated in creating this strategy. The feedback I received while drafting these documents also assisted in helping me to revise and refine my legal analysis of the options available to YRITWC communities.

Led by a noted water rights attorney, team members included me, a law professor at the University of Montana who specialized in Indian and Natural Resource Law, and several law students from Canada and the University of Montana. The team met by phone weekly from March of 2012 until July of 2013 and produced two primary documents: (1) a watershed wide water quality standards plan; and (2) a strategy to propose to Yukon River member communities to increase their role in governance of the natural resources of the watershed. Both documents were presented at the 2013 Biennial Summit in Mayo, Canada. Summit delegates unanimously adopted the water quality plan, and approved the recommended approach to asserting increased governance throughout the Watershed.

2.4.1. Participant Observation

Participant observation is a valuable technique when studying processes, organizations and relationships (Jorgensen 1989). It is likewise appropriate when attempting to understand the differences of views between groups of people and it is useful for research that endeavors to generate, rather than test theories (Jorgensen 1989).

I engaged in participant observation through a structured internship as a member of the legal team within the YRITWC that spanned a time period from March 2012 until September 2013. This internship offered the opportunity to observe the work of the Council's staff, legal team, and leadership on improving self-governance and then to generate theories about why this is important to community wellbeing. Moreover, this approach was participatory and action oriented (Gatenby and Humphries 2000).

From 2012-2013, I created a series of legal memos using legal research and legal analysis methodologies. During this period, I developed a matrix for use by the YRITWC that identified the types of government structures and institutions within each of the 55 Alaskan member communities, and which of those communities operated environmental programs of some form. I called every village council within the Alaska side of the watershed to collect this information.

Throughout the duration of my internship with the YRITWC, I participated in approximately 28 bi-weekly meetings of the legal team during which the legal team created a legal strategy to propose to the YRITWC leadership for how best to assert authority over lands and resources within the watershed and how to leverage a water quality standards plan into a governance strategy. I participated in four community teleconferences from May to July 2013 whereby YRITWC member communities called in with any questions they had on the water quality plan draft document. I also worked with legal interns during the summers of 2012 and

2013 during their tenure as summer law clerks with the YRTIWC, and acted as one of their supervisors.

I kept a written log of the weekly meetings I attended as part of the legal team, and of the community teleconferences we held immediately prior to the Mayo Summit. I created a series of legal memos as well during my internship that served to move the governance strategy forward, and to capture my legal analysis of the options available to the tribes to assert their rights to govern. My work as a participant observer informed my on-going data collection and analyses in ways consistent with both a framework analysis and a grounded theory approach (Gibbs 2007). The most marked example of this combined approach is that I began my research using the three categories I identified in my literature review to frame my initial understanding of the nature of the relationship between lands, governance and wellbeing wherein I posited that tribes needed territoriality in order to govern for their members' wellbeing. However, as my research evolved, and I continued to collect and analyze data and compare it against my initial theoretical constructs, my research began to suggest that tribes were relying on much more than just territorial authority as a source of governance (Gibbs 2007). The very nature of the water rights strategy we developed reflected an alternative, non-territorial approach to asserting governance that relied on science and traditional knowledge rather than land-based sovereignty.

2.4.2. Key Informant Interviews

The case study research involved conducting a series of semi-formal interviews held between 2012 and 2013. As with my scoping interviews, my initial key informants were purposively selected based on their role within the YRITWC organization (leadership and staff, and Summit attendees), and then expanded through the process of snowball sampling (Kolb 2008; Esterberg 2002).

I conducted three interviews with YRITWC leaders, staff (current and former), and consultants between March and August 2013. The purpose of these interviews was to explore the reasons behind why the YRITWC was pursuing a strategy to increase self and shared governance of lands and waters within the Yukon River Watershed. I also conducted four interviews during the August 2013 biennial summit. These interviews were with YRITWC leaders (representatives from YRITWC member communities) and with invited experts attending the Summit to assist in the development of the governance strategy. As with the scoping interviews I had been conducting, I obtained written or oral consent of all participants (see Appendix 1). Each interview was taped and transcribed prior to coding. The identities of the key informants have been kept confidential, and each key-informant has been assigned a number identity to which I will attribute quotes and data. Key informants from the YRITWC leaders and staff will be identified as “YRITWC 1” and so forth, and key informants from other sectors of the community will be identified as “K-I Expert 1” and so forth.

2.4.3. Data Analysis

My method of analysis was slightly different for my participant observation notes than it was for my notes taken during key informant interviews. My notes taken as a participant/observer were directly integrated into a series of legal memos I created that then were used by the legal team to inform the development of a legal strategy to elevate the role of the Alaska tribes in self-governance. As described above in the section on critical research methodologies, these memos became a component of the notion of reciprocity as I was able to share my legal analysis with the organization in a way that responded to their needs directly. Similarly, the evolution of my knowledge as a result of engaging in this legal analysis informed the way I conceptually understood the types of loss experienced by communities as a result of

the lack of territoriality. For example, I identified the lack of capacity to regulate environmental quality as a specific consequence to the loss of territoriality because of the legal research and analysis I did during my role as a participant observer (see Chapter 6). In addition, the data I collected and analyzed within that role also shaped the way I began to think about appropriate policy responses to that loss. Specifically, I was able to ultimately identify that non-territorial authority is as vital a piece of governance capacity as territoriality (see Chapter 9).

I used a system of progressive coding to organize my analysis. First, I reviewed the interview notes using line by line coding (Thornberg and Charmaz 2012) where, in each line of the text of my transcribed interviews, I was able to identify values articulated by the informants, such as culture and tradition, and the importance of sharing knowledges and experiences within and through generations. I was able to identify peoples' views of the role of land to culture, and how vital living off of the land's resources is to community longevity and cultural identity. People used words that described loss – loss to control, loss of ability to make sure they lived in clean environment, loss of knowledge – as some examples.

From this initial open-coding, I refined the concepts reported in the data. I began to use theoretical codes where I categorized concepts in a way that produced “integrative scope, broad pictures and a new perspective” (Thornberg and Charmaz 2012, 51). Moreover, theoretical coding elucidated the relationship between my theoretical frameworks in a way that presents “an analytical story that has coherence” (Thornberg and Charmaz 2012, 51).

After moving through the coding process from open ended coding to more focused coding, what emerged were themes of loss, resilience, relationship and rights. These four themes became the basis for generating my theoretical constructs regarding the relationships between land and governance and wellbeing. I was better able to determine what my key informants

meant by the term "wellbeing." Within the context of my research question, wellbeing meant the ability of tribes to exercise authority and responsibility as a government to better control their fates and their futures, and it meant being respected as a sovereign government by other state and federal sovereigns. Likewise, through this analytical process, I was able to identify connections between the lack of territoriality and the impacts of tribes to govern for the wellbeing of their community. I could articulate the specific losses that tribes felt as a result of losing their ability to govern lands; losses to food security, to environmental quality control, to the ability to control changes arising from transforming environmental conditions, and the lack of authority to protect public safety in their own communities.

2.5. CREATING A PUBLIC POLICY FRAMEWORK

The last chapter of this dissertation proposes broad public policy goals that would support human development and human rights. I constructed these goals through a public policy analysis of existing laws and regulations regarding land and governance rights. Public policy analysis provides the larger framework necessary to determine whether and how "public or governmental policies will most achieve a given set of goals in light of the relations between the policies and the goals" (Nagel 1988). Drawing on Esterberg's (2002) cautions regarding conflicting meanings, I relied on interpretative policy analysis and the identification of relevant "communities of meaning" (Yanow 2007; Yanow 2000).

Interpretative policy analysis is a mechanism to evaluate policies after they have been enacted and implemented (Yanow 2000). Policy analysis can inform both policy makers and citizens with "an intelligent basis for discussing and judging conflicting ideas, proposals and outcomes" (Yanow 2000, 2). Policy analysis helps to develop a legal framework and strategy for promoting local control and self-governance by creating a means to understand how existing

policies do or do not achieve those purposes, and what possible proposals might lead to better outcomes (Yanow 2000).

Yanow (2000) argues that a true understanding of policy consequences requires “local knowledge” which she defines as expert understanding about the local conditions derived from lived experiences. In addition to providing a more accurate assessment of the impacts of public policies on local communities, such knowledge can likewise help to avoid future disasters, particularly in the context of community development policies (Yanow 2000). Interpretative policy analysis integrates “local knowledge . . . the expert understanding of and practical reasoning about local conditions derived from lived experience” in order to compensate for the “lack of attention to or outright devaluing of local knowledge . . . common in development policies” (Yanow 2000, 22).

Yanow also describes “communities of meaning” as focal points for research. These communities are not rooted in geography, but rather in shared commonalities such as “values, beliefs and feelings” (Yanow 2000, 22). The data involved in interpretative policy analysis that are specific to these communities of meaning include “the words, symbolic objects, and acts of policy-relevant actors along with policy texts, plus the meaning these artifacts have for them.” (Yanow 2000, 22).

Table 2.1 illustrates the relevant communities of meaning that emerged throughout the course of my research, and the data upon which I relied to both identify these communities and use as a basis for analyzing their common “values, beliefs and feelings” (Yanow 2000, 22).

TABLE 2.1. COMMUNITIES OF MEANING AND THEIR EXPRESSION THROUGH “DATA”

| Communities of Meaning (as they existed during the term of this research: 2011-2014) | “Data” (words, symbolic objects, actions by policy actors) |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| The Yukon River Inter-Tribal Watershed Council as an organization committed to increasing self-governance within the Watershed over traditional lands and waters. | Interviews with staff and leadership and consultants Participant Observation notes |
| Alaska Native organizations and activists committed to increasing self-governance over lands and other tribal matters (public safety, domestic relations, for example). | Public hearing testimony and background materials Interviews with key leaders identified through snowball sampling |
| “Rights based” institutions whose purpose was to adjudicate different perspectives and “rights”/entitlements and develop approaches based on either policy (ILOC) or law (as in the case of the courts). Includes the Alaska State Courts and the U.S. Indian Law and Order Commission. | Court decisions Final published reports |
| The State of Alaska and U.S. government agencies. | Official statements, testimony at public meetings or for public processes Legal arguments in court documents |

For each community of meaning, I analyzed how each regarded issues of land rights, self-governance and wellbeing. As expected, differences emerged that reflected the values of each. The Alaska Native organizations I followed focused on how to increase self-governance by advocating for changes to federal law and regulation. For rights-based institutions such as the judicial system and the US Indian Law and Order Commission (ILOC), the lack of a land base had differing impacts. For the State of Alaska Court system, tribes retained authority to regulate relations between members regardless of land status, but the Court has restrained itself from making any broad policy pronouncements and instead treats these questions on a case-by-case

basis. For the ILOC, land is critical to reestablishing tribal control over public safety issues, and so reasserting Indian country becomes a critical key to wellbeing. For the State of Alaska Executive branch, the loss of land jurisdiction was fatal to the ability of tribes to govern anything beyond the barest of issues, but the state maintained that this does not hinder a local tribes' ability to promote the interests of its community.

Given these differences in perceptions regarding whether territoriality is integral to community wellbeing, it becomes necessary to bridge these differences in order to create effective and meaningful public policies. Interpretative policy analysis provides a mechanism to help “generate new ideas for policy action – possibly by synthesizing opposing arguments or reframing the debate at another level rather than merely advising on the choice of one existing proposal over the other” (Yanow 2000, 22). As described more fully in Chapter 9, I relied on this approach to develop a prescription for policy action that combines both territorial and non-territorial authority as a means to recognize and support the capacity of tribal governments to secure community wellbeing (human development) and assert their right to self-determination (human rights).

2.6. ETHICAL COMPLIANCE AND PROTOCOLS

Throughout my research, I adhered to ethics protocols required by the Yukon River Inter-Tribal Watershed Council, the University of Alaska Anchorage Institutional Review Board, and Central European University. The Yukon River Inter-Tribal Watershed Council provided full prior consent to my proposal to observe and participate in the water rights governance strategy (see Appendix 2). I underwent the Institutional Review Board process at the University of Alaska. Through this process, I obtained an exemption from a full IRB review and conformed to their rules and regulations regarding principles and responsibilities of ethical research (Appendix

3). This approval was necessary due to my affiliation as a visiting scholar at the Institute for Social and Economic Research and as a faculty member in the Department of Political Science at the time my research originated. Similarly, I obtained approval from Central European University pursuant to CEU's Ethical Research Policies and Guidelines (Appendix 4).

For each interview I conducted, I obtained full and prior consent of the informant. In all but one of these cases, this consent was in writing (the one exception was because the informant failed to return the consent form, but his consent is recorded). I taped each interview, and transcribed the interaction. In accordance with U.S. law, I will retain the interview notes and consent forms for three years subsequent to the completion of this research, at which point all documents will be shredded and deleted from my computer (45 CFR 46.115(b), 45 CFR 46.117).

2.7. LIMITATIONS OF SELECTED METHODOLOGY

Through my research I was able to identify precise impacts to communities that resulted from the loss of territoriality. This result moves the discussion of local governance forward in new ways because it adds a new level of specificity so that policy makers can understand the actual impacts of how constructing property regimes impacts on governance capacity. For the first time, we can itemize what happens when local communities are not able to govern in ways that they need to address the wellbeing of their communities. However, what is not reflected in my findings is identifying whether communities are capable of governing themselves and, if not, how this capacity could be increased.

Additionally, my methodology is limited in the following ways. My key informants include Alaska Native leaders and Alaska Native organizational leaders, YRITWC staff and consultants, attorneys, and community representatives. I did not interview state and federal officials because the data that would be generated through these interviews was accessible

through archival documents in the form of official government papers and in legal pleadings. I chose instead to focus on obtaining information that was not otherwise available. The information I collected from my key informant interviews cannot be found in any other documents or records.

Similarly, I had minimal contact with individual community leaders from villages within my study area. This was in part a matter of logistics as I had no ability to travel to the YRITWC member communities due to the high cost of travel to the remote villages along the Yukon and the lack of funding to do so. Therefore, the only community leaders I had access to were those who attended the 2013 Biennial YRITWC Summit in Mayo, Canada. Having the opportunity to interview more community leaders throughout the 55 Alaska Native tribal members of the YRITWC would have resulted in a broader representation of opinions regarding the impacts of the loss of territoriality on community wellbeing. Given this restriction, I limited my case study to the work of the YRITWC as an institution and the institutional responses to the lack of territorial governance capacity. As a member organization that takes direction from its community delegates, I can assume a level of representativeness.

This research is limited temporally. It represents a slice in time. Laws and regulations are already changing from when I started this research, some of these changes are accounted for here but other efforts are on-going. The legal and practice landscape is constantly changing, making this research extraordinarily interesting and timely.

This research is likewise limited geographically. The YRITWC is an international organization and so spans two completely different national jurisdictions with very different legal frameworks. The First Nations on the Canadian side of the border experience tremendous challenges to ensuring that they can meet the needs of their community members in much the

same way that Alaska tribes do, but the legal landscape is entirely distinct. The Alaska tribes, unlike the Canadian First Nations, cannot govern the lands they occupy, making the Alaskan experience the only setting appropriate to assess the consequences of the loss of territoriality on tribal governance capacity. Therefore, the research and conclusions are limited in scope to communities that, like Alaska tribes, lack a geographic source and scope of jurisdiction.

CHAPTER 3. ALASKA’S UNIQUE APPROACH TO TERRITORIALITY AND THE IMPLICATIONS FOR HUMAN DEVELOPMENT AND HUMAN RIGHTS IN AMERICA’S ARCTIC

The U.S. government settled indigenous claims to traditional lands in a unique way that transformed customary land rights and systems of governance into corporate for profit ownership models. The outcome of this approach illuminates the stark difference between land ownership and land governance in a way that can be instructive for communities and nation-states around the world struggling with how to construct property rights frameworks. As described herein, the failure to understand this distinction created obstacles to the ability of tribal governments to assert the right to self-determination and the capacity to govern for community wellbeing.

My research aim was to understand the impacts of the loss of territoriality (governance over lands and resources) on the ability of Alaska Native tribes to govern for their own wellbeing. My inquiry into how the loss of territoriality impacts community wellbeing embeds three distinct variables: land rights, governance and wellbeing. This chapter examines how these three variables interact in general terms among indigenous tribes in the U.S. where those tribes have retained authority over territory. This understanding provides the context to then examine the State of Alaska, where the sovereign right to govern traditional territory is markedly different.

This chapter describes critical terms necessary to frame my analysis. The idea of territoriality as the nexus between land and governance is examined both as a whole, and then broken into its constituent parts: property rights and governance authority. The term “development” as it is used in this research is likewise explored, and I introduce the term wellbeing as a component of human development. As described here, the recent application of human development principles in the Arctic provides a framework for discussing how governance policies are or are not capable of promoting community “wellbeing” as that term is

defined in human development literature. Finally, this chapter introduces human rights and the right of self-determination as guidepost to assess how Alaska indigenous communities are faring.

3.1. TERRITORIALITY

Territoriality describes “the application of a rule or law [governance] to any spatial region [territory] with the aim of controlling the behavior of people within it” (Kofman 2007, 66). The notion of territoriality contains three elements vital to this research: *governance*, or the idea that governments have the authority to apply rules and laws over *territory*, or a spatial region; and over *people* within that spatial region. Put more simply, governments exercise two types of sovereign authority – over people and place.

As the idea of sovereignty has evolved, these two types of authority are often thought of as inextricably bound together, but as this research shows, Alaska demonstrates that the two do not always co-exist. This dissertation examines what happens when a sovereign government loses authority over place, its “territorial reach,” and the impacts that loss has on a government’s ability to protect the wellbeing of its people. Despite the creative ways governments overcome the loss of territoriality, land sovereignty is still vital for governance capacity as a matter of law and policy. Similarly, the distinction between land governance and land ownership is not widely understood by policy makers, and yet as this research demonstrates, that distinction can impact on the ability to assert the right of self-determination and on the capacity to govern for wellbeing and promote human development.

3.2. THE NATURE OF LAND AND PROPERTY RIGHTS IN WESTERN SYSTEMS

Territoriality is the idea that rules and laws (“governance” in this study) are tied to land or territory (here, “property”) and that the controlling group (the sovereign) attempts to “affect, influence, or control people, phenomena and relationships [within] a geographic area” (Kofman

2007, 66). Indeed, for a state to be recognized under international law, it must have a discrete, bounded territory over which to govern (Ansell 2004, 225). Branch (2011) argues that the modern understanding of territoriality as a geographic boundary is “part of the fundamental structure of sovereign statehood and modern international politics” (Branch 2011, 281). Indeed, the idea that governments “exercise power over people through its control of a bounded space” is one of the defining features of state power (Johnston 2001, 684).

Within western systems of property rights, sovereigns retain the authority over territory including the ability to organize and enforce the ways in which rights to specific lands and resources within their borders are allocated (Bromley 1991). The ways that sovereigns allocate rights to land, or “property rights,” are “among the most potent determinants of the character of social relations, economic activity and political power” (Offner 1981; Bromley 1991). Property rights regimes reflect and define “social relation[s] that defines the property holder with respect to something of value against all others” (Bromley 1991). This section describes how property rights are defined and allocated within western legal systems. It describes how the notion of private property has become a dominant feature of these systems, and then examines the emergence of common property regimes.

3.2.1. The Evolution of Private Property Rights in Western Legal Systems

Property is the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe (Blackstone as cited in Cohen 1954, 357).

The notion of property as something to be “owned” by an individual to the exclusion of everyone else lies at the heart of western notions of property rights. “Private” property finds its roots in the theories of natural laws. John Locke believed that man’s right to assert dominion over lands and resources to which he applied his own labor, was inalienable. In his Second

Treatise on Civil Governance, Locke describes the transformation of lands from commonly used to privately held:

Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others (Locke 1690).

Locke argues that people have an inalienable right to own specific parcels of property once they have labored on that land. Once an individual applies his labor to a parcel of land, that land becomes that person's private property, and that person is able to assert a variety of rights over that land, including the right to use the land and to exclude others (Locke 1690; Underkuffler 2003). Unlike other rights that are subject to regulation by the sovereign such as civil rights, Underkuffler (2003) distinguishes property rights as "zero sum;" when one person has a property right, it necessarily means that another does not have the same right to that property (Underkuffler 2003).

Although the philosophy behind private land ownership stemmed from Locke's theories of natural law, eventually land tenure systems evolved to address more practical concerns about ways in which sovereigns would carve up rights to particular pieces of land amongst their citizenry (Bromley 1991). The configuration of rights associated with lands changed over time, the sovereign remains the authority that defines and allocates a variety of rights to property (Sprankling 1999). The rights afforded to landowners by sovereigns vary in degree, and are often referred to as a "bundle of sticks" wherein each "stick" represents a different right such as the right to use, to alienate, and to exclude (Cole and Ostrom 2011; Offner 1981). One category of land ownership is known as "fee simple" or "fee simple estate" where the owner of such an

estate has the exclusive right to alienate or sell their rights to the land (Black's Law Dictionary). In western legal systems, this type of estate is considered to be the highest and best form of property ownership.

However, even when a landowner possesses "fee simple" title, the right to use the property is not complete. Those rights remain subject to the authority of the sovereign to tax and regulate land use (Sprankling 1999), and to enforce those authorities even against landowners. "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases" (Sprankling 1999, 1). Property rights are a political instrument used by the sovereign to order social and legal relations around a thing of value to achieve particular purposes or policy goals (Bromley 1991).

In addition to being the "highest and best form of property ownership," private property became the cornerstone to economic and environmental health and wealth in western systems. In his classic essay, "The Tragedy of the Commons," Garrett Hardin (1968) argued that economic wealth and environmental health depended on either a system of intensive governmental regulation or the vesting of private property rights in landowners who would, as rational actors, choose to use their land and resources wisely to maximize their own benefits (Hardin 1968). As Bromley describes, "the conventional wisdom is that private property rights are a necessary condition for the generation of economic wealth; in land, this means that private ownership of land is a precursor to the realization of an economic surplus" (Bromley 1989, 868 as cited in Hirsch, 1998, 14). Cole states "it is presumed that if someone does not 'own' a resource, they do not have long term interests in sustaining the resource over time, and thus cannot be expected to act beneficially toward that resource" (Cole and Ostrom 2011, 11). Hardin's Tragedy of the Commons provided the intellectual underpinning for resource

economists throughout the 1970s and 1980s to argue that privatization was the best public policy to manage resources on a sustainable basis and to “reduce externalities and transaction costs [and] increase[e] gains from trade and facilitat[e] resource conservation” (Cole and Ostrom 2011, 2; *see also*, Agrawal 2002).

The high value placed on private property rights within western systems of government informed the direction that the federal government took when Congress settled land claims with Alaska Natives in 1971. As described in Chapter 4, the Alaska Native Claims Settlement Act privatized lands once held in common by Alaska Native communities, but did so in unique and innovative ways. While this form of property rights settlement bore tremendous economic wealth for Alaska Native corporations, its impact on the right of tribes to engage in self-government and to secure the wellbeing for their people was less clearly positive.

3.2.2. The Emergence of Common Property Systems as an Alternative to Private Property Rights

In the 1990s, an alternative perspective emerged that, upon close examination, reveals a similarity to indigenous views on land that is discussed in the next section of this chapter. This alternative emerged from Hardin’s Tragedy of the Commons when many scholars argued that Hardin’s understanding of the commons was based on a false dichotomy; land was either privately owned or openly accessible to all – a concept Hardin referred to as a “commons” (Bromley 1991; Cole and Ostrom 2011). Ostrom, Bromley and others refuted that characterization, and argued that the regimes described in Hardin’s tragedy are more accurately understood as “open access regimes” that lack a definable structure of land rights and management responsibilities (Bromley 1991). Beginning in the 1990s, extensive research emerged documenting the existence of what came to be called common property systems (Cole and Ostrom 2011). These systems vest title to the land to a collective, and where members of

that collective or community share rights and duties to the land and resources. In common property regimes, as in private property regimes, owners have the right to exclude outsiders and manage the natural resources attendant to the property subject to state and/or federal laws (Bromley 1991). These systems are self-governing, encompassing a set of institutions, regulations, and management practices (Cole and Ostrom 2011).

Commons scholars did not create the commons as an alternative form of property rights, but rather acknowledged that these regimes exist and have existed and functioned for hundreds if not thousands of years. Rather, the bulk of commons scholarship has been focused on documenting the existence of common property regimes throughout the world, especially within the developing world (Fuys, Mwangi, and Dohrn. S. 2008). Agrawal (2002) argues that common property scholars have forced a shift within policy debates to acknowledge the existence of functioning common property systems when developing public policy options related to crafting property regimes, and that “scholars and policy makers are less likely to propose central state intervention, markets or privatization of property rights over resources as a matter of course.” Agrawal (2002) similarly recognizes that power relations may shift beneficially toward local communities with the recognition of common property regimes as a viable alternative to property rights constructs.

Table 3.1 depicts the four types of land regimes scholars identified in response to privatization theorists. Note that within this typology, land governance is conflated with land ownership, reflecting the idea that territoriality is so engrained in the way we think about land that scholars do not emphasize the distinction between the two notions of governance and ownership.

TABLE 3.1. THE CONVENTIONAL TYPOLOGY OF PROPERTY SYSTEMS

| | |
|-----------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| State/public property | <p>The State or its agencies have the <i>right</i> to determine rules of access and use, but a <i>duty</i> (in theory at least) to manage publicly owned resources for the public welfare.</p> <p>Individual members of the public do not necessarily have a right of access or use, but they have a <i>duty</i> to observe access and use rules promulgated by the State.</p> |
| Private property | <p>Owners have the exclusive <i>right</i> to undertake socially acceptable uses to the exclusion of non-owners, and have a <i>duty</i> to refrain from socially unacceptable uses.</p> <p>Non-owners have a <i>duty</i> to refrain from preventing owners' socially acceptable uses, but have the <i>right</i> to prevent or be compensated for socially unacceptable uses.</p> |
| Common property | <p>Each member of the ownership group has the <i>right to access</i> and use group- owned resources in accordance with access and use rules established collectively by the group, and a <i>duty</i> not to violate access and use rules.</p> <p>Each member also has the <i>right to exclude</i> non-members of the ownership group, but no right to exclude other members of the ownership group. Non-members of the ownership group have a <i>duty</i> not to access and use the resource, except in accordance with rules adopted collectively by the ownership group.</p> |
| Nonproperty/Open Access | <p>No individual has a <i>duty</i> to refrain from accessing and using a resource.</p> <p>No individual or group has the <i>right</i> to prevent any other individual or group from accessing and using the resource as they choose.</p> |
| Source: (Cole and Ostrom 2011, Adapted from Bromley (1991, 31)) | |

3.2.3. Alaska as a Commons

At the time Alaska became a state in 1959, it was granted title to one-quarter of the lands in the state (Cooley 1984). Alaska's constitution requires that all of the state's lands and resources are to be used for the common benefit of all Alaskans equally. The Constitutional mandate of a common benefit that accrues to all Alaskans reflects the attributes of a commons,

particularly when considered in conjunction with the notion of reciprocal obligations that is enshrined in the first paragraph of the state's constitution, "all persons have corresponding obligations to the people and to the State" (Article 1). The following provisions of the Alaska State Constitution contain provisions that, taken together, form what former Governor Walter J. Hickel called "the Owner State" – a place in which all Alaskans "own" the resources of the state, which are then to be managed in such a way as to benefit all Alaskans (Hickel 2002).

§ 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

§ 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 4. Sustained Yield

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

These provisions of the state's constitution combine with the fact that under the Alaska Statehood Act, one-quarter of Alaska's lands are owned by the state. In a state with a very small population, taxation is not a viable option for Alaska to financially sustain itself, thus the financial benefits that accrue to the state from resource development are a vital part of the state's economy (Botos 2011, 11). The state relies on "private sector development of collectively owned resources and the citizens share the benefits" (Hickel 2002, 29).

The idea of Alaska as a commons inspired former Governor Hickel to conceive of Alaska as an "Owner State" that could become a model for nations and peoples around the world

(Hickel 2002). An “Owner State” model, like common property systems, conflates land ownership with land governance where those who own lands simultaneously govern them, providing a way to better allocate the benefits of resource development across the population who lives close to and depends on those resources. “My hope is that a century from now, the ideal that the commons should be managed for the benefit of the total will be an accepted part of life . . . the stakes could not be higher and the rewards to the entire human race and to our planet could not be greater” (Hickel 2002, 255). Local governance and control was a critical piece of this vision, “resources managed from afar . . . are usually mismanaged and exploited for the interests of those far away” (Hickel 2002).

An “owner state” model addresses this concern that resource management decisions are more responsible and sustainable if they are made by the people affected by them. The idea that local control is the preferred approach to wise resource management was one of the primary motivators behind the push for statehood by Alaskans, and is reflected in the state’s constitution. This notion is similar to the principle of subsidiarity, an organizing principle that calls for governance power to be devolved to the “smallest, lowest or least centralized competent authority” (Botos 2011, 21). The principles of devolution and subsidiarity acknowledge that there is not a “one-size fits all” solution to sharing power between levels of government, and that some local communities might have more capacity to govern than others (Botos 2011, 21-22). Capacity in this sense, and for purposes of this research, is more focused on the question of legal capacity to exercise authority rather than a determination of whether a community has functioning structures capable of actually exercising authority. This focus reflects the type of analysis I conducted. As a question of law, the issue of whether a government has the legal authority to govern a place or a people is a predicate to the question of whether they have the

structures and expertise in place to do so. I recognize that this distinction may not be relevant to remote communities such as those found in Arctic Alaska, where indigenous customs and traditions are as much or more a part of the way of life than the western legal system.

3.3. TRIBAL TERRITORIALITY, DOMESTIC DEPENDENT SOVEREIGNTY AND INDIAN COUNTRY

The literature that describes and “defines” the ways in which traditional indigenous communities view land is descriptive rather than quantitative in nature. Scholars and policy makers describe ways in which traditional indigenous cultural views on land differ from those held by settler societies primarily in that indigenous cultures see themselves as indivisible from land; indigenous communities “control” land as a collective; and indigenous values determine that land is best protected by adherence to collective stewardship that transcends generations which then determines its present and future value. “The land from which our culture springs is like the water and the air, one and indivisible” (Manuel and Posluns 1974).

The interconnectedness between culture and land underpins the very essence of indigenous cultures and is critical to defining these cultures (*see e.g.*, Florey 2010; Kronk Warner and Abate 2013; McCoy 2002/2003). The U.N. Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José Martínez Cobo, formulated a working definition of indigenous communities as:

[P]eoples and nations . . . having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.² (Martínez Cobo 1986, 379).

2 This is only a working definition within an international legal framework as no official definition exists. J. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*. E/CN.4/Sub.2/476 (New York [1986]).

Similarly, Duffy (2008) defines the relationship between indigenous peoples by virtue of their durable relationship to land:

They are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of the more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence that links them to the communities, tribes, or nations of their ancestral past.

Mick Dodson, Commissioner of the Aboriginal and Torres Strait Islander Social Justice Commission adds that self-identification is a critical component of the definition of indigenous peoples, but that of crucial importance is the existence of historical and ancient connections with lands and territories (Martinez Cobo 1986, 379).

The United Nations Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims likewise identifies the intimate nature of the relationship between indigenous communities and the lands they occupy,

Indigenous peoples have a distinctive spiritual and material relationship with their lands . . . the importance of the issue of the link between self-determination and the right to land is recognized . . . Indigenous peoples continue to be affected by the consequences of colonialism and are often deprived of a land and resource base . . . the recognition of the rights of indigenous peoples to specific lands which they cannot be separated from the recognition of other rights, within larger areas necessary for their material and cultural development. (United Nations 1996, E/CN.4/Sub.2/AC.4/1996/6).

Land is essential to the culture and communities of indigenous peoples around the world. Sutton (1975) writes, “earth and nature are inseparable from the Indian himself.” Land means survival and strength to collective indigenous communities (Manuel and Posluns 1974; Coulter and Tullberg 1984). The connection between communities and their lands is so critical that it is acknowledged in the United Nations Declaration on the Rights of Indigenous Peoples.

In traditional indigenous systems, kinship relations controlled access to land and resources (Bodley 1990). Within traditional cultures “the relationship to the land is collective,

rather than individualized; it is the entire community that is affiliated to a particular territory” (Duffy 2008, 508). The concept of land “adheres to the spirit of collectivism and rejects the idea of private property” (Duffy 2008, 511). The idea of collective rights to land is commensurate with collective responsibility. Duffy notes, “as the land is held in usufruct for future generations” (Duffy 2008, 510).

3.3.1. The Struggle Over Lands: The Doctrine of Discovery and the Emergence of Indian Country

As territoriality is a dominant and foundational element of sovereignty (Johnston 2001, 684; Branch 2011, 282), the authority to control land is integral to governance. Land has been at the heart of the conflict between aboriginal and western communities for the past four centuries (Manuel and Posluns 1974). Taking control over new territories was the driving force behind centuries of colonial dispossession of indigenous communities from their lands (Kohn and McBride 2011). Harris (2004, 167) describes the pull of land for European colonizers:

Underlying social space are territories, land, geographical domains, the actual geographical underpinnings of the imperial, and also the cultural contest. To think about distant places, to colonize them, to populate or depopulate them: all of this occurs on, about, or because of land. The actual geographical possession of land is what empire in the final analysis is all about.

Banner (2007) describes the history of colonial settlement throughout the Pacific as giving rise to basic legal questions regarding the nature of the rights of the dispossessed indigenous communities to their lands. In the United States, the official policy regarding aboriginal lands was that the indigenous populations retained some form of property rights in the lands they occupied (Banner 2007). However, those rights were not absolute and were constrained by the idea that the colonizers, or “discoverers” had rights to conquer and re-possess indigenous lands as long as they did so through sale or treaty (albeit this practice was in name only) (Banner 2007).

The doctrine of discovery wherein conquering nations claimed legal right to lands they “discovered” was applied to the United States early in its history. Chief Justice John Marshall relied on this principle of international law when he determined that “the first discovering power [was] endowed with the sole right of acquiring the soil from the natives, and establishing settlements upon it” (Case and Voluck 2012) at page 2. The result was the loss of land and self-governance to indigenous communities throughout the world (Monette 1995).

In 1823, the U.S. Supreme Court led by Chief Justice John Marshall held that by the act of conquest and “discovery,” the newly formed United States (as successor to the British monarch) supplanted the rights of the indigenous communities to claim title to lands (*Johnson v. M’Intosh* (21 U.S. (8 Wheat.), 543 (1823))). Marshall ruled that the act of “discovery gave title to the government . . . by whose subject, or by whose authority, the discovery was made” (Johnson: 573-4). Once the conquering sovereign displaced indigenous claims to land title, all that remained was the right of “occupancy of the natives” (Johnson, 577). The transformation of property rights from the right of possession to the right of occupancy became the foundation for the creation of “Indian Country” – a designation that supports tribal territorial governance to this day.

The doctrine of discovery arose again in an 1831 case in which Justice Marshall subverted the sovereign authority of tribes to the newly conquering United States. In *Cherokee Nation v. Georgia* (30 U.S. (5 Pet.) 1 (1831)), Marshall declared that Indian tribes were to be considered “domestic dependent nations” subject to the U.S. government’s absolute legislative authority, and the relationship between the U.S. government and tribes were to be that of a ward to a guardian. A third case, *Worcester v. Georgia* (31 U.S. 515 (1832)), reiterated the legal right

of the U.S. Congress to exclusive (“plenary”) power over tribes, which afforded Congress with the authority to define the precise contours of tribal governance authority.

These three Supreme Court cases have come to be known as the Marshall Trilogy. The trilogy established that Indian tribes have occupancy, not ownership, rights to land. In addition, tribal sovereignty is now truncated, and this “domestic dependent sovereign” status means that Congress determines the extent of tribal governance authority tribes over lands and peoples (Hipp 2013, 75). Despite the fact that Chief Justice Marshall acknowledged the pre-existing legal claims that tribes as sovereigns could make on the lands now occupied by the new United States, the Marshall trilogy and the legal framework it established has been the subject of much criticism. For example, one legal critic states “since that fateful decision in *Johnson v. M’Intosh*, American law has often worked against Native Americans, legitimizing the appropriation of their property and the decline of their political, human and cultural rights as indigenous peoples in the hands of the government” (Case and Voluck at 3). Notwithstanding these criticisms, the Marshall Trilogy provides the enduring framework for understanding tribal governance and land rights within the United States and the development of the notion of “Indian Country.”

“Indian Country” is the term used to describe lands controlled by Indian tribal governments throughout the United States. Deloria and Lytle defines Indian Country as a concept that transcends “mere geographical connotations and represents that sphere of influence in which Indian traditions and federal laws passed specifically to deal with the political relationship of the United States to American Indians have primacy” (Deloria and Lytle 1983). Legally, “Indian country” is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . all dependent Indian communities within

the borders of the United States . . . and all Indian allotments” (18 U.S.C. 1151 as cited in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998)).

“Indian Country” recognizes the differences between “the powers of a sovereign over land as compared with the powers of a landowner” (McCoy 2002/2003, 477). Indian Country status affords the right of exclusive occupancy to a group or tribe, but does not include the “ultimate fee” or ability to convey or sell the occupied land (Case and Voluck 2012). That right is reserved to the conquering sovereign, along with the right to further delimit the rights of tribal governments who reside on aboriginal lands (Case and Voluck at 36).

The term “Indian Country” is the essence of contemporary Native territoriality (McCoy 2002/2003). When the territorial boundaries of Indian Country are altered, so is the extent of tribal governance authority over lands (Florey 2010, 595; McCoy 2002/2003, 421). If Indian Country is converted into private property, even within a reservation, “the tribe loses plenary jurisdiction over it” (Florey 2010, 606). Likewise, tribal ownership of land does not mean that it is Indian Country. Once a piece of land has lost its “Indian Country” status, even if a tribe subsequently buys back that land, it does not again become “Indian Country” for purposes of supporting tribal governance authority. Florey underscores the idea that tribal *ownership* of land is insufficient for tribes to adequately assert sovereign control (606-610).

The idea that tribes as sovereigns govern but do not own the lands on which they exist is integral to the idea of tribal territoriality (McCoy 2002/2003, 442-43), and reflect the on-going unique nature of the relationship between tribes and lands. McCoy identifies three distinct “modes of [tribal] territoriality” – homeland, sacred land and nation-state – that taken together encompass the relationship of tribes to land as culturally significant that far exceeds “western notions of land and property” (McCoy 2002/2003, 424). Nation-state territoriality represents the

“power to express themselves as nations, and to form and maintain political as opposed to solely ethnic identities is diminished; and sovereignty. The right of self-government is the most important attribute of nation-state territoriality” (McCoy 2002/2003, 442-443).

The lack of ownership rights has not been a fatal blow to the right of Indian tribes to control the lands they occupy. Tribal governments retain a variety of property rights that enable them to control the wellbeing of their lands and members to some degree. “Tribes retain several affirmative rights . . . that they may impose upon occupants or entrants into Indian Country [including] . . . the right to exclude, [the right to] impos[e] legislative, regulatory and adjudicatory jurisdiction including the right to tax . . . and . . . the right to "exclusive aboriginal hunting, fishing, trapping and gathering rights . . . which contrast with private landowners [who] enjoy the right to hunt and fish on their fee land but are constrained by state and federal regulations" (McCoy 2002/2003, 478-79).

However, the lack of ownership rights means that the idea of “Indian Country” is very similar to the idea of common property as it does not involve private property ownership, but rather encompasses the notion of collective rights to land (McCoy 2002/2003). As Case and Voluck describe, within Indian country, tribes as a collective are vested with a variety of property rights including the right to use and access lands and the right to exclude outsiders (2012). Importantly, because tribal governments retain sovereign status, they are also accorded regulatory and taxation authorities over lands within their jurisdiction (Case and Voluck 2012; Hirsch 1998; Florey 2010). In this way, Indian tribes throughout the U.S. have managed to preserve a (greatly diminished) collective relationship to the lands they occupy.

Table 3.2 expands on Table 3.1 in that it breaks open the idea of territoriality and further distinguishes land governance from land ownership within each property rights regime type. In

addition, this table describes tribes as a commons in order to illustrate the similarities between the two.

TABLE 3.2. LAND GOVERNANCE CONTRASTED WITH LAND OWNERSHIP BY REGIME TYPE

| Type of Regime | Land Governance Authority | Land Ownership Rights |
|------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| State/Public Property | State governs lands for the public welfare. The state determines rules of access and use, and individual members of the public do not have a right of access or use unless allowed by the state. | No individual has rights to the land. |
| Private Property | State retains authority to tax and regulate lands, even when those lands are privately owned. The state can also prescribe required mechanisms for registering and selling private interests in the land. | Owners have the exclusive right to use, exclude, and alienate their lands. These rights are subject to the laws of the sovereigns. Owners cannot tax and must adhere to land use regulations where they exist. |
| Tribal lands as Commons (this does not depict the land ownership regime in Alaska) | <p>Tribal governments determine use and access rights for community members.</p> <p>Tribal lands (in the Continental United States) are owned by the U.S. government but held “in trust” for the benefit of the tribes.</p> | <p>Each member of tribe has the right to access and use common lands in accordance with access and use rules established collectively by the tribe, and a duty not to violate access and use rules.</p> <p>Tribes have the right to exclude nonmembers from access to tribal lands.</p> <p>Nonmembers of the tribe have a duty not to access and use the resource except in accordance with rules adopted collectively by tribe.</p> |
| Open Access | State | <p>No individual has a duty to refrain from accessing and using a resource.</p> <p>No individual or group has the right to prevent any other individual or group from accessing and using the resource as they choose.</p> |

Adapted from (Cole and Ostrom 2011).

3.3.2. *Contemporary Tribal Governance*

Assessing the capacity of tribes to self-govern requires determining “the capacity of the government to . . . formulate and implement policies, and the respect of the citizens and the state for the institutions that govern” (Kaufman & Kraay, 1999). Scholars describe indigenous governance as rooted in distinct cultural world-views that “differ greatly from that of Europeans and settlers” (Fondahl and Irlbacher-Fox 2009, 1). One of the distinguishing threats to effective indigenous governance is when authority over traditional lands and resources is diminished:

Without effective control over land and natural resources, local indigenous leaderships may be vulnerable to the machinations of local elites and/or transnational corporations, . . . [placing] pressures on indigenous subsistence security . . . Advances in indigenous control over land and natural resources . . . may in turn strengthen indigenous peoples’ subsistence security and material well-being (Horton 2006, 829-858).

As tribal self-governance has evolved over centuries of colonial domination, it is now practiced on a much smaller scale than the form practiced by the states and nations that house these communities (Fondahl and Irlbacher-Fox 2009). In addition, the actual powers that can be exercised by sovereign tribes are now constrained by that greater sovereign (Case and Voluck 2012). For example, tribes do not possess criminal jurisdiction over non-members and their ability to assert civil jurisdiction over non-members on tribal lands is also greatly circumscribed (*see, e.g.,* Florey 2010; McCoy 2002/2003). However, tribes throughout the United States continue to possess certain sovereign powers to self-govern including: the right to determine their respective forms of government; to define citizenship, to make and enforce laws through their own police forces and courts; to collect taxes, to regulate the domestic affairs of their citizens, and to regulate property use (Harvard Project of American Indian Economic Development 2008; Hipp 2013, 82; Case and Voluck 2012).

In analyzing the concept of territoriality as applied to U.S. Indian reservations, Florey describes a steady trend away from defining tribal authority over a land base and more as a function of tribal membership (Florey 2010, 597). She notes an increasing trend where “the Court has shifted the basis of tribal powers from tribal land ownership to tribal membership, meaning that tribes effectively lack the power to regulate the activities of nonmembers – including nonmembers who live on the reservation and strangers within tribal territory – even when those activities take place on tribal lands” (Florey 2010, 597).

Tribes in Alaska do not fall within the contours of Florey’s analysis because, under ANCSA, tribal territorial governance over lands conveyed under that Act is foreclosed as described in depth in Chapter 4. Although many legal scholars argue that ANCSA did not doom all Indian country (Landreth and Dougherty 2012), a great portion of lands once controlled by Alaskan tribes no longer fall within their jurisdiction, including the lands upon which Alaska Native villages are physically situated. The implications for this on the extent of tribal governance in Alaska remains a point of intense conflict, and will be described more fully in Chapter 5.

3.4. ENVIRONMENTAL GOVERNANCE INNOVATIONS: ADAPTIVE GOVERNANCE FRAMEWORKS AND STAKEHOLDER MODELS FOR SHARED GOVERNANCE

Just as a recognition of common property systems responds to different cultural contexts of territoriality, “adaptive governance,” “adaptive management,” and “adaptive co-management” are concepts that underscore the need to recalibrate governance structures to cope with climate change and related challenges, and prescribe the means to do so (Paavola and Adger 2005; Cash et al. 2006; Adger 2001; Armitage 2008; Folke et al. 2005; Brunner 2010). This scholarship calls for an expansive view of governance and generally argues that central management and governance is insufficient to equip communities to cope with environmental challenges.

Adger argues for the need to expand governance across scales, or layers, of societies. As a matter of justice, Adger finds that climate change has “potentially catastrophic effects on the economically and political marginalized social groups in many areas of the world” (2001, 921), and yet those groups are typically left out of the response. A more responsive governance system would be a multi-level one that empowers local decision making capacity (Adger 2001, 924). As a matter of more efficient and better policy, Adger argues that creating strong local governance institutions will help to achieve sustainable development and wellbeing and that policies designed to promote resilience and lessen vulnerability should be targeted at social groups within countries, rather than at a national level (Adger 2001, 924-25).

Similarly, co-management (and adaptive co-management) among the various scales of society is repeatedly identified as an appropriate institutional response to the environmental and social challenges that climate change creates (Cash et al. 2006; Folke et al. 2005). Berkes (2009) defines co-management as the sharing of power and responsibility between the government and local resource users. Co-management links stakeholders with government agencies responsible for resource management (Berkes 2009). It can be an ideal situation for public agencies who may not have the knowledge or capacity to adequately manage a given resource or region and who can rely on local knowledge, expertise, and cooperation (Berkes 2009).

Folke et al. defines “adaptive co-management” systems as “flexible community based systems of resource management tailored to specific places and situations and they are supported by and work with various organizations at different levels (2005, 448). Like others, Folke uses the terms “stakeholders” and “users” to denote local groups with whom state and federal managers should engage (See Folke et al. 2005; Adger et al. n.d.; Adger, Brown, and Tompkins

2006; Adger 2001; Cash et al. 2006; Brunner 2010). Chapter 5 describes the variety of existing co-management structures or “adaptive governance” systems in Alaska.

3.5. THE CHANGING FACE OF TERRITORIALITY

As this research documents, there are two transitions in the way western systems view property rights that are relevant for understanding the ways in which property rights define governance, which can in turn impact on a community’s capacity to govern for wellbeing. The first shift is away from the idea that private property is the ultimate form of property rights and an increasing acceptance by scholars and policy makers of common property as an alternative rights regime (*see e.g.*, Bromley 1991; Bromley 1989; Ostrom 1990). The second is the notion that sovereignty is bounded and determined by the extent of land (*see e.g.*, Landreth and Dougherty 2012; Case 2005). Increasingly, sovereign authority is being understood as emphasizing who is being governed as much as where they are being governed. There are “a variety of forces ranging from domestic privatization to economic and cultural globalization” eroding the idea that governmental authority should be tied to a land base (Ansell 2004, 3). The idea that sovereign authority is disassembling and is increasingly understood as “constituted along non-territorial lines” (Ansell 2004, 7) very much characterizes the governance authority of Alaskan tribes as described in subsequent chapters (Case 2005, 149-154; Landreth and Dougherty 2012, 321). However, it remains to be seen whether this new construction of governance can support the ability of communities to engage in human development, and to assert their collective rights to self-determination under international law.

3.6. HUMAN DEVELOPMENT

This dissertation examines the impacts to a sovereign’s ability to govern for community wellbeing that arises from the loss of territoriality. As described in subsequent chapters, because

tribes lack a land base, they cannot regulate activities taking place on the lands on which these communities exist. These activities impact on the wellbeing of community members, and so without the ability to regulate those activities, tribes do not have the capacity to engage in critical governance decisions that impact on community members. As described below, the ability of northern governments to adopt policies that benefit human development impacts on the idea of “fate control” as that notion is understood in the circumpolar north.

3.6.1. Arctic Human Development

The concept of human development emerged in the 1970s as an alternative approach to combating global poverty and redressing structural inequities that inhibit growth (ul Haq 2003). Human development recognizes that policies that focus only on growing economic wealth ignore important measures of individual and community progress (ul Haq 2003). Rather than simply growing people’s wealth, ul Haq and Sen(2003) argue the goal of development programs and projects should be to “enlarge people’s choices” by addressing the lack of education, poor health care, inequalities in economic, social and political rights, and other factors that hinder human progress. Instead of focusing on the expansion of “only one choice – income,” ul Haq suggests that human development offers a path to enlarging “all human choices – whether economic, social, cultural, or political” (ul Haq 2003). Metrics of success under this paradigm thus shift the focus away from analyzing gross national product statistics in favor of measuring literacy, longevity and GDP per capita rates, in order to determine meaningful human progress (ul Haq 2003).

Importantly, a human development framework accommodates the “rising aspirations of people” by taking decision making closer to the people through decentralizing government (Sen 2003; ul Haq 2003). At the same time, new patterns of global governance account for an

increasingly connected world (ul Haq 2003). The notion of decentralizing governance to empower local communities while at the same time promoting global governance institutions capable of addressing macro policy issues is central to human development. The persuasiveness of the human development paradigm explains why it has received widespread support, including from the United Nations, which has relied on it since publishing the first annual Human Development Report in 1990 (United Nations 1990).

The concept of human development – that progress should be measured in terms other than strict economic growth – resonates in the Arctic. The concern for “the richness of human life rather than the richness of the economies in which human beings live” (Sen 1998) is profound within indigenous communities that depend on a healthy natural environment. Human development frameworks are particularly relevant as most communities throughout the Arctic are located in fairly wealthy nation-states, and yet the wellbeing of communities, particularly tribal communities, remains troubled.

Relying on human development principles, the Arctic Human Development Report was drafted in 2004 as a framework for creating public policy in the Arctic (AHDR 2004). The Report begins by acknowledging that even within a human development framework; the specific metrics must be tailored to reflect the unique attributes of life in the Arctic and the historic context of Arctic indigenous peoples. The Report suggests three alternative measures of human development: (1) the ability of indigenous communities to control their own fate, (2) the ability of communities to promote their cultural viability, and (3) the ability of communities to continue to rely on the natural environment to sustain them (AHDR 2004).

The Report identifies the importance of property rights and self-governance as critical to promoting rights of self-determination and sustainability of culture and environment in the Arctic

(AHDR 2004). The Report recommends “systematic studies and analysis of the full range of property-rights systems as they are applied in the Arctic, look[ing] critically both at the privatization approaches . . . in North America and of alternative systems” and notes a rise in co-management systems that devolve power to local governments (AHDR 2004). In addition, the Report finds that lack of local governance directly affects human health in the Arctic (AHDR 2004). The AHDR notes that in areas where there have been efforts to allow local self-government, mental health has improved and tragically high suicide rates have fallen (AHDR 2004).

The idea of alternative measures to determine the status of community and individual wellbeing is not limited to the ideas contained within the AHDR. A variety of other efforts to measure growth in non-economic terms throughout the Arctic region exist. For example, the Arctic Social Indicators (ASI) project was developed in 2007 to provide a direct follow up to the HDR that attempted to expand and operationalize the social indicators developed by the AHDR (ASI 2009). This project expanded the indicators to include more traditional human development measures of material wellbeing, education and health (ASI 2009).

3.6.2. Fate Control

The emergence of reports and studies measuring community wellbeing in non-economic terms underscores the notion that scholars are increasingly relying on the notion of indicators to better understand how Arctic communities are faring. This research will use one of those indicators, fate control, as a way of analyzing the relationship between property, governance and wellbeing.

Fate control, or the ability of people to “guide their own destiny”, was identified in the ASI as pivotal to achieving wellbeing and recognized it as “of critical importance to . . . human

development in Arctic areas” (ASI 2009). As an indicator, the notion of fate control is particularly relevant to this study in that it emphasizes the wellbeing of the collective as a focal point. The ASI (2009) report found that fate control is important to individual wellbeing, but “the collective control of fate . . . seems of critical concern to Arctic residents.”

Similarly, the notion of fate control implies that people and communities must have the capacity to make their own decisions, and the resources to implement these decisions. This perspective is relevant to developing an understanding about the impacts that sovereign control over lands (i.e., ability to tax and regulate) might have on well-being as the extent of the ability to exercise sovereign control bears on the extent of resources at the community’s disposal. Finally, fate control as a notion is substantially similar to the right of self-determination guaranteed to indigenous communities in the 2007 U.N. Declaration on the Rights of Indigenous Peoples and therefore arguably recognizes the critical role that land plays to community well-being and identity (ASI 2009).

The notion of fate control was amplified in the ASI 2009 report. That report offered five component indicators to measure collective fate control in Arctic communities (ASI 2009). Each component indicator was crafted from a variety of indicators that the authors felt were necessary to measure fate control at both an individual and community level, including: (1) political power and activism; (2) decision making power; (3) economic control; (4) knowledge construction; and (5) human rights (ASI 2009, 131). The ASI likewise identified the very real challenges of ensuring that data to support these indicators be both available and applicable to the Arctic as a region (2009). However, as described in this dissertation, the indicators proposed by the ASI do not adequately address the notion of territoriality as a marker of wellbeing and thus would benefit from reformulating the approach taken.

3.7. HUMAN RIGHTS

The right of self-determination is an aspect of sovereignty and has recently been recognized under international law as a collective human right of indigenous peoples around the world. This next section describes the evolution of that right, and the linkages between the right of self-determination, and land rights.

3.7.1. Inherent Tribal Sovereignty

Sovereignty is a western European concept of law that is used to define the existence and authorities of a government (Case and Voluck 2012). As Case and Voluck explain, although “sovereignty” has historically been a term used in a nation-state context, increasingly the term is being applied to the rights of indigenous peoples to represent the inherent rights of self-government that predate colonialism. As applied by U.S. courts and discussed above, the idea that tribal sovereigns are “domestic dependents” means that the powers of inherent self-government that Indian tribes possess are subject to limitations under U.S. federal law (Case and Voluck 2012). The notion that tribes retain inherent sovereign powers, even though the U.S. Congress has the legal authority to curtail and define those powers, has nonetheless acted as a “bulwark against the complete destruction of indigenous governments and the cultures associated with them” (Case and Voluck 2012).

3.7.2. The Right of Self-Determination

As a component of sovereignty, the right of self-determination represents one of the most basic and compelling human rights, particularly for post-colonial societies (Anaya 1993, 132). “Self-determination is extraordinary among human rights norms in its concern with the essential character of government structures” (Anaya 1993, 136). As a construct of modern political organizations such as nation-states, self-determination “concerns both the procedures by which

governing institutions develop and the form they take for their ongoing functioning” (Anaya 1993, 137). Self-determination as a modern concept of the right of peoples to determine their own fates, acknowledges that the idea of contemporary statehood with its notions of exclusive territory and authority are increasingly less relevant in a globalized, post-colonial world. Instead,

To be treated as a generally applicable human rights norm relevant to modern trends and conditions, the international norm of self-determination must account for the multiple and overlapping spheres of human association and political ordering that actually exist. Appropriately understood, therefore, self-determination benefits individuals and groups throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just groups defined by existing or perceived sovereign boundaries; and in a world of increasingly overlapping and integrated political spheres, self-determination concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live (Anaya 1993, 143).

Anaya identifies self-determination as occurring in two phases: a constitutive phase when a government is first being created or reformed in a way that requires meaningful participation of the individuals and groups involved in a way that does not dictate a particular outcome, but rather is truly reflective of the collective will of the people, or peoples, concerned (Anaya 1993, 145).

The second phase of self-determination is the idea that peoples are capable of “freely pursu[ing] their economic, social and cultural development” (Anaya 1993, 151) even when these sovereigns are “nested” within other sovereign authorities, as tribal governments are “nested” within the U.S. system of government.

In a world of interconnected and overlapping spheres of authority, self-determination can be seen to empower human beings with regard to all levels of governance, from the most local to the most encompassing (Anaya 1993, 155-156).

Henriksen (1999) identifies the idea of self-determination in the context of the struggles by the indigenous community to have their own sovereignty recognized even as they exist within

external nation-states (Henriksen 1999). This struggle culminated with the passage of the UN Declaration on the Rights of Indigenous Peoples.

The Declaration contains important provisions regarding the governance rights of indigenous communities. Article 3 specifically recognizes self-determination as a right to freely determine political status, and to freely pursue economic, social and cultural development (UN DRIP 2008). Article 4 describes the right of indigenous peoples to self-government “relating to their internal or local affairs” as a function of the right of self-determination (UN DRIP 2008). Article 5 recognizes the rights of indigenous peoples to maintain and strengthen their distinct political, legal, economic social and cultural institutions while fully participating in those same institutions of the state in which they reside (UN DRIP 2008). Article 18 states that indigenous people have the right to participate in decision making through their own representatives, and the right to maintain and develop their own indigenous decision making institutions (UN DRIP 2008). Article 26 recognizes the importance of governing traditional lands and resources for indigenous communities, and articulates the on-going rights to own, use, develop and control the lands they possess (UN DRIP 2008). Article 46 requires that the exercise of the rights articulated in the Declaration “shall be respected” (UN DRIP 2008).

The International Labor Organization (ILO) Convention No. 169 of 1989 is a binding treaty agreement that establishes the right of indigenous peoples to maintain and develop their societies and calls on other governments to “develop, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples” (Article 2(1)). It articulates an obligation on the part of nation-states to adopt special measures to safeguard “their persons, institutions, property, labour, cultures and environment.” (Article 4(1)). The ILO has been ratified by only twenty-two nations, and the United States is not one of them

(Ratifications of ILO Conventions). The Organization of American States is also in the process of preparing a legal instrument to protect the human rights of indigenous peoples.

The human right of self-determination held by indigenous peoples is increasingly recognized as both a global and regional norm under international human rights law (Bankes and Koivurova 2014, 237). Using this approach, the principles contained in both the UN DRIP and the ILO articulate the right to self-determination as a human right that obligates recognition by nation-states, despite the lack of ratification. Both instruments identify control over land as part of that right and both instruments recognize this right as being held by a collective as well as on an individual basis. Despite the fact that the U.S., like other Arctic states, might see itself as a strong supporter of the right of self-determination for indigenous peoples, the application of these norms is not sufficiently integrated into the law or practice of the U.S. or state government (Bankes and Koivurova 2014, 241)

Perhaps one reason for this reluctance is that the idea of collective human rights is relatively new in the development of this area of international law. Framing human rights as a set of rights guaranteed to individuals posed formidable challenges to communities wherein identities are more collective in nature. Gradually, the international community began to recognize that human rights should encompass collective rights to cultural identity, ancestral lands, and language (Iyall Smith 2008, 1820). Henriksen (1999) further identifies the right of self-determination as one held by every sovereign in the international legal community, including indigenous communities even though they exist within nation-states. “Human rights can be a means of attaining the rights to self-determination, self-government, the maintenance and development of culture, and holding land collectively” (Iyall Smith 2008, 1821).

Another reason for the reluctance to integrate international human rights principles into domestic law may be the concern that recognizing tribal governments limits state authority (see discussion in chapter 5). There is also concern that given the number of tribes in Alaska, acknowledging the capacity of each of these tribes as a government disrupts the efficient functioning of state government and “Balkanizes” the state (Downing 2015).

In spite of the reluctance of non-tribal governments to recognize tribal authority as a matter of policy, in practice the failure to do so manifests in very consequential ways. This research identifies four distinct outcomes of the loss of territorial governance that impact on the human right of self-determination and the capacity of Alaska Native communities to govern for their own wellbeing. These four areas – public safety, climate change, food security and environmental quality – are all arenas in which tribes have lost governance authority as described in detail in chapter 5. As described in this research, this loss impacts on the rights of tribes to exercise the human right of self-determination and the capacity of tribes to assert control over the fates and futures of their communities.

CHAPTER 4: THE LEGAL TRANSFORMATION OF TRADITIONAL LAND RIGHTS TO ALASKA NATIVE CORPORATE OWNERSHIP

It took over one hundred years after the United States took possession over Alaska from Russia for the U.S. government to settle aboriginal claims to Alaska's lands. The 1971 Alaska Native Claims Settlement Act represents a dramatic departure from the conventional style of land settlement where indigenous communities are relocated onto lands over which they retain some governance authority. Instead, ANCSA created for-profit corporations to take title to over ten percent of Alaska's lands, and left no provision for questions of tribal governance. This form of settling indigenous land claims is unique – it had never been done prior to ANCSA. The result was to transform traditional communities into corporate structures and has yielded both tremendous economic benefits and challenges to local governance.

This chapter describes the history of Alaska Native land claims dating back to the era of Russian occupation. It sets the groundwork for analyzing the impacts to governance and wellbeing that ANCSA had. I identify how ANCSA transformed land rights from common property regimes into systems of private property. This chapter analyzes the impact of this transformation of land rights regimes on Alaska Native territoriality and self-governance and sets the foundation for later findings that assert that land governance matters to wellbeing, as much or more than land ownership. Ownership rights alone are insufficient to support community efforts to secure wellbeing, and that governments require some recognized amount of territorial authority to ensure human development.

4.1. HISTORY OF ALASKA NATIVE LAND CLAIMS

The ability of Alaska tribes to assert inherent sovereign powers over lands that they have used and occupied for millennia is significantly limited compared to tribes elsewhere in the United States. The unique way in which the federal government settled Indigenous land claims

in Alaska terminated the territorial reach of tribal governments, transferring rights to commonly held lands and resources from traditional community structures to modern corporate entities.

Alaska's colonization occurred as a gradual "encroachment" rather than outright warfare (Huhndorf and Huhndorf 2011, 388; Cooley 1984, 17). Russia first occupied the territory, drawn by a lucrative fur trade. During their brutal occupancy in which many Alaskans were enslaved and subject to extreme cruelty and mass killings, the Russians had little interest in taking possession to land beyond the few settlements they occupied along the coast (Mitchell 1997). Indeed, the Russian American Charter stipulated that the "Company shall be obligated to leave at the disposal of [the dependent tribes] as much land as is necessary for all their needs, at the places here they are settled or will be settled" (Arnold 1976, 21-22).

Alaska's tribes were virtually ignored when the United States "acquired" Alaska from Russia in 1867, for a total of \$7.2 million U.S. dollars. The Treaty of Cession that transferred Alaska from Russia to the United States in 1867 made the merest mention of indigenous peoples, subjecting tribes to "such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes" (Case and Voluck 2012). Paradoxically, there were no provisions regarding aboriginal land rights but the Treaty of Cession did include provisions protecting the rights of Russian settlers to the lands they claimed,

The purchase of Alaska differed little from earlier American territorial expansions, in which non-Indian recipients of land grants from earlier sovereigns saw their property rights protected, while questions concerning the property rights of Indians were given little thought, and effectively deferred to a later time, when the pressure of white settlement would bring them to public attention (Banner 2007).

Although the Treaty of Cession brought Alaska Natives within the reach of federal law, it neither settled nor extinguished aboriginal land claims to the new territory (*see*, for example, Huhndorf at 389-90). Tribes throughout the state continued to assert sovereign rights to lands

that had been traditionally used and occupied, and the Federal government repeatedly acknowledged these rights over the next century. For example, the 1884 Organic Act, which established federal control in the Territory of Alaska provided that “the Indians . . . shall not be disturbed in the possession of any lands actually in their use or occupancy or now claimed by them, but the terms under which such person may acquire such lands is reserved for future legislation by Congress” (Case and Voluck 2012). The Alaska Organic Act of 1884 extended U.S. mining law into Alaska, but “denied to settlers land titles for other purposes,” putting off the question of what to do with indigenous land claims (Banner 2007).

Early in Alaska’s territorial history, two pieces of federal legislation allowed Alaska Natives to gain some form of title to land. The 1906 Native Allotment Act allowed individuals to get title to 160 acres of land (Arnold 1976). The 1926 Native Townsite Act provided for lands within villages to be conveyed in a restricted status (meaning that the lots could not be sold or taxed) to Alaska Natives for homes (Arnold 1976). Neither of these Acts addressed the larger issue of aboriginal title with Alaska. The U.S. government continually put off this question, even as it was extending its reach into the new territory. Despite this, the pressures for clarifying property rights continued to increase as more and more settlers came to Alaska (Banner 2007).

White men are coming out and taking up all the land; they are staking homesteads, cultivating the land raising potatoes and all kinds of crops. . . . [they] are going to keep taking up this land until all the good land is gone, and the Indian people are going to have to move over . . . and when all the good land is gone, the white men are going to keep on taking more land. After a while the Indian will have no land at all (Huhndorf and Huhndorf 2011, 391).

As settlements increased, Congress resisted creating a land policy recognizing indigenous rights that would have correspondingly supported creating a system of obtaining property rights for settlers, instead declaring that settlers could not make any claims to lands that Natives were

physically using (Banner 2007). Thus, Congress implicitly recognized indigenous rights of occupancy while acknowledging that eventually, land claims would require a more formal settlement.

As questions of land rights were postponed, Alaska Native peoples and communities continued to be subject to the same policies and programs as tribes in the rest of the continental U.S. (Huhndorf and Huhndorf 2011, 389). Although not U.S. citizens until 1924 (Arnold 1976), Alaskan tribes arguably met the definition of “Indian community” and fell within the framework of federal Indian law. Tribes thus retained inherent sovereign powers subject to limitation by the U.S. Congress, and were beneficiaries of a “trust” relationship with the federal government. Under that trust, the government was obligated to act as a guardian over matters of tribal members and lands, and the territory of Alaska could in no way impede on federally regulated activities of tribal members or whatever lands might be considered tribal.

Alaska’s transformation from territory to state complicated the question of indigenous land rights. The 1959 Statehood Act ceded 105 million acres from federal control to the new state as part of the grant of statehood. The Act protected the on-going claims of Alaska’s aboriginal peoples by having the new State disclaim any rights to lands held by Alaska Natives under claim of aboriginal title. The Act also declared that state land selections must be “vacant, un-appropriated, and unreserved” at the time of selection (Linxwiler 1992 13). As the new state began to select lands ceded to it under the Statehood Act, the Alaska Native community began formally organizing to protect and push for land claims (Cooley 1984, 17). In addition to statehood, other pressures emerged on the land from settlement and proposed development projects (for example, a proposed mega dam project in Interior Alaska and a proposal to use an

atomic blast to create a deep water port in northwestern Alaska (See for example, Cooley 1984, 18; Arnold 1976).

Howard Rock, an Inupiat leader and editor of the *Tundra Times*, explained the reasons Alaska Natives began to gather and create new organizations: “[W]e had begun to realize that we, as Native people of Alaska, had many problems. We also found that by speaking as a group, we were heard.” (Federal Field Committee for Development Planning for Alaska 1969, 27). By 1966, there were twenty-one regional or community based associations, and they came together to create one statewide association, the Alaska Federation of Natives.

One of the main motivations behind forming the Alaska Federation of Natives (AFN) was to press for land claims (Cooley 1984, 18). In a paper distributed around the time of AFN’s creation, a young leader, Willie “Iggiagruk” Hensley warned of an impending “controversy of immense proportions.” Hensley asked “what are the rights of the Alaskan Natives to the property and resources upon which they have lived since time immemorial?” (Hensley 1966). At AFN’s first gathering, the delegates put forward three recommendations: (1) to freeze state land selections under the Statehood Act until Native land claims were resolved; (2) to enact federal legislation to settle Native land claims; and (3) to have substantial consultation with Natives prior to passing land claims legislation (Arnold 1976). Later that year, the U.S. Secretary of the Interior declared a land freeze, following the first recommendation and motivated in large part because the amount of land being claimed by various tribes and the state exceeded the actual amount of acreage in the state (Linxwiler 1992 15).

One year after AFN formed, oil was discovered on the North Slope of Alaska’s Brooks Range. In order to bring the newly discovered oil to market, the State needed to build a pipeline. However, the state was unable to secure permits for a necessary right of way because of

Secretary Udall's land freeze (McBeath and Morehouse 1994). The push to settle Alaska Native land claims had a new actor, the oil industry.

4.2. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT OF 1971

The discovery of oil in northern Alaska provided the impetus to finally settle indigenous to the land. With the prospect of great oil wealth looming, the oil industry and Congress felt great urgency to finalize land claims as quickly and with as little litigation as possible (Federal Field Committee for Development Planning for Alaska 1969). In preparation for settling land claims, the Congress commissioned a report to be compiled on the social and economic status of Alaska Natives in order to serve as the basis for creating legislation (Federal Field Committee for Development Planning for Alaska 1969; , see also, Arnold 1976). That report, *Alaska Natives and the Land*, documented and supported the claim that Alaska Natives had used and occupied most of Alaska and that tribal territoriality with definable boundaries was a fact of life in indigenous Alaska (Federal Field Committee for Development Planning for Alaska 1969). Likewise, the Report found that rural Alaska Natives experienced very high rates of poverty, unemployment, and mortality when compared with urban non-Natives. The need to minimize the disparities between urban and rural, and between Native and non-Native, propelled the idea that in addition to a monetary aspect of settling land claims, Alaska Native corporations could be created to share in the state's potentially vast mineral resources and potentially mitigate some of these disparities through developing economic opportunities for rural Natives (Arnold 1976).

The idea of creating reservations in Alaska was an anathema to the notion that Alaska Natives needed to participate in and benefit from the promise of resource development (Federal Field Committee for Development Planning for Alaska 1969). In addition, the state of Indian reservations in the continental United States during the time of land claims negotiations did not

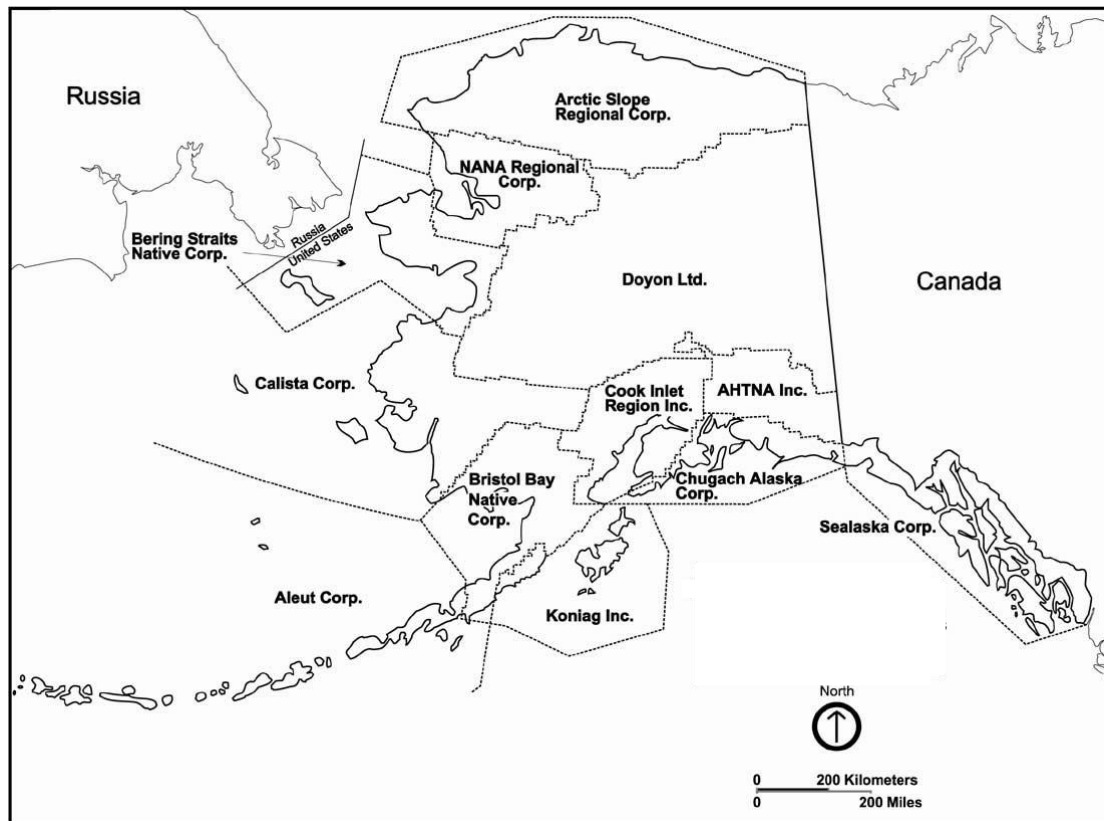
hold much appeal. Despite the promise of the federal government to safeguard the lives and lands of Indian people, rampant poverty kept these communities in a cycle of dependency and despondency (Huhndorf at 387). Seeking to avoid this same fate, and to put their own people on a path to self-sufficiency, Congress embarked on a unique and innovative path, one that eschewed the creation of reservations in favor of vesting Alaska Natives with the means to develop their own economies. Aided by the oil industry, tribal leaders eventually secured passage of the Alaska Native Claims Settlement Act in 1971 (ANCSA), 43 U.S.C. § 1601 et. seq.

Finding that “there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on Aboriginal land claims,” ANCSA called for the land settlement to be rapid, certain, and in conformity with the real economic and social needs of Alaska Natives (43 USC §1601(a)(b)). The U.S. Congress did not intend to establish any “permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska” (43 USC §1601(b)).

ANCSA conveyed 44 million acres of land and a one time, one billion dollar payment, to Alaska Natives in exchange for terminating all future aboriginal land claims (Cooley 1984, 20). The Act did not convey ownership title to the more than 200 Alaska Native tribes or villages, but rather created twelve Native regional, for profit corporations (Arnold 1976). The corporations were created in a way to match broad cultural regions. In addition, the Act directed that corporations be formed in every village where at least 25 Alaska Natives lived (Arnold 1976).

At the time of the land claims settlement, of the 302,173 Alaska residents, 51,712 were Alaska Native with over 40,000 living in rural parts of the state (Rogers 1971, Tables 1, 4).

MAP 4.1. ALASKA NATIVE REGIONAL CORPORATION BOUNDARIES



Source: (Wikimedia n.d.)

Some of the land selections were to be based on their value for subsistence use, but Congress anticipated that most lands would be selected for their economic potential (U.S. House of Representatives 1971). Congress determined that there would be minimal incentive to select lands for subsistence uses because they anticipated that people would be able to continue to use state and federal lands to hunt, fish and gather (U.S. House of Representatives 1971).

Land selections were to be divided between village and regional corporations. Over two hundred and twenty village level corporations were also established (Cooley 1984, 20). Village

corporations took title to the surface estates of land that included the village site and surrounding lands needed for subsistence hunting and fishing purposes (U.S. House of Representatives 1971). In total the 224 village corporations took title to the surface estate of about half of the total land in the settlement (Arnold 1976, 150). Rights to the subsurface estates on these lands remained with the respective regional corporations (Arnold 1976, 150).

The purpose behind granting title to the subsurface estate to regional corporations instead of village corporations reflected the dual nature of ANCSA. Village corporations were to select lands necessary to sustain the community itself and to take lands important for subsistence (Federal Field Committee for Development Planning for Alaska 1969). On the other hand, regional corporation selections were to be based on the potential economic value of the mineral estates in order to support economic development. According to the legislative history,

The Department [of Interior] . . . feels that the mineral estate . . . should be patented to the Corporation. Not only will this avoid conflicts between native surface ownership and non-native mineral rights but it will also provide the natives with a permanent economic future in the State. . . . The mineral deposits have not been used by the natives in the past on a village subsistence basis, as has the land, but instead is included as a part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.

(Statement of Roger Morton, Secretary of Interior, U.S. House of Representatives 1971). The dual purpose behind the land settlement – to protect subsistence rights but also promote economic development “to the fullest extent possible” – was seen to benefit not only Alaska Natives but all Alaskans and Americans (Statement of Hon. Carl Albert, U.S. House of Representatives 1971).

Typically, throughout the U.S., aboriginal rights were settled in a way as to provide tribes with a land base they could occupy exclusively and over which could retain some self-governance authority (Case and Voluck 2012). Outright private “fee simple” ownership was not

normally part of the settlement. ANCSA, however, not only transferred outright fee simple title as opposed to a right to occupy, but it transferred these rights to new Alaska Native corporations that were organized under the laws of the State of Alaska. A new breed of private, for-profit corporations now owned forty-four million acres, or about 12% of Alaska's lands. Each Alaska Native Corporation (ANC) is chartered under the laws of the State of Alaska and subject to state regulation and control (Case and Voluck 2012).

In addition to distinguishing title between surface rights and subsurface rights, ANCSA bifurcated the Native community into shareholders and non-shareholders. Shares to the new corporations were issued to people alive on or before the date of ANCSA's passage in December of 1971. People born after that date were left out of the Act, and therefore have no ownership right in ANCSA lands unless they received shares through either inheritance or if the corporations opened up their shareholder roles. Seventy-seven thousand Alaska Natives alive as of December 1971 were subsequently enrolled as shareholders in a regional and village corporation.

ANCSA accomplished two very important goals: it settled aboriginal land claims as described in more detail below, and it set a pattern for land ownership for Alaska (Cooley 1984, 19). ANCSA rescinded Udall's land freeze, and created a mechanism for selecting lands to be set aside "in the national interest" for subsequent inclusion into a federal conservation system (ANCSA sect. 17 d).

Nine years after ANCSA, the U.S. Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA)(43 USC ss. 1602-1784). ANILCA was the final piece of federal legislation that carved up lands within Alaska, and placed almost two-thirds of Alaskan lands into federal ownership, many tracts of which were included in some form of a conservation unit.

In addition to being the final piece of land legislation in Alaska, ANILCA contained a provision that identified subsistence uses of fish and wildlife as a priority consumptive use of federal lands and resources, and guaranteed that rural subsistence users would be given a priority in times of resource shortage (Sect. 3113, 3114).

Title VIII of ANILCA also established a resource governance structure that formally integrated rural subsistence hunters and fishers as stakeholders in the management process. Section 3115 establishes a management structure for subsistence uses of fish and wildlife on public lands and created local committees and regional councils to provide input and advice to the Secretary of the Interior regarding regulating subsistence harvests of fish and wildlife. This structure is discussed further in Chapter 5.

4.3. ECONOMIC DEVELOPMENT: A NEW HARPOON

ANCSA represents an innovative and unique approach to settling aboriginal land claims, and one that reflected the times in which it was created. ANCSA transformed land into private property, consistent with a dominant theme embedded in economic development theory at the time – the idea that natural resources and lands should be privatized pervaded public policy approaches to property rights (Cole and Ostrom 2011). ANCSA developed a system of property rights that rendered land from a source of survival and cultural identity into an asset that could create monetary wealth for the people that now owned this asset. It displaced traditional systems of use and occupancy with a formal set of property rights that controlled distribution of an asset (in this case physical land) and limited access to the assets and the benefits that flowed from ownership of these assets to corporate shareholders.

At the time of its passage, many saw ANCSA as “the beginning of a great era for the Native people of Alaska” (Karpoff and Rice 1992). At the time of its passage, observers praised

ANCSA's international significance as an "example of a major attempt by aboriginal peoples to establish a distinct and contemporary place for themselves in Western society" (Arctic Policy Review, 1984) Charlie Edwardsen, an Inupiat activist from the North Slope region of Alaska who was a critical player in ANCSA's passage, wrote an essay characterizing ANCSA as a "new harpoon" – a "tool that can be implemented to fulfill the socioeconomic needs of the Alaska Native people" (Edwardsen 1974, 252). The creation of western corporations replaced traditional, collective Alaska Native land rights with private property systems and transformed "the Alaska Native . . . from a hunter to a red-blooded capitalist" (Edwardsen 1974, 251).

At the time of ANCSA's passage, its primary focus was on land and economic development (Linxwiler 1992, 7). ANCSA "embodied a considerable amount of idealism concerning the transformational power of capitalism" (Linxwiler 2007, 3). This approach to settling aboriginal land claims was completely new, and the first twenty years after its passage were marked by "extensive litigation and statutory amendments" to adjust "to the real world" (Linxwiler 2007, 3). As a result of these amendments, ANCSA lands are cannot be taxed or used to satisfy debts or bankruptcy related obligations (43 U.S.C. 1636(d) (2007)). Similarly, ANCSA was originally written to allow ANCSA stock to be freely alienable (sold) twenty years after its original passage. The amendments to the Act in 1992 now prevent that unless the ANC specifically and affirmatively allows it (43 USC 1606(g)(2007)). Similarly, the original ANCSA foresaw a one-time distribution of shares to occur at the time of its passage, but amendments to the Act now allow for issuance of shares to new shareholders (i.e., people born after 1971) (43 USC 1606(g)(2007)). The collective impact of these changes is that now ANCSA now enables protections against market forces that could threaten "perpetual ownership by Natives" (Linxwiler 2007, 3).

ANCSA corporations have become “the new sophisticated business powerhouses of the Alaskan business world” (Linxwiler 2007, 4). Alaska Native corporations are consistently among the top economic performers in Alaska based on their gross revenues and number of people employed (in state and globally) (Campbell 2004; Harrington 2012; Marrs 2003).

ANCSA corporations likewise provide a wide range of shareholder benefits ranging from cash dividends to employment to education to cultural preservation efforts (ISER 2009). Each regional corporation operates an educational foundation or scholarship program that provides financial assistance to shareholders seeking higher education, and many ANCs provide work force training opportunities and jobs for their shareholders (ISER 2009; Linxwiler 2007, 46). ANCs have invested in village infrastructure in many communities throughout Alaska, including barge facilities, housing, police and emergency services, and laundromats to name a few (ISER 2009, 7). The corporations have likewise earned credit for creating a generation of Native leaders and role models who have been catalysts for positive change in their communities (ISER 2009). ANCSA provided Alaska Natives with the means to promote their own economic development, and Alaska Native corporations have emerged as an economic force that translates to a substantial degree of political power within the State of Alaska (Marrs 2003).

Despite the increased economic power that has accrued to Native corporations, ANCSA has not provided relief for the persistent economic inequities that exist between urban and rural Alaskans, and between Alaska Natives and non-Natives, and the social problems that are exacerbated by those inequities (see Chapter 6). Rural communities continue to suffer abnormally high rates of poverty and unemployment as compared to their urban counterparts in the state, making the situation not that much different than it was at the time of ANCSA’s passage (Howk 2014). Even though Alaska as a whole has less than 10% of households living

below the poverty line, that number more than doubles for rural areas. In the Yukon-Koyukuk Census area, a region that geographically overlaps with the area served by the Yukon River Inter-Tribal Watershed Council, 24.2% of residents lived below the poverty line between 2009-2013 compared to a statewide level of 9.9% for this same time period (U.S. Census Bureau 31 March 2015). In that same region, incomes were much lower than the statewide average – per capita income was at \$19,729 USD compared to a statewide income of \$32,651 USD. The population in this census area is 70.8% Alaska Native or American Indian, and 22% “white” (U.S. Census Bureau 31 March 2015).

In addition, ANCSA curtailed the powers and authorities of tribal governments. As described in subsequent chapters, ANCSA left Alaska Native tribes as “sovereigns without territorial reach” and thus greatly limiting the capacity of tribes to govern for their community’s wellbeing. The impacts of this loss of territoriality and the responses to this loss, is the focus of the remainder of this dissertation.

CHAPTER 5: GOVERNANCE IN ALASKA: A "COMPLEX NON-SYSTEM"

"You own the stars?"

"Yes."

"But I have seen a king who-"

"Kings do not own, they reign over. It is a very different matter."

— *The Little Prince*

This chapter identifies the critical distinction between land ownership and land governance. As described herein, governance in rural Alaska is no simple matter. In addition to losing territorial authority over traditional lands, the more than 200 tribal governments scattered throughout Alaska have to cope with complex and disconnected government federal and state governance systems. The result of the lack of coherence among these governance structures results in what has come to be known as a “complex non-system” with consequences for the capacity of rural governments to implement policies designed to promote the wellbeing of community members. This chapter outlines the evolution of this chaotic system, and identifies four outcomes that impede community wellbeing.

This chapter describes the state of tribal governance in Alaska to illustrate what happens to a sovereign that loses its capacity to “reign over” the lands they occupy. The right to govern lands and resources is fundamentally different than the bundle of rights that attach as a result of “owning” land, and those differences have impacts on the ways in which communities can assert the right to self-determination and the ability to implement policies that ensure their own wellbeing.

The ability to “reign over,” or to assert governance authority is at the heart of “the capacity of the government to . . . formulate and implement policies” (Kaufmann, Kraay, and Zoido-Lobaton 1999, 1). Governance authority is tied to land in two ways relevant to this research: first, only governments, not landowners, have the legal capacity to “affect, influence, or

control people, phenomena and relationships” (Kofman 2007, 66). Second, as discussed in depth in Chapter 3, governance authority is limited to a specific geographic area, a concept known as “territoriality” – the idea that rules and laws (“governance”) are tied to a specific area land (see for example, Kofman 2007; Ansell 2004; Branch 2011). Thus, the idea of territoriality is relevant only to sovereigns, not to private property owners. This chapter examines the construct of territoriality as it applies to Alaska Native tribal governance capacity.

5.1. TERRITORIALITY IN ALASKA: GOVERNANCE DISPARITIES IN A STATE RICH IN COMMONS

Territoriality plays out in disparate ways in Alaska. Ninety-nine percent of Alaska’s lands are in some form of collective ownership. As illustrated below, 25% of Alaska’s lands are owned by the State of Alaska. The U.S. Government has title to 63% of lands. Alaska Native corporations own 11% of lands within the state, and the remaining 1% is privately held. However, this allocation of land ownership is not equally reflected in the allocation of sovereign authority in Alaska. The state and federal governments govern the lands they hold title to, but lands held by Alaska Native corporations are not governed by an Alaska Native entity.

Alaska Native Corporations (ANCs) are an amalgam of two of the types of property regimes described in Chapter 3: private and common property. Ownership rights vest within a collective rather than a single individual. As a collective, ANCs can exercise all rights of fee simple ownership, subject to state laws just as any private landholding would be. Rights to use the land are likewise reserved to the ANCs to determine, and the ANCs have the ability to exclude access to the lands.

However, there are subtle, but vital differences between ANC ownership of ANCSA lands and typical common property regimes. First, the collective that retains ownership rights to the land is defined by membership in a state chartered corporation, not by virtue of membership

(citizenship) in a traditional community or government. Second, the institutional base that supports the exercise of the rights of the collective over their lands is now the State of Alaska rather than a traditional government or council. Third, the rights of the collective as defined under ANCSA are very different than those of traditional governments. For example, ANCSA corporations are not able to tax or regulate the lands they own as would be typically a right of a sovereign, even a domestic dependent sovereign (albeit in a more limited capacity). Finally, because ANCSA corporations are organized as corporations, their legal obligations are to shareholders and not to the community residents as they would be in a true commons.

Table 5.1 illustrates the differences between land ownership and land governance for Alaska Native corporations and tribes.

TABLE 5.1. ALASKA NATIVE RIGHTS REGIMES (CORPORATE AND TRIBAL)

| Type of Regime | Land Governance Authority | Land Ownership Rights |
|----------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ANCSA Corporations | No authority to govern (i.e., tax and regulate). State of Alaska has regulatory authority over lands and resources conveyed under ANCSA. | As owners, Alaska Native Corporations have the exclusive right to use, exclude, and alienate their lands, subject to the laws of the state and federal sovereigns. Regional corporations own the subsurface estates to all regional and village corporation lands. Village corporations only own the surface estate. |
| Alaska Native Tribal governments | Tribes cannot tax or regulate activities on lands conveyed under ANCSA, even if a tribe now owns these lands. | If ANCs have conveyed land to tribes, they own lands as fee simple owners. They have the exclusive right to use, exclude, and alienate their lands. These rights are subject to the laws of the sovereigns. Owners, even if they are tribal sovereigns, cannot tax and must adhere to land use regulations where they exist. |

One stark example of distinction between land ownership and land governance was illustrated in the aftermath of the Exxon Valdez Oil Spill in 1989. In the area impacted by the oil spill, village corporations had the opportunity to sell their lands to a Council of Trustees who would put the lands into conservation status. Within the Chugach region where the spill occurred, four of five of the village corporations sold their lands to the trustees. This meant that the land was lost to future generations of tribal members, which raises the question of why shareholders would vote to alienate their lands:

An important distinction to understand is that many of the people who live in the Native villages do not hold shares in the corporations named after that village . . . over the years, many shareholders moved away from the villages or they inherited shares, but live elsewhere. This dichotomy sometimes creates a split between village residents and Native shareholders. Although Native corporations have a general history of working cooperatively with the native villages they represent, they do not always share the same goals” (Hunt 2010).

5.2. THE RURAL GOVERNANCE LANDSCAPE IN ALASKA

As described in Chapter 3, Article 8 of the Alaska Constitution transformed the state’s resource base into a commons to be managed for the benefit of all Alaskans equally. Similarly, the state’s constitution enshrined the rights of citizens to have a voice in their government. The Constitution’s declaration of rights recognizes that the source of the state’s power rests with its people, and that the people have corresponding obligations to each other and to the state (AK Const. art. 1: Declaration of Rights).

While Article 1 is largely a statement of values, the idea that Alaskans have a right and responsibility to self-governance is actualized in Article 10 of the Constitution. This Article provides for “maximum local self-governance with a minimum of local government units” (AK Const. art. 10). When Alaskans sought statehood in 1959, they did so in large part to get away from the control of corporate interests and the federal government and ensure a system of government responsive to local needs (Getches 1973, 56). In addition, the Constitution calls for the adoption of “home rule” powers where a city or borough government would exercise “all legislative powers not prohibited by law or charter” (Article 10 sect. 11). “Home rule” forms of government were to be the means to promote strong local government in a state with great variations in geographic, economic, social and political conditions (Alaska Dept. of Community and Econ Development, 2004).

Alaska state law creates two types of municipal (local) governments: cities and boroughs (Alaska Stat. (AS) §29). AS 29 authorizes both forms of government with the power to tax and

regulate, depending on if they organize as a “home rule, first or second class city or borough (AS 29.10). The sixteen organized boroughs cover about 43 percent of Alaska’s geography, with the remaining 57 percent comprising a single, unorganized borough as required under state law. The Alaska state legislature serves as the governing body for the unorganized borough (AK Const. art. 10, §6, AS 29.03.010). Within the unorganized borough, Regional Educational Attendance Areas (REAAs) govern the delivery of public education. Boroughs and cities that are organized under AS 29 have authorities to tax and regulate that tribal governments throughout Alaska lack.

Notwithstanding the vision of Alaska’s founders, local governance in rural Alaska is a complicated affair than within their urban counterpoints. McBeath and Morehouse (1994) summarize the difference in local governance between urban and rural areas in Alaska:

The urban system is relatively simple, with only two-dozen general governmental units. The rural system is very complex, comprising more than five hundred governments and quasi-governments with specialized political and administrative functions. The small number of urban governments serve most of Alaska’s population; the many rural governments serve relatively few.

Within rural communities, a wide array of institutions and organizations exist to provide governmental services, constituting what Case and Voluck (2012) refer to as a “complex non-system.” They categorize five distinct forms of organizations that provide different functions within rural communities:

- (1) governments;
- (2) economic profit corporations;
- (3) nonprofit development and service corporations;
- (4) multiregional political organizations; and
- (5) international organizations.

Village residents are subject to local laws, tribal codes, borough regulations, state laws, federal laws, and international treaties. For example, the average small community of 200 people may have three or more forms of local government: a city, a borough, and a village tribal

council. In addition, village and regional corporations as land-owners play a profound role in determining the communities' relationship to their environment. Rural Education Attendance Areas regulate education policy, fish and game advisory boards (state and federal) manage hunting and fishing, and regional health corporations provide community health services, to name just a few.

The following table is a list of the entities that are either potentially geographically located in a rural community, or whose policies and practices directly impact on the governance of rural communities.

TABLE 5.2. LOCAL GOVERNMENTS IN RURAL ALASKA

| Entities located outside of local communities | Entities located within local communities |
|-------------------------------------------------------------|--------------------------------------------------------------------------|
| Rural and regional electrical authorities and cooperatives | Tribal governments (traditional councils, IRA Councils or both) |
| State government/legislative districts | Municipal/city government |
| Federal government agencies | Federal government agencies |
| Fish and Game Advisory Councils and Boards of Fish and Game | |
| Borough government | Borough government |
| Rural Education Attendance Areas | School boards & Rural Education Attendance Area School Advisory Councils |
| Regional health corporations | Port authorities and utility boards |
| Alaska Native regional corporation (profit and non-profit) | Alaska Native village corporations |
| International laws, regulations and treaties | Community Councils |

The sheer number of entities whose policies and practice impact on the lives of rural residents adds to this “complex non-system” (Case and Voluck 2012). The bewildering maze of organizations makes it difficult to coordinate governmental services. These complexities are

amplified by the fact that Alaska statutes do not recognize tribal governments as a form of local self-governance. Federal law, on the other hand, is clear that tribes are sovereigns recognized by the U.S. government. This gap created between federal and state laws regarding how tribes are recognized is the source of much confusion and conflict.

5.3. ALASKA TRIBAL GOVERNANCE UNDER FEDERAL LAW

The federal government recognizes two forms of tribal governments in Alaska: traditional councils and councils organized under the 1934 U.S. Indian Reorganization Act (IRA Councils). At the time of ANCSA's passage, of the 210 Native villages that were recognized under the original statute, 70 had organized IRA councils. That number has grown, and in 1993, the federal government issued a list of 227 federally recognized tribes in Alaska that included 151 traditional councils and 75 IRA Councils (Case and Voluck 2012). Later, the U.S. Congress enacted the Federally Recognized Tribes List Act of 1994, updated annually, which lists all federally recognized tribes throughout the Continental U.S. and Alaska (25 U.S.C. 459; see also, 79 Fed Reg 19, 4749 (29 January 2014)).

The traditional and IRA councils provide a variety of governmental services within their communities, and are often the only forms of government (Case and Voluck 2012) (although many communities also house a municipal form of government as well). These services include operating tribal courts, traditional foods programs, health and human services, housing, education and training, economic development, subsistence, community planning, environmental and land use planning (Case and Voluck 2012). The array of services provided within the many communities varies depending on capacity and funding restraints (Case and Voluck 2012).

In addition, the regional and village non-profit corporations perform critical governance functions for communities. In 1975, the U.S. Congress enacted the Indian Self-Determination

and Education Assistance Act requiring the federal government to contract governmental services to tribes or tribal organizations. Tribal organizations include “nonprofit development and service corporations” such as Tanana Chiefs Conference (TCC) and the Association of Village Council Presidents (AVCP), the two regional nonprofit corporations serving the villages within the Yukon River Watershed.

TCC and AVCP operate a variety of programs that provide services that would otherwise be managed by federal agencies (Case and Voluck 2012). For example, both regional organizations operate regional health care services through funding provided by the U.S. Indian Health Service. They operate a natural resources program through funding from the U.S. Bureau of Indian Affairs, housing programs funded by the U.S. Housing and Urban Development, and education programs through the U.S. Department of Education (*see* <http://www.tananachiefs.org/home>, <http://www.avcp.org/services.htm>).

5.3.1. Territoriality After ANCSA

Throughout the United States, Indian tribes possess certain sovereign powers to govern including: the right to determine their respective forms of government; to define citizenship, to make and enforce laws through their own police forces and courts; to collect taxes, to regulate the domestic affairs of their citizens, and to regulate property use (Harvard Project of American Indian Economic Development 2008). However, these authorities do not exist for Alaskan tribal governments to nearly the same extent.

At the time of ANCSA’s enactment, two issues of critical importance to tribes remained unresolved. While it resolved long-standing land claims, ANCSA did not address other issues critical to the concerns of Native communities, most specifically sovereignty and subsistence rights (Huhndorf and Huhndorf 2011). Subsistence rights and management were addressed in

1980 as discussed below, but it was almost thirty years until the issue of tribal sovereignty over lands conveyed under ANCSA was finally settled.

In 1998, the U.S. Supreme Court faced the issue of whether tribes had the authority to regulate and tax ANCSA lands. In *Alaska v. Village of Venetie Tribal Government*, the Court determined that because ANCSA conveyed lands to “state-chartered and state regulated private business corporations,” these lands lost the necessary character of “federal superintendence” and thus were not “Indian Country” capable of supporting tribal governance (522 U.S. 520 (1998)). The issue before the Court was whether a tribal government could tax and regulate activities on lands that had been conveyed under ANCSA. The Native Village of Venetie Tribal Government owns approximately 1.8 million acres of lands in interior Alaska. These lands had been transferred in fee simple status under ANCSA to two Native corporations, which then transferred that title to the Native Village of Venetie Tribal Government. In 1986, the State of Alaska contracted with a construction company to build a school in Venetie, and the Tribe then attempted to levy a tax for conducting business on tribal land.

Both the state and the contractor sued to enjoin the tribe from levying a tax and the case wound its way through the federal court system, ultimately winding up in front of the U.S. Supreme Court. In *Venetie*, the Court addressed whether ANCSA-created, privately held land that was subsequently transferred to a tribal government could retain its status as a “dependent Indian community” (522 U.S. 520 (1998)). Such status would have preserved the tribe’s ability to govern (i.e., tax and regulate) these transferred lands. The Supreme Court determined that because ANCSA conveyed lands to “state-chartered and state regulated private business corporations,” these lands did not meet the federal superintendence requirements to support their designation as a dependent Indian community. As a result, the Court held that ANCSA severed

tribal territorial jurisdiction (territoriality) over ANCSA lands. ANCSA therefore “left [tribes] as sovereign entities for service purposes, but as sovereigns without territorial reach” (522 U.S. at 526).

The Court’s holding that ANCSA impacted on Indian Country was limited to lands transferred under ANCSA. In a footnote, the Court clearly made this point:

Other Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a ‘dependent Indian communit[y]’ under our interpretation of [18 U.S.C.] 1151(b), or if it constitutes “allotments” under [18 U.S.C.] 1151(c) (522 U.S. at fn 2).

Although “it is now relatively clear that tribal membership is the most significant basis upon which Alaska Native tribes exercise tribal authority,” (Case 2005), this footnote leaves open the possibility that some elements of territoriality remain. Case notes that the Court’s decision did nothing to negate the fact that “tribes exist in Alaska and they have jurisdiction over both their members and their territory. [However] after . . . *Venetie*, the scope of territorial jurisdiction is . . . limited to allotments and restricted town site lots” (Case 2005, 149-154). However, *Venetie* did not completely do away with tribal territoriality, “in fact, the Court was careful to point out that allotments would fall under Section 1151 and thus be Indian country” (Landreth and Dougherty 2012, 14).

It was not until almost thirty years after ANCSA was enacted that the full impact of ANCSA’s failure to reserve any governance rights for Alaska’s tribes was more clearly understood (Case and Voluck 2012); however, the issue of what remains of sovereign authority remains unsettled in some very key areas. What is clear is that the lands conveyed to tribes under ANCSA are clearly not Indian country and tribes cannot tax or regulate any activity occurring on those lands. Far less clear is the remaining question of what sovereignty, if any, the remaining “Indian Country” in Alaska can sustain. This question is coming into sharper focus

due to recent proposed changes to federal regulations that potentially increase Indian Country (see Chapter 6).

ANCSA “transformed communal lands into corporate property, thus disrupting traditional land management practices” (Huhndorf and Huhndorf 2011, 386). Once land became an asset, it became “vulnerable to loss” (Huhndorf and Huhndorf 2011, 386).

The settlement introduced conflicts between historical tribal values expressed in communal property-oriented actions and other actions that result from a new, corporate orientation that promoted private property and individual wealth accumulation (Thornburg and Roberts 2012, 205).

ANCSA “substitute[d] tribes and sovereignty . . . with corporations and the pursuit of profits” (Hirsch 1998, 6), grafting a western form of land ownership onto traditional indigenous communities. The emphasis on economic development and privatizing property rights as a means to that end transformed territoriality for Alaska Native governments.

5.3.2. Federal-Tribal Co-Management Frameworks

For Alaska Natives, subsistence lies at the heart of culture, the truths that give meaning to human life of every kind. Subsistence enables the Native peoples to feel at one with their ancestors, at home in the present, confident of the future (Berger 1985).

Much more than sustenance or a way of putting food on the table, subsistence, as the above quote demonstrates, lies at the heart of Alaska Native culture (*see e.g.*, Berger 1985; Bryner 1995). Although ANCSA settled aboriginal land claims, it did not resolve the pressing issue of how to protect subsistence rights for Alaska Natives (Case and Voluck 2012). Typically, rights to traditional subsistence practices are protected in one of three ways: reservations, off reservation treaty rights, and other federal preemptive legislation (Case and Voluck 2012). ANCSA eliminated all but one reservation, precluding that option. Similarly, the lack of off reservation treaty rights to subsistence, coupled with the State of Alaska’s rights to

manage fish and game on its own and ANCSA's land, foreclosed this path as an opportunity to protect this cultural right (Case and Voluck 2012). The only option remaining to protect subsistence was through federal preemptive legislation. ANCSA was not this legislation, but it did include a section that eventually precipitated federal subsistence protections. Understanding that subsistence traditions require large tracts of lands upon which to hunt, fish and gather, section 17 of ANCSA created a Land Use Planning Commission to determine which lands to place into conservation units that could continue to support these traditions (Case and Voluck 2012). Nine years after ANCSA, Congress passed the Alaska National Interest Lands Conservation Act, the largest single conservation act in the United States. ANILCA section 801 states

The continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native, physical, economic traditional and cultural existence, and to non-Native physical, economic, traditional, and social existence.

16 U.S.C.A. 3111(1).

5.3.2.1. The Alaska National Interest Lands Conservation Act and Subsistence Management.

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) set aside 104 million acres of land in Alaska (out of a total 375 million acres statewide) as federal parks, refuges, forests and conservation areas (Smith et al. 2001). Title VIII of ANILCA was "intended to carry out the subsistence related policies and fulfill the purposes of ANCSA" (Case and Voluck 2012). Unlike conservation units in the continental United States, ANILCA allows subsistence hunting and fishing within these federal conservation units, and recognizes it as a priority consumptive use (Smith et al. 2001, 29). Title VIII of the Act establishes that the "purpose . . . is to provide the opportunity for rural residents engaged in a subsistence way of life

to do so” (Smith et al. 2001, 33). The statute specifies that in times of a resource shortage, subsistence use of fish and wildlife shall be accorded a priority in federal resource allocation decisions (16 U.S.C. § 3114). Importantly, the Act designates “rural” residents as the object of the statutory preference rather than Alaska Natives. Rural residents who can demonstrate a history of dependence on wild resources qualify as “subsistence” users for purposes of this management regime.

ANILCA likewise established a mechanism for sharing decision-making authority with rural Alaskans (Case and Voluck 2012). Section 805 of ANILCA created a regional and local advisory system that provided a means for subsistence users to participate in natural resource decision-making (Smith et al. 2001, 33). Section 809 specifically provides for the Secretary of the Interior to enter into cooperative agreements “or otherwise cooperate with other federal agencies, the State, Native corporations, other appropriate persons and organizations and . . . other nations to effectuate the purposes and policies of this title” (Smith et al. 2001, 33). Notably, this provision does not specify tribes among the list of potential governance partners. Although ANILCA created opportunities for rural Alaskans to participate in subsistence management decisions, this statute does not specify or recognize the unique relationship between Alaska Natives and the resources managed under this statutory scheme, thus relegating tribal members as stakeholders in the management process and neglecting the sovereign status of tribal governments.

ANILCA contained a provision that allowed the State of Alaska to manage all fish and game throughout Alaska if they did so in accordance with the terms set forth in Title VIII of ANILCA. Thus, in 1978, the State of Alaska established a subsistence management regime that likewise provided for a subsistence priority, and for involving the public in management

decisions(Case and Voluck 2012). Upon ANILCA's passage, the state became the sole regulatory authority over all fish and game that was not otherwise regulated through international treaty(See Case and Voluck 2012 for a complete list), a role the state held until 1988 when the Alaska Supreme Court held that the rural preference violated the State's equal protection provisions (*McDowell v. State*, 785 P.2d 1 (Alaska 1989)). After a drawn out conflict between the state and the federal government over whether the state's constitution or ANILCA should be amended to accommodate the other, the standstill was acknowledged and the federal government resumed governance over fish and wildlife on federal lands (See McGee 2010). In both the federal and state systems, individual local rural residents sit on these boards, not representatives of local governments or tribes (Case and Voluck 2012).

5.3.2.2. *The Marine Mammal Protection Act*

The U.S. Marine Mammal Protection Act of 1972 (MMPA) vests management authority for marine mammals with the federal government and prohibited all taking of marine mammals with few exceptions (Case and Voluck 2012). One of the exceptions allowed Alaska Natives to continue to "take marine mammals in a non-wasteful manner for subsistence purposes or to create authentic native handicrafts or clothing" (Case and Voluck 2012). In 1994, Congress amended the MMPA to authorize federal agencies to enter into cooperative agreements with Alaska Native organizations for marine mammal subsistence management (Case and Voluck 2012). These organizations include the Alaska Eskimo Whaling Commission, the Eskimo Walrus Commission, the Alaska Sea Otter Commission and the Alaska Native Harbor Seal Commission (Case and Voluck 2012).

Unlike ANILCA, the MMPA recognizes the rights of Alaska Natives (not rural Alaskans) to harvest marine mammals and affords a subsistence priority to tribes and tribal members. In

turn, these rights and priorities guide management practices. These provisions of the MMPA resulted in unique co-management agreements partnering tribes and state and federal agencies together as rights holders, not stakeholders. This approach is rooted in and reflective of government-to-government relationships between Alaskan tribes, and federal and state management agencies. Many look to co-management as a means to integrate local knowledge and needs into marine mammal management decisions. It is also a way to ensure more general ecosystem health, particularly in times of great environmental change (*see* for example, Robards 2009; Brower 2002 concluding that the agreement between Canadian First Nations and Alaska tribes resulted in sustainable management practices and calling for increased monitoring and education to ensure continued success).

5.4. ALASKA TRIBAL GOVERNANCE IN ALASKA: STATE LAW AND POLICY

Despite the lack of legal recognition under Alaska state law, Alaskan tribes have consistently fought to have the state recognize sovereignty. There is a strong history of local self-governance in Alaska, but there is no formal mechanism to recognize or work with tribal governments. This section describes Alaska's governance framework as a background to subsequent descriptions of the efforts of Alaska tribes to leverage their own governance power despite a mechanism within the state's governance framework to do so.

5.4.1. Policies of Local Self-Governance in Alaska

The notion of self-governance is familiar to Alaska. The state constitution emphasizes the need to seat governments close to the people (Alaska Const. Art. X, § 1 (stating that the state should have a maximum of local self-government with a minimum of local government units)). Structuring the state's political organization to "provide for maximum local self-government with a minimum of local government units," the constitution attempts to balance the need for

local control with the goal of minimizing layers of bureaucracies (McBeath and Morehouse 1994). The state's founders envisioned a system of nested local governments to ensure local needs were met and sufficient resources would be available to meet those needs (McBeath and Morehouse 1994). When Alaskans sought statehood in 1958, they did so in large part to get away from the control of corporate interests and the federal government (Getches 1973, 56). The constitution's call for "maximum local self-government and minimum local governmental units" attempts to ensure a system of government responsive to local needs (Alaska. Const. Art. X, § 1, cl. 1).

The Alaska Constitution embodies the ideal of an "owner state," a term employed by former Alaska Governor Walter Hickel to express the idea that Alaska's lands and resources are commonly owned by all Alaskans, and should be used to the collective benefit of all residents of the state (Wilkinson and Limerick 2003, 12). "[The] constitution recognized that the state would sometimes have to choose who would get to use scarce resources," Governor Hickel said, "but it also prohibited special privileges or exclusive rights to what is commonly owned" (Hickel 2002). Article 10 of the Constitution established systems to govern resource management, ensure local control over the resources upon which local communities directly depend, and share authority for the health of Alaska's common resources between multiple layers of government (Alaska Const. Art. 10). Collective control over resources is further embodied in the Declaration of Rights in the Alaska Constitution: "all persons have corresponding obligations to the people and to the State" (Alaska Const. Art. 1, § 1, cl. 3).

5.4.2. Practices of Local Governance in Alaska

State policies reflect and reinforce Alaska's commitment to local governance stand in stark contrast to the lack of authority accorded by the state to tribal governments. As described

below, the “complex non-system” of governance in the rural areas of Alaska creates tremendous obstacles for tribal governments when measured against similarly situated local governments in urban Alaska (Case and Voluck 2012).

Tribal governments are the only government in Alaska without a land base. The impacts of this disparity are magnified by the unwillingness of the State of Alaska to work with tribal governments on governance issues, even where territoriality is not relevant. For example, the state recently fought efforts by a tribal court to issue an order granting custody to a child who was a tribal member (*Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014)). In *Simmonds*, the Alaska Supreme Court held that that tribal sovereignty extended to member children, against state objections in the trial court. Referencing the litigious nature of the relationship between the State of Alaska and Alaskan tribes, Troy Eid, Chairman of the U.S. Indian Law and Order Commission posed the question to the 2014 annual convention of the Tanana Chiefs Conference in Fairbanks, Alaska, “Why is everything a fight? No state in the U.S. spends more money per capita litigating against its own citizens than the State of Alaska.”

5.4.3. Exercising Local Governance Through State Power

In 1972, realizing that ANCSA would not be sufficient to ensure their governance interests, the Inupiat community of the North Slope region of Alaska pursued the creation of a borough under Alaska state law to provide themselves with the powers of self-government (Zellen 2008). The borough's geographic boundaries are the same as the regional for-profit corporation created under ANCSA. The effect has been to imbue the region with governmental powers through the borough, and the rights of a land-owner through the corporation. This arrangement has worked because of the coterminous boundaries, and also because the majority population of the borough is Inupiaq (U.S. Census Bureau 31 March 2015).

Similarly, the Northwest Arctic Borough, whose borders overlap with the regional for-profit corporation, NANA (Northwest Arctic Native Association), where over 80 percent of people are Alaska Natives, also has tax and regulatory authorities. These forms of governance work in areas like the North Slope and the Northwest Arctic Borough because Alaska Natives continue to maintain a numeric majority. The danger though, is that shifting demographics could bring shifts in power as Alaska Natives “could eventually become [political] minorities in their own lands” (Zellen 2008). Another issue arises because boroughs and cities cannot institute a Native-preference policy for hiring practices because those policies violate the state’s equal protection clause. However, Native preference policies do not violate federal law, and as such tribal rights to institute such policies have withstood constitutional challenges (Case and Voluck 2012).

5.4.4. Asserting Tribal Governance Through Litigation

Since the *Venetie* decision, Alaska courts have been grappling with questions related to whether tribal authority continued to exist after ANCSA, and if so, to what extent could tribes govern in the absence of “Indian Country.” In a 1999 case, the Alaska Supreme Court recognized the authority of tribes to “regulate domestic relations among members” even in the absence of Indian Country (*John v. Baker*, 982 P.2d 738 (Alaska 1999)); *see also*, (Blurton 2003). The Court distinguished land based sovereignty and membership sovereignty, recognizing that many open questions remain because of this distinction:

Because the traditional reservation based structure of tribal life in most states forms the backdrop for the federal cases, courts have not had occasion to tease apart the ideas of land based sovereignty and membership sovereignty (982 P.2d at 754).

The Alaska Court found that the “the key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure

tribal self-governance” (982 P.2d at 756). In holding that tribes “have power to make their own substantive law in internal matters,” the Court stated that tribal courts may also have jurisdiction to “resolve disputes involving non-members, including non-Indians” when the civil actions involve matters essential to self-governance and is vital to the maintenance of tribal integrity and self-determination (982 P.2d at 754). Tribes may be able to regulate non-members if that power is essential to tribal integrity and self-determination. In holding that tribes “have power to make their own substantive law in internal matters,” the *John v. Baker* court stated that tribal courts may also have jurisdiction to “resolve civil disputes involving non-members, including non-Indians” when the civil actions involve matters essential to self-governance and is vital to the maintenance of tribal integrity and self-determination (982 P.2d at 754). Relying on U.S. Supreme Court precedent, the Alaska court found that the “the key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance” (982 P.2d at 756).

The Alaska Supreme Court recently confirmed the authority of tribes to regulate the domestic affairs of their own members. In *Simmonds v. Parks*, 329 P.3d 995 (Alaska 2014), the Court ruled that the tribal court order that terminated Mr. Parks’ parental rights were entitled to full faith and credit by Alaska courts, meaning that under state law, tribal orders regarding parental termination for a child who is a member of that tribe should be accepted by the State of Alaska. The State of Alaska objected to the right of a tribal court to issue such an order, and refused to recognize their jurisdiction over such matters. The Court rejected that approach, and began their decision by framing the issue in a way that acknowledged that “Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe’s dependent status” (982 P.2d at 1008). These fundamental

attributes of sovereignty include “inherent non-territorial sovereignty,” in other words, authority to govern that is not bound to land or “Indian Country” (982 P.2d at 1009). The Supreme Court found that the State’s position “fails to afford tribal courts the respect to which they are entitled as the judicial institutions of sovereign entities” (982 P.2d at 1010-1011).

The Supreme Court forcefully rejected the state’s argument that non-Natives and non-tribal members would not get a fair process in a tribal judicial context, allowing tribal jurisdiction over a conflict that involved a non-tribal member (982 P.2d at 1016-1017). The Alaska Supreme Court has adopted an approach that recognizes the sovereign authority of Alaska’s tribes that is not delimited by territoriality. So far, the Court has been clear that the State of Alaska must recognize tribal jurisdiction to regulate the wellbeing of member children, even in the absence of a land base. While the *Baker* and *Parks* decisions rescue sovereign authority from the potentially devastating impacts wrought by *Venette*, this approach has serious limitations because of the lack of land-based jurisdiction. Tribes are still not able to tax and regulate lands they occupy, thus restricting the scope of governance tools available to them.

The loss of tribal territoriality compounds the complexities of governance that small rural communities in Alaska face. As described in detail in this chapter, in any given town in Alaska, there are several different governance regimes operating. The overlapping systems create what has come to be understood as a “complex non-system” that erects barriers to efficient, responsive local control. These complexities challenge the capacity of tribes to “recover their own distinctive cultures and institutions of self-government as a basis for their development and place in the world” (Anaya 2012, para 25). Territoriality is central to the economic and cultural foundations of tribal communities (Anaya 2012, para 39).

Moreover, as described in section 5.5, the loss of territoriality has very specific consequences on the ability of tribes to assert the right of self-determination and to promote policies that enable human development for their communities.

5.5. CONSEQUENCES OF THE LOSS OF TERRITORIALITY

Throughout my research, I consistently heard themes of loss from key informants I interviewed and through observation at public meetings. Alaska Native leaders described the importance of maintaining connection with land to both present and future generations, and a key aspect of this connection was the ability to control what occurred on these lands. One leader described having convened over ten meetings of statewide leaders, called Tribal Leaders Summits, to discuss the impacts that ANCSA had on tribes and to develop strategies to overcome barriers to self-governance. At one of those meetings, an elder described why ownership of lands is not sufficient to protect the cultural connection to land,

We are here for the land. Tribes cannot be tribes without land. We need land, to live on, to live off of, to go home to, to be buried in. Without land, we cannot exist as tribes. Like fish without water. In 1998, the Supreme Court said you are tribes but you cannot tax because there is no land on which to exercise your powers as a tribe. This was a great defeat for the native people.

Yes, indeed tribes have lost their lands. Congress gave tribal lands to state chartered, private corporations. These are lands tribes need for all kinds of reasons, including to exist. If you lose lands, you no longer exist. There is no place to be buried, no place to be free in.

Corporations are not here because they believe they will hang on to the land until the end of the world. But corporations go out of business, and a lot of village corporations are insolvent. These lands can be seized.

(Testimony at Tribal Leaders Summit, May 2, 2013).

The notion of loss of rights and of authority emerged throughout the many interviews and meetings I attended, and as I analyzed my notes to better understand the characteristics of that

loss, four distinct themes began to emerge. Subsistence rights were a common discussion in many of the meetings I attended including the annual conventions of the Alaska Federation of Natives and regional meetings. During these meetings, people expressed concern about the loss of authority to manage fish and game resources, which meant their communities were food insecure. Similarly, during my research, the U.S. government commissioned one report outlining the state of public safety in rural Alaska and a second report more specifically focused on the safety of Alaska Native children and families. Both reports generated public meetings that I attended and reports that I reviewed and both reports highlighted the idea that the loss of tribal territoriality directly correlated with public safety concerns in villages.

The third theme of loss to emerge in my research involved the inability of tribes to respond to the challenges of a changing climate. This theme emerged during my work with the Yukon River Inter-Tribal Watershed Council and was the basis for their work gathering scientific data to document the impacts of climate change throughout the Watershed. The lack of governance capacity to promote community resilience was likewise highlighted by a White House Task Force on Climate Change and Resilience issued during the period of my research.

The final theme of loss was directly tied to the work I was doing as part of the YRITWC's legal team. Because tribes in Alaska have no land base, they cannot seek to manage water or air quality – an option that is available to tribes in the Continental United States that have a land base over which to govern. This environmental insecurity was the impetus behind the creation of a water quality standards plan and a water rights governance strategy, both of which I was involved in during my time working with the YRITWC. This next section describes these losses in depth.

5.5.1 The Loss of Territoriality and Food (In)security

Alaska tribes are foreclosed from the governance framework regarding subsistence resources. The lack of tribal authority to participate as governments in subsistence management has been a long-standing issue in Alaska, and the issue arose repeatedly throughout this research. Again, as with the lack of authority over water management, the foreclosure of tribal participation was due to the lack of territoriality.

Throughout the United States, Indian tribes engage in natural resource governance to varying degrees, and regulate and manage subsistence hunting and fishing practices on tribal lands (*see generally*, Case and Voluck 2012). In Alaska, the lack of a land base from which to assert jurisdiction over subsistence management prevents Alaskan tribes from exercising their rights as sovereigns to govern the resources upon which they depend. In the case of ANILCA, the failure to engage tribes in a sovereign partnership has left Alaskan tribes in a position where they need to seek changes to federal law in order to participate in subsistence management on a government-to-government basis.

As described in depth in the previous chapter, ANILCA provided for a subsistence preference in hunting and fishing for rural Alaskans (ANILCA § 3114). While initially, this level of protection for rural Alaskans existed in state law, in 1988, the Alaska Supreme Court found that a rural preference violated the State of Alaska's constitution and so struck down the State's subsistence statute. As a result, the state lost the ability to regulate fish and game on federal lands, and a system of "dual" management now exists where the federal government manages fish and wildlife on federal lands and has a rural subsistence priority, and the state manages fish and game on state and ANCSA lands and does not include protections for rural Alaskans.

This dual management system has led to widespread dissatisfaction. As one key-informant explained:

In ANCSA, we lost hunting and fishing aboriginal rights that were to be addressed in ANILCA. [But] ANILCA left Alaska Natives with no protection from anyone on hunting and fishing issues, and left them with scraps.

The [Alaska] state constitution has equal access provision, yet no allowance or recognition in a formal way of the history of indigenous use of those resources. Therefore it creates a conflict amongst users. In the state government, they choose not to grant preferential uses (Expert KI-3).

The former head of the Tanana Chiefs Conference testified before the U.S. Congress in 2014 that, “the lack of authority to manage hunting and fishing on our own ANCSA lands is one of the greatest existing injustices for Alaska Natives. Protection of Alaska Native hunting and fishing will continue to be the Alaska Native people’s number one priority until we see implementation on the ground of legislation establishing an Alaska Native priority and Alaska Native co-management.” (Isaacs Testimony, Wildlife Management Hearing).

The failure of the regulatory framework to protect Alaska Native hunting and fishing rights has consequences that go beyond ensuring that people have enough food to put on the table every year. A recent report by the U.S. government links subsistence practices to community safety and wellbeing:

[Regulations] that limit the ability of Alaska Natives to conduct traditional subsistence hunting and fishing are directly connected to violence in Alaska Native villages and the exposure of Alaska Native children to that violence. [V]iolence is essentially nonexistent during the times in which the communities are engaging in traditional subsistence hunting and fishing activities, whereas violence spikes during times when Alaska Natives are unable to provide for their families. *The need for tribes to control their own traditional hunting and fishing regulations is an important issue for all tribes, but it has particular significance for Alaska Tribes* because subsistence hunting, fishing, and gathering are not only a part of everyday life for Alaska Natives, but for many Alaska Natives it is literally the subsistence on which their families survive. Beyond providing basic food, subsistence fishing and hunting has been essential to Alaska Native families’ way of life for generations. Like language and cultural traditions, it has been passed down from one

generation to the next and is an important means of reinforcing tribal values and traditions and binding families together in common spirit and activity. Interfering with these traditions erodes culture, family, a sense of purpose and ability to provide for one's own, and a sense of pride (Attorney General's Advisory Committee 2014, 150).

The failure of these systems to protect subsistence traditions has been recognized by one of the leading statewide organizations. In a white paper prepared by the Alaska Federation of Natives (AFN) for the 2012 presidential and congressional transitions, AFN stated that "the legal framework governing subsistence in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods" (Alaska Federation of Natives 2012). Blaming both the federal and state governments for failing to protect subsistence for Alaska Natives, AFN is currently pushing for new legislation to ensure a "Native" or "tribal" subsistence preference throughout Alaska. The UN Special Rapporteur found that the state subsistence regulatory regime "allows for, and appears to often favour, competing land and resource uses such as mining and other activities, including hunting and fishing for sport, that may threaten natural environments and food sources" (Anaya 2012, para 60). Recognizing that the federal government is perhaps a more willing partner, there is currently a movement within the Alaska Native community to integrate tribes in subsistence management as an alternative to the scheme established in ANILCA.

5.5.2. The Loss of Territoriality and Community Safety

Although not natural resource focused, the fourth theme of loss that emerged throughout my research was the impact of the loss of territoriality on the ability of tribal governments to protect community safety. During the timeframe within which I conducted my research, I attended a number of public meetings where presenters and participants identified public safety as a matter of community wellbeing, and described the obstacles tribes face when seeking to secure their communities. At least two federal reports were issued during my research timeframe

that outlined how the lack of a land base resulted in stripping away tribal authority to regulate public safety within their communities, placing people at risk (Indian Law and Order Commission 2013; Attorney General's Advisory Committee 2014).

One of the stark examples of this loss emerged in reports and public testimony related to the U.S. Violence Against Women Act (VAWA). The Violence Against Women Act was first adopted in 1995 in order to bring victims of domestic violence and sexual assault under federal legal protection. Congress reauthorized VAWA in 2013 and included provisions specifically designed to extend tribal jurisdiction over domestic violence crimes committed on Indian lands for the first time (Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, 2013-2015). Alaska tribes were specifically excluded from this provision because of the lack of Indian Country.

VAWA SEC. 910. SPECIAL RULE FOR THE STATE OF ALASKA

- a. Expanded Jurisdiction—In the State of Alaska, the amendments made by sections 904 and 905 [i.e. recognition of civil domestic violence jurisdiction over “any person”] shall only apply to the Indian country (as defined in section 1151 of title 18, United States Code) of the Metlakatla Indian Community, Annette Island Reserve.

By limiting application of expanded jurisdiction to “Indian Country,” VAWA curtailed the capacity for Alaska Native tribes to address the very real threats to public safety because of the lack on “Indian Country.” This meant that Alaska tribal governments, unlike other local governments in Alaska and unlike other tribes in the continental United States, lacked the authority to protect public safety in their community because they lacked the ability to govern the lands upon which their communities are located.

Alaska ranks first in the U.S. for suicide and intimate partner homicides, and more than half of Alaskan women have been victims of sexual violence. Only 39 of the 220 rural communities have courthouses, and most lack public safety personnel. Seventy-five of the more

than 220 villages have no law enforcement, and only one community has a shelter for domestic violence victims (Indian Law and Order Commission 2013, 39).

Alaska Native women are less than 20% of the state's overall population and represent nearly half of all reported rape victims (Indian Law and Order Commission 2013, 41). Children are particularly susceptible to community violence, causing depression, anxiety, addiction, trouble in school, suicide, and more violence. Again, the statistics fall disproportionately on Alaska Native children, who comprise more than half of all maltreatment reports to child protective services and more than 60% of kids removed from their homes.

Report after report chronicles the deficiencies in public safety in rural, indigenous communities. In 2007, Amnesty International described barriers that deny indigenous women access to justice and perpetuate intolerable levels of sexual and domestic violence in Alaska (Amnesty International 2007). In 2012, the UN Special Rapporteur on Indigenous Rights identified "continuing system barriers to the full realization of indigenous peoples' rights" (Anaya 2012)

In November 2013, the Indian Law and Order Commission issued a report entitled "A Roadmap for Making Native America Safer." Their findings recommend "reinforcing the power of locally based Tribal criminal justice systems" to address the lack of justice in Indian Country (Indian Law and Order Commission 2013). The report included a specific section on the State of Alaska because "the problems in Alaska are so severe . . . [they] are no longer just Alaska's issues. They are national issues" (Indian Law and Order Commission 2013).

The Commission's report included recommendations to make Alaska safer. Among these, the Commission called out VAWA's failure to include Alaska Native tribes in its expansion of tribal jurisdiction as "unconscionable" and urged Congress to amend VAWA to treat Alaska

tribes in the same way as tribes in the continental United States. The Commission likewise called for expansion of criminal jurisdictional authority for Alaskan tribes. Ultimately, in December of 2014, the Congress amended the VAWA provision that excluded Alaskan tribes from the right to exercise sovereign authority over domestic violence relations (Alaska Native News 2014). Although the lack of Indian Country remains a tremendous obstacle for tribes seeking to assert criminal jurisdiction over domestic violence crimes, tribal governments are now able to issue domestic violence restraining orders that the state law enforcement system must recognize (Landreth 2015).

The lack of infrastructure available in communities to take steps to ensure public safety and wellbeing was highlighted in a report issued in November of 2014 by the U.S. Attorney General's office. Relying on statistics provided to the U.S. Congress, that report made the following findings that all point to a lack of community wellbeing throughout rural communities:

- less than half of remote Alaska villages are served by trained State law enforcement entities and several Indian tribes utilize peace officers or tribal police without adequate training or equipment;
- the centralized State judicial system relies on general jurisdiction Superior Courts in the regional hub communities, with only a handful of staffed magistrate courts outside of the hub communities; and
- the lack of effective law enforcement and accessible judicial services in remote Alaska villages contributes significantly to increased crime, alcohol abuse, drug abuse, domestic violence, rates of suicide, poor educational achievement, and lack of economic development (Attorney General's Advisory Committee 2014).

In addition to issues of domestic partner violence, the Executive Branch of the Alaska State government does not recognize tribal authority over child welfare issues because of the State's position that tribal authority is limited to: (1) the authority of tribes to determine tribal membership; and (2) the authority to regulate disputes involving child protection and child

custody when both parents and the child are members of the tribe (Geraghty 2013, 4) The state's position is rooted in the lack of territoriality. "Land status is particularly important because tribal authority centers on the land held by the tribe and on tribal members within the reservation" (Geraghty 2013, 6). Alaska tribes rejected a reservation style land settlement, therefore, the state Attorney General argues that the lack of "Indian Country" in Alaska means tribes lack the requisite nexus between lands and governance that would support their assertion of governance authority in areas beyond the two arenas listed above (Geraghty 2013, 2).

There are logistical as well as legal reasons behind the state's reluctance to engage in government-to-government relations with Alaskan tribes.

Empowering over two hundred separate sovereigns with criminal jurisdiction would have serious consequences for both the State and its citizens. Such a change would create a confusing patchwork quilt of jurisdictions, undermine the clarity of the current system, and complicate the State's ability to police its own territory. . . . without years of advance planning and coordination with the state, significant issues are also likely to arise given that many of Alaska's 228 off reservation tribes currently lack justice infrastructure such as written codes, courtrooms or jails.

Moreover, the costs of suddenly empowering over two hundred separate criminal jurisdictions will ultimately be borne by the individuals subjected to tribal jurisdiction and . . . they would likely lack a remedy outside the tribal context (Geraghty 2013, 7-8).

In response, the Indian Law and Order Commission Report found that the question of how to combat high rates of domestic violence depends less on geography and more on the willingness of the State to recognize tribes as partners in this effort.

Alaska's approach to criminal justice issues is fundamentally on the wrong track. The status quo in Alaska tends to marginalize and frequently ignores the potential of tribally based justice systems, intertribal institutions, and organizations to provide more cost-effective and responsive alternatives to prevent crime and keep all Alaskans safer. If given an opportunity to work, Tribal approaches can be reasonably expected to make all Alaskans safer – and at less cost (Indian Law and Order Commission 2013, Ch. 20).

The state's opposition to the exercise of tribal jurisdiction over domestic violence crimes erects a serious obstacle to the ability of tribes to govern the wellbeing and safety of their own communities. As the ILOC report finds, the lack of a geographical base from which to root tribal authority does not condemn the ability of tribes to work as sovereign partners on these vital issues. The 2014 *Defending Childhood* report issued by the U.S. Attorney General stated, "these issues must be addressed at the local level, with the state working in partnership with tribes, to build local capacity to address public safety and access to justice" (Attorney General's Advisory Committee 2014, 136).

5.5.3. The Loss of Territoriality and Climate Change

Climate change has warmed Alaska more than twice as rapidly as the rest of the United States in the last sixty years (Chapin et al. 2014, 516). The impacts include reduced sea ice, retreating glaciers, thawing permafrost, earlier snowmelts, and drier landscapes (Chapin et al. 2014, 516). Temperatures, precipitation, and changes in snowmelt and permafrost are all expected to continue to increase, creating a great many changes for all aspects of life in America's Arctic. Arctic and subarctic watersheds are "disproportionately affected by climate change" (Wilson, Walter, and Waterhouse 2015, 93). The extent of climate change impacts on the Yukon River, for example, in terms of water, sediment and discharge are not well known because of the lack of scientific data within the watershed (Wilson, Walter, and Waterhouse 2015, 94).

In addition to the biologic changes that are happening in the Arctic and sub-Arctic, the rapidly changing climate impacts on community viability and infrastructure throughout Alaska. For example, disappearing sea ice is causing Alaska's coastlines to erode, threatening communities living along the coast with displacement and possible relocation (Bronen and

Chapin 2013). Thawing permafrost is altering wildlife habitat, increasing the frequency of wildfires that threaten communities, and changing the availability of safe drinking water sources (Chapin et al. 2014, 516-522). Community elders throughout the Yukon River watershed are noticing increased temperatures that impact snowpack, erosion, permafrost and river flow (Wilson, Walter, and Waterhouse 2015, 98). Climate changes have likewise adversely impacted livelihoods of people living along the Yukon River, including subsistence (Wilson, Walter, and Waterhouse 2015, 102). These impacts mirror those experienced by other indigenous tribes throughout the United States which include lost access to traditional foods, decreases in water quality and quantity, damage and loss to traditional lands, damages to community infrastructures, and the increasing threat of forcible relocation (Bennett and Maynard 2014, 298). These impacts are exacerbated by “historical events and contemporary conditions” unique to tribal communities throughout the country (Bennett and Maynard 2014, 298).

Indigenous knowledge gleaned from long-term observations provides data critical to long-term studies of understanding changing climates. This is especially the case along the Yukon River when the primary source of scientific data about the water quality is collected by the YRITWC Science Department, according to the former Science Director (YRITWC K-I 2). Indigenous knowledge is vital to planning throughout the United States, and the “datasets on climate impacts on water in many locations throughout Indian Country, such as the need to quantify available water and aquifer monitoring, will be important for improved adaptive planning” (Bennett and Maynard 2014, 304). The tribes along the Yukon River are now the primary entity collecting scientific information relevant for understanding the impacts of climate change, and contain historical observations vital for assessing and monitoring environmental health in the form of traditional knowledge (YRITWC K-I 2).

An Alaskan representative to the White House's Task Force on Climate Change and Resilience identified the challenges to Alaska tribes arising from the loss of territoriality on the ability of tribes to respond to climate change. Not only is vital traditional knowledge neglected by policy makers and planners, but due to the impacts of ANCSA and the Supreme Court's decision in the *Venette* case, tribes lack critical governance tools such as regulatory authority necessary to respond to the challenges their communities face related to climate change.

The Task Force representative explains,

With regards to climate change . . . place-based knowledge [is] so important. Traditional knowledge does not only help tribes, but the states and the country because the people have a depth of understanding of the environment that is probably underutilized (Expert K-I 3).

This perspective was integrated into the final recommendations released by the White House Task Force,

The Federal Government must fully incorporate its government-to-government relationship with Tribes and Alaska Native communities into existing programs and activities that relate to climate change by enhancing self-governance capacity, promoting engagement of State and local governments with tribal communities, and recognizing the role of traditional ecological knowledge in understanding the changing climate (The White House 2014, 8).

The lack of territoriality implicates community resilience by impeding the capacity of local governments to respond to acute and long-term shocks. The changing climate is opening oceans and extending ice and snow free seasons, creating unprecedented opportunities for economic development projects that require access to natural resources and the means to transport resources to market. With increases in these economic opportunities, communities must be prepared to address both the "perceived threats and anticipated benefits" (Chapin et al. 2014, 522). However, Alaska tribes lack governance authority necessary to create public policies related to climate change because of the lack of territoriality. This means that Alaska

tribes are again placed at a disadvantage when compared with other local governments and tribes in the continental United States, with very specific consequences to Alaska tribes including the lack of authority to tax and regulate. One of the recommendations contained in the White House Task Force report would be to offer economic incentives and technical assistance for tribes and communities that create “climate-smart land use and development that actively assesses and manages climate-related risks. State and local governments, tribes, and territories that employ such practices should receive preferential consideration” (The White House 2014, 11).

Similarly, the White House Task Force called for the full integration of Alaska Native tribal communities in subsistence governance. In the recommendation designed to promote communities in promoting their own food security, the Task Force recommendation reads:

Support subsistence activities central to the economic and food security of tribal, Alaska-Native, territorial, indigenous island, and other communities. These communities and their representative jurisdictions *must be fully integrated into resource governance decisions that affect their food sources*, including the Federal Subsistence Board, fishery management councils, and co-management organizations (The White House 2014, 29).

However, as noted earlier in this chapter, the subsistence management system does not allow for tribal integration into resource governance decisions that affect food supplies (see below). Without commensurate systematic changes that recognize and integrate tribal governments as governments into subsistence management regimes, this recommendation is moot.

Just as global, national, and state governments and institutions evolve to adapt to the changing climate, tribes need governance tools to effectively respond to the needs of their communities. “To be effective and culturally appropriate, it is important that such institutional frameworks recognize the sovereignty of tribal governments and that any institutional development stems from significant engagement with tribal representatives” (Bennett and

Maynard 2014, 307). Land-based governance, or tribal territoriality, is a critical tool necessary to promote policies of resilience and adaptation, but one that is foreclosed to tribes in Alaska.

5.5.4. The Loss of Territoriality and Environmental Quality Management

The lack of territorial authority for Alaska tribes means that, unlike their counterparts in the U.S., Alaska tribes have no ability to seek the delegation of water quality management authority from the U.S. government. As described more fully in the next chapter, without this pathway, the Yukon River tribes have been forced to create a much more circuitous and less certain route to asserting their inherent sovereign right to manage the water quality of the river.

Indigenous tribes throughout the continental United States have the opportunity to apply for the authority to manage air and water quality on reservation lands. This authority is delegated to the tribes through the U.S. government. The United States Environmental Protection Agency (EPA) is the agency in charge of ensuring clean water and clean air throughout the United States. That agency can delegate this authority to either states or federally recognized Indian tribes (40 CFR 131.4(c)). In addition to safeguarding the environment, the EPA has taken some of the most progressive steps towards ensuring environmental justice and working with Indian tribes of any federal agency. In 1983, the EPA became the first agency to adopt its own "Indian policy" that defined how it would interact with tribes (<http://www.epa.gov/indian/pdf/indian-policy-84.pdf>). That policy describes how the EPA will work on Indian reservations, and as such, was not directly relevant to most of Alaska (with the exception of the Metlakatla Indian reservation). Subsequent EPA policy statements were more broadly articulated to include Alaska Native tribes, for example, a policy on consultation and coordination with Indian tribes issued in 2011 (and later reaffirmed in 2014) specifically identified Alaska tribes as among those to whom these policies applied (EPA memos 2014 and 2011).

Two EPA programs directly reflect the agency's commitment to work with tribes on environmental issues. In 1992, Congress enacted the Indian Environmental General Assistance Program (42 USC 4368b) which authorizes funding through EPA to federally recognized tribes and tribal consortia to plan, develop and establish environmental protection programs, including solid and hazardous waste programs. The IGAP ("Indian General Assistance Program") provides much of the funding available for the environmental programs conducted throughout Alaska, as well as other parts of the United States.

The second program is one in which the federal government, through the EPA, can delegate the power to regulate water and air quality to a qualifying Indian tribe. The Clean Water and Clean Air Acts both provide the opportunity for Indian tribes to apply for status to be treated in the same manner as a state ("Treatment as State" or TAS) to regulate either or both air and water quality.

Section 518(e) of the Clean Water Act authorizes the EPA to:

Treat an Indian tribe as a State for [certain] purposes . . . but only if (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the U.S. in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian tribe is reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act.

An extensive legal analysis prepared by the Indian Law Resource Center determined that Alaska tribes do not qualify for treatment as state status (Indian Law Resource Center 2009). Lands transferred under ANCSA do not qualify under subsection 518(e)(2) and so therefore preempt the ability of Alaskan tribes to avail themselves of an opportunity to manage water and air quality under U.S. law (33 U.S.C. § 1377(e) (2012)). The lack of land-based authority

forecloses the most direct option available to tribes to assume governance authority over water quality.

5.6. SUMMARY

These four consequences that flow from the lack of territoriality as described in this chapter all combine to impact the capacity of tribal governments to ensure that their communities have the tools necessary to survive and thrive in times of change. Recognizing that tribes in Alaska are still recuperating from centuries of transformation to their people, cultures, languages and lands caused by colonization, Kyle Wark, Indigenous Researcher and Policy Analyst with the First Alaskans Institute envisioned “systems that hold our people up instead of holding them back” (Wark 2014). He asked two questions necessary to bring about that vision: first, what can local people do that we do not need permission for; and second, what state and local policies should be implemented to achieve that vision?

The next chapter describes what local people are doing in the absence of explicit statutory “permission” to create opportunities for self-governance, and then identifies contemporary changes in public policies that provide an institutional framework that supports these efforts.

CHAPTER 6: THE YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL: A CASE STUDY IN GOVERNANCE INNOVATION

This chapter describes the efforts of the Yukon River Inter-Tribal Watershed Council to take steps to assure the wellbeing of their community, and to assert their inherent rights to self-determination. The YRITWC is assisting their tribal members with crafting innovative strategies to “hold themselves up rather than back” and to overcome obstacles to self-governance. The work of the YRITWC is in response to two of the losses described in the previous chapter: the loss to addressing climate change and resilience needs of their communities and the loss of environmental quality management. The YRITWC relied on combining science and traditional knowledge with their inherent sovereign rights to forge a path forward into governance where none otherwise exists.

The Yukon River Inter-Tribal Watershed Council is an intertribal international organization of Alaska tribes and Canadian First Nations. In 2011, the YRITWC embarked on a path to assert their inherent sovereign authority over the river’s water quality. This effort was the subject of my case study. This chapter describes the Yukon River watershed, and recounts the development of the YRITWC as a mechanism to organize the tribes and first nations along the River. It then describes the YRITWC’s efforts to create a framework wherein their member tribes could assert sovereign authority to engage in water quality management. As described here, the Alaska member tribes have had to innovate a path towards governance because of the lack of territoriality, and because of the lack of explicit statutory authority to share in the river’s governance. This case study is limited to examining the efforts of the Alaskan communities along the Yukon River to increase self-governance even as territorial authority is lost, because, unlike the Canadian First Nations, Alaska tribes lack territoriality.

6.1. THE MIGHTY YUKON

The Yukon descends from this borderland between earth and heaven, between science and myth (O'Neill 2006).

Yukon means “great river” in the Gwich’in language (Lomax et al., 2012 at 1). The Yukon River is the fourth largest watershed in the United States (Brabets, Wang, and Meade 2000), and the largest free flowing river in the world (Lomax et al., 2012 at 3). The River flows for 3,700 kilometers (2,300 miles) from its headwaters in British Columbia, Canada, bisects Alaska and drains into the Bering Straits (Figure 6.1). “With a little jig-sawing, the drainable basin of the Yukon River could contain all of Texas and California, the largest of the contiguous states, or sixteen of the little ones” (O'Neill 2006).

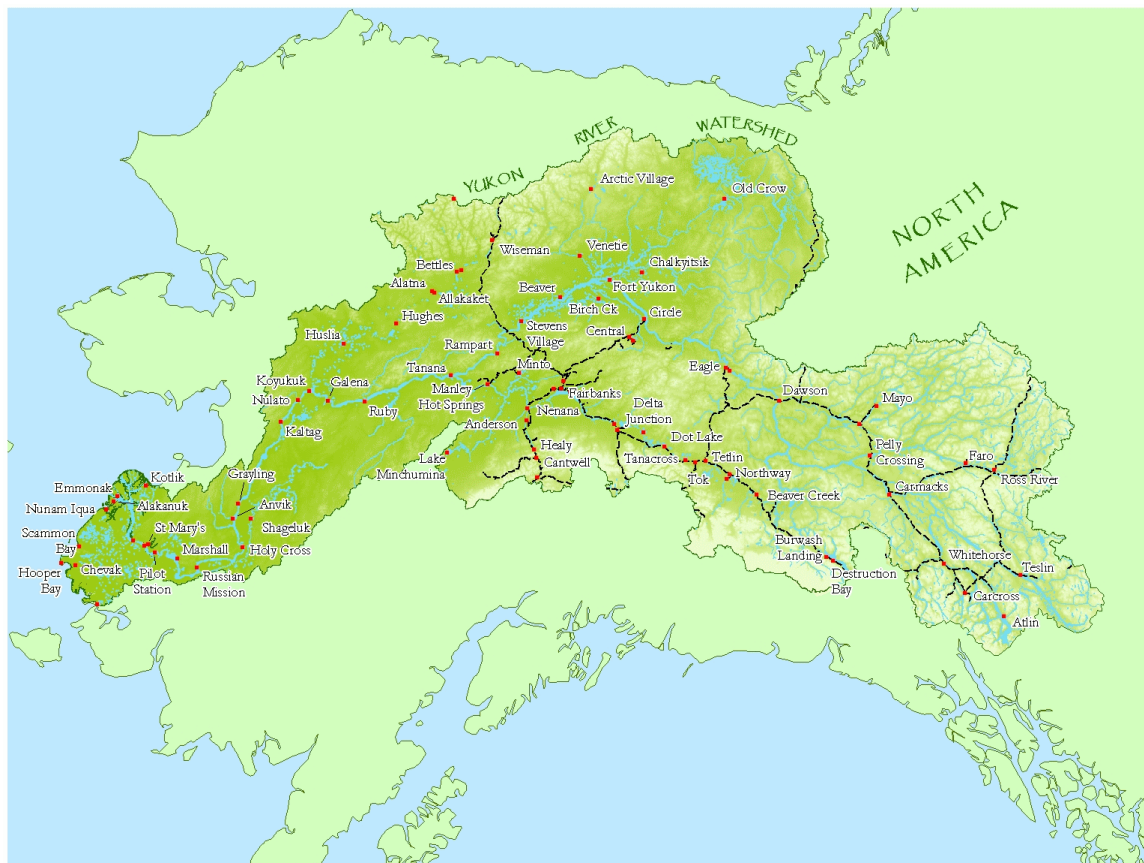
The Yukon River watershed (YRW) is one of the most diverse ecosystems in North America and is vital to the ecosystems of the Bering and Chukchi Seas (United States Geologic Survey (USGS) 2009, 1). Its relatively intact ecosystem has thousands of lakes, ponds, sloughs, wetlands and river habitat. The river basin is home to more than 150 bird species, 40 mammal species and 18 species of fish (Lomax et al. 2012, 4). The Yukon provides eight percent of the Arctic Ocean’s fresh water supply and is home to one of the longest salmon runs in the world (Alaska Department of Environmental Conservation et al. 2009, 4).

The changing climate is impacting the lands and waters within the basin. Warming temperatures mean an earlier and longer spring melt period, increased permafrost thawing, increased runoff and erosion (United States Geologic Survey (USGS) 2009, 1; Hay and McCabe 2010, 509). These changes impact water quality, with potentially negative effects for disease and contamination levels in both fish and water (Dube et al. 2012, 428). Assessing these changes and their impacts on the communities is difficult because of the lack of data about the river’s water quality, both temporal and spatial (Dube et al. 2012, 436).

6.1.1. The People of the Yukon River

The Yukon River Watershed has long been home to over 125,000 people and approximately seventy Alaskan tribes and Canadian First Nations. Within Alaska, the Yukon River communities include Cup'ik, Yup'ik, Koyukon and Gwich'in Athabascan Tribal nations (Lomax et al. 2012; Wilson 2012; Dube et al. 2012) (see Figure 6.2). Approximately 83% of the people living along the river are indigenous, and subsistence is a way of life for these communities (Lomax et al. 2012, 5). The river and surrounding lands provide over half of the food supply and all of the drinking water for the villages living within the watershed (Dube et al. 2012, 428; Lomax et al. 2012, 5). The river is a source of ceremonial and traditional practices among the indigenous peoples living along its shores (Dube et al. 2012, 428; Lomax et al. 2012, 5; Yukon River Inter-Tribal Watershed Council 2002). As most of these communities are located far from any roads, the river also provides a critical transportation corridor for people. The “complex connectivity” of the relationship between residents of the community of Ruby, Alaska, with the Yukon River is reflected in the variety of ways the residents depend on the river, including transportation, habitat, drinking water, spiritual uses, recreation, providing access to firewood, sanitation, and watering gardens (Wilson 2012, 100).

FIGURE 6.1: COMMUNITIES LOCATED WITHIN THE YUKON RIVER WATERSHED.

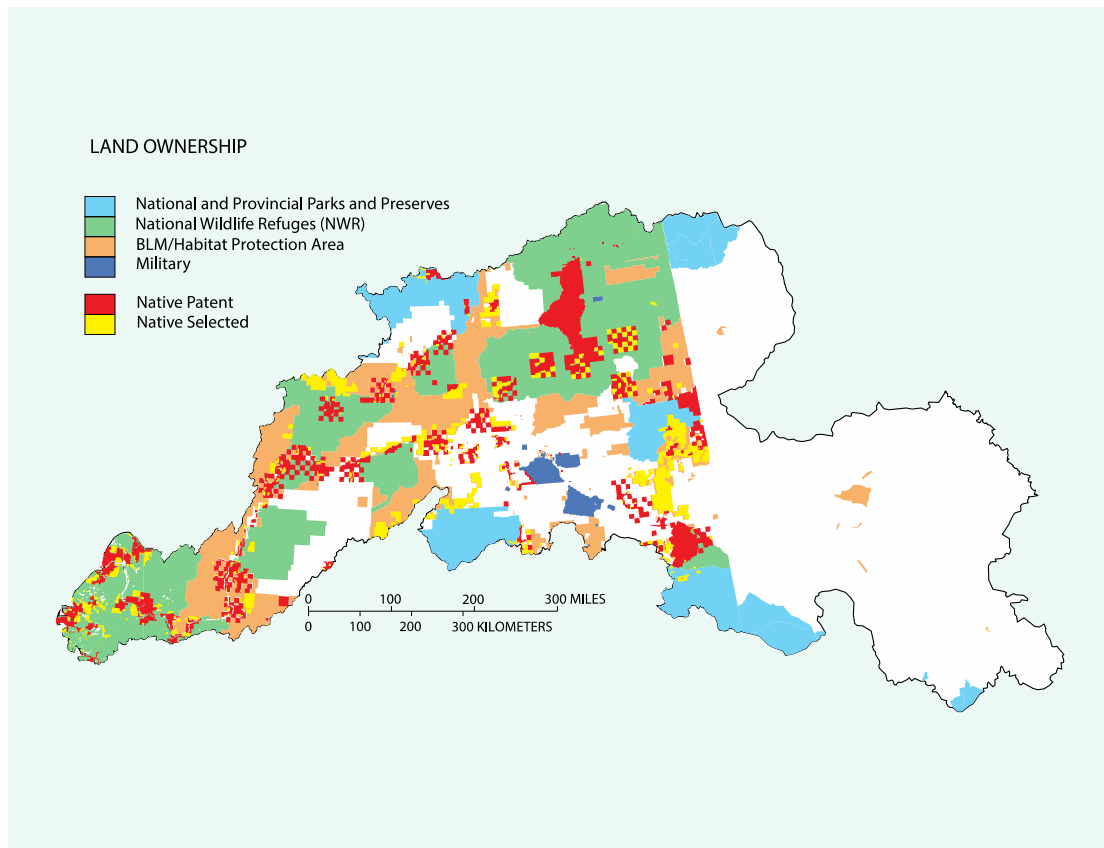


Source: (Yukon River Intertribal Watershed Council)

6.1.2. Lands and Wild Resources of the Yukon River Watershed

Lands on the Alaska side of the Yukon watershed are owned by three different entities (Figure 6.2). Over two-thirds of the land within the Alaskan side of the basin is federally owned and managed as some form of conservation unit (national park, wild and scenic river, etc.), although the U.S. military also holds title to a small percentage of these lands. Native corporations, both village and regional, also own lands within the basin. Finally, the State of Alaska owns lands as well (Brabets, Wang, and Meade 2000).

FIGURE 6.2: ALASKAN LAND STATUS WITHIN THE YUKON RIVER WATERSHED



Source: (Brabets, Wang, and Meade 2000).

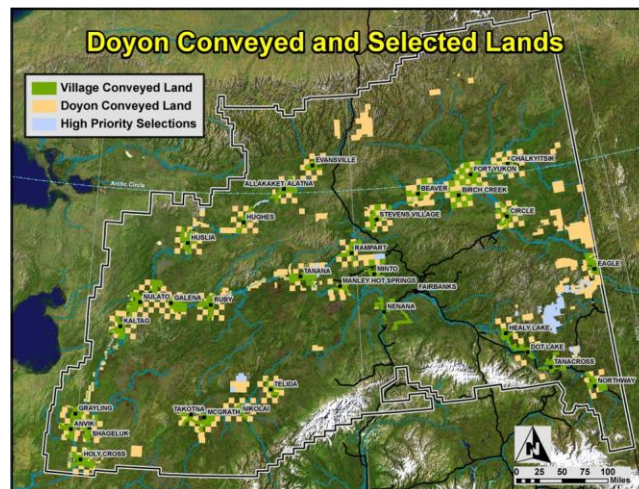
The complexities involved with managing the wildlife, wild lands and resources within the watershed subject the communities to a variety of governmental jurisdictions.³ All of the Alaska Native communities within the Watershed have a tribal council, and a few also have cities organized under state law. Most of the communities are located within the unorganized borough, which means that the State of Alaska exercises regional governance powers that impact the communities. There are two Alaska Native corporations within the region, Doyon Corporation (and its corollary non-profit organization, Tanana Chiefs Conference) and Calista

³ In the map, BLM Habitat/Protection Area refers to areas managed by the U.S. Bureau of Land Management. “Selected” lands refers to lands chosen by an Alaska Native corporation and when those selections are finalized and title issued, they become “patented.”

Corporation (and its non-profit affiliate, the Association of Village Council Presidents). Each of the sixty villages has a for-profit corporation that own lands in fee simple in and around their respective communities, and each holds the subsurface title to those lands. Both Doyon and Calista regions include villages that are not members of the case study used in this research, the Yukon River Inter-Tribal Watershed Council, and although not all lands owned by these corporations are within the watershed, I provide a very brief description of each corporation and their holdings below.

Under the terms of the Alaska Native Claims Settlement Act, Doyon Corporation will ultimately receive title to 12.5 million acres of land in Interior Alaska, making it the largest private landowner in Alaska (<https://www.doyon.com/lands/overview.aspx>). So far, according to their website, Doyon has received title to almost 11.4 million acres of land that is located around the 34 communities within their region (https://www.doyon.com/corporate_profiles/ancsa.aspx) (Figure 6.3). Doyon owns the surface and subsurface estate to approximately 7.8 million acres, and the subsurface estate to 3.6 million accrues that are under lands owned by village corporations within the region (https://www.doyon.com/corporate_profiles/ancsa.aspx).

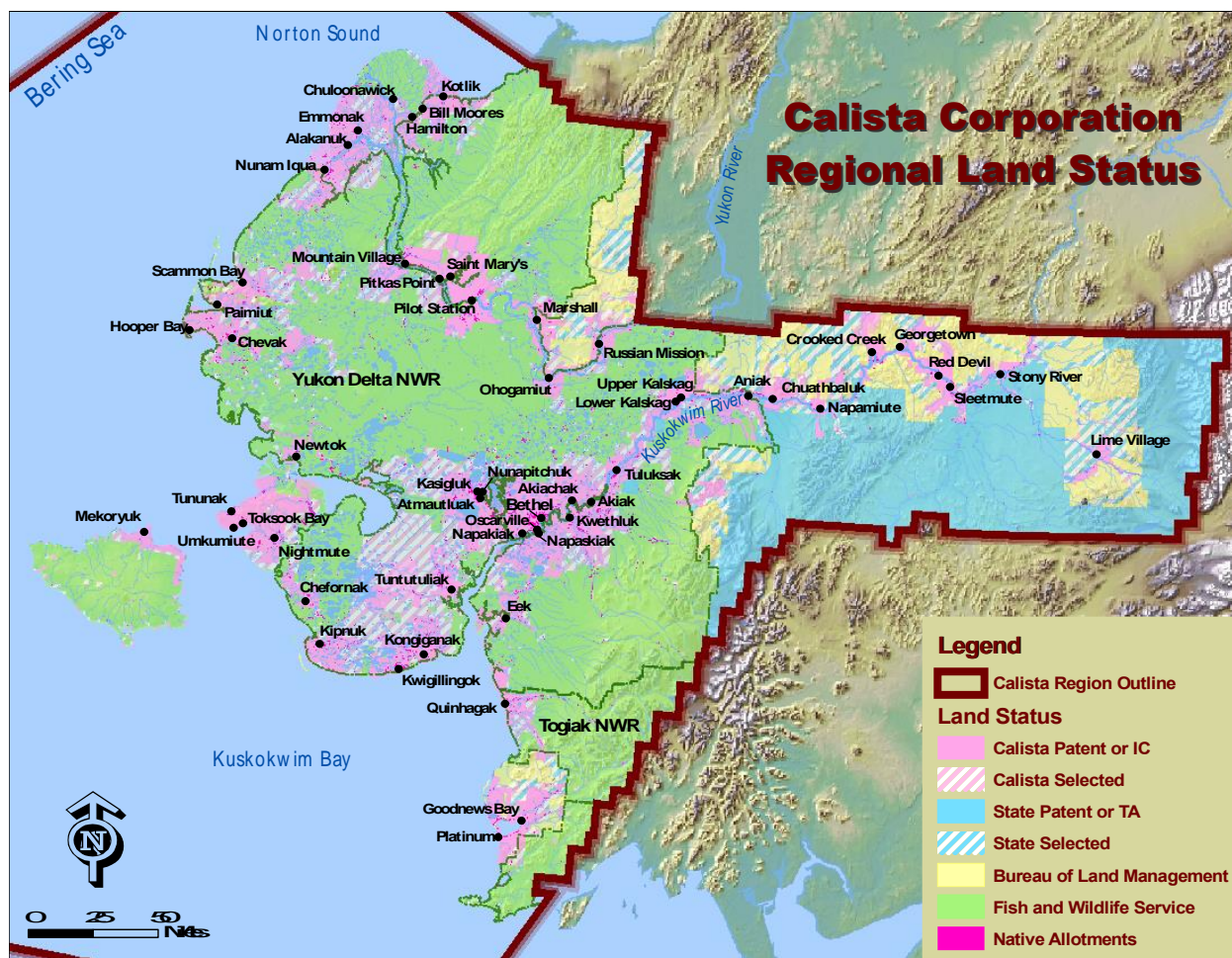
FIGURE 6.3: LANDS WITHIN THE DOYON REGION OF CENTRAL ALASKA



Source: (Doyon)

Calista Corporation is entitled to 6.5 million acres of land, or less than 20% of the total land within the Calista region (www.calistacorp.com). Over three-fourths of the land located within this region is federal and is managed by the U.S. Fish and Wildlife Service (Figure 6.4). The fifty-six federally recognized tribes within the region can be accessed only by plane, boat or snowmobile, no roads attach them to larger hub communities. There are 45 for profit village corporations located within the region, all recipients of surface estate lands conveyed under ANCSA (www.calista.corp).

FIGURE 6.4. CALISTA REGION IN SOUTHWEST ALASKA



Source: (Calista Corporation ND)

6.1.3. Fish and Game and Subsistence Management

The variety of landowners within the Watershed means that natural resources management is complex. Many of the wildlife species found along the river are subject to international treaties such as the Migratory Bird Treaty, the Pacific Salmon Treaty and its annex, the Yukon River Salmon Agreement, and the Convention on Nature Protection and Wildlife Conservation in the Western Hemisphere (Indian Law Resource Center 2003; U.S. Fish and Wildlife Service 1987, 6).

A number of federal agencies are responsible for managing habitat within the basin, along with the Alaska Department of Natural Resources. The Alaska Department of Fish and Game and the U.S. Fish and Wildlife Service are each responsible for managing different subsistence resources within the watershed, depending on whether these resources are on state or Alaska Native Corporation or federal land. The U.S. Fish and Wildlife Service manages wildlife populations on federal lands, and the State of Alaska Department of Fish and Game is responsible for management on state and ANCSA lands. Although individual Alaska Natives can sit on regional advisory councils that have input into management practices, Alaska Native tribes have no statutory role in governing wildlife.

The overlapping jurisdiction between state and federal management agencies was the subject of protracted litigation over the question of who is responsible for managing fish populations in navigable waterways. In a series of cases known as *Katie John*, so named for the key plaintiff, several Alaska Natives and the Village Council of Mentasta sued the U.S. in 1994 to ensure that the U.S. Fish and Wildlife Service, not the State of Alaska, manage navigable waters as public lands (*Katie John v. United States*, 720 F.3d 1214 (2013)). This would have the effect of ensuring a federal regulatory framework for these waters, which protects and prioritizes subsistence uses for rural residents, unlike state regulatory regimes (see Chapter 5). The federal courts determined that management of navigable waters is within federal jurisdiction, and therefore subject to the “federal reserved water rights” doctrine (*Katie John*). This doctrine means that waters reserved within conservation units, or “reserved waters,” are to be managed for the same purposes as the adjacent lands. In the case of the navigable waters found within the Yukon River Watershed, many of the rivers and streams are located within conservation units created to serve four purposes: (1) to promote a rural subsistence priority; (2) to protect fish and

wildlife; (3) to protect and improve the river's water quality (for functioning habitat for fish and wildlife); and (4) to honor and implement international agreements (such as the Pacific Salmon Treaty commitments within the Yukon River). The outcome of the *Katie John* litigation was to direct the U.S. Fish and Wildlife Service to manage the waters, as well as the lands, within conservation units for those purposes, thus protecting subsistence practices under federal law (*Katie John*).

The state and federal government have long argued over who should have the authority to manage fish and game resources within the watershed. Aspects of that dispute have been settled with the outcome of the *Katie John* litigation with the federal government retaining authority over subsistence resource management within the watershed. Even with the federal government's obligation to manage for and protect subsistence resources, tribal governments have no formal role to play in subsistence management.

6.1.4. Water Quality Within the Watershed

Water quality in the Yukon River watershed is impacted by a long history of military and mineral development activity in the region. Geographically, the Yukon has historically been an area with a lot of military activity given Alaska's proximity to Europe and particularly to Russia/the former Soviet Union. The River has had a military presence dating back to World War II, and the military sites along the river, while now abandoned, continue to contain contaminants (Lovgren 2004; Yukon River Inter-Tribal Watershed Council 2002, 11-12). Mining has occurred throughout the Yukon drainage since the mid-19th Century (Yukon River Inter-Tribal Watershed Council 2002).

Both mining and military activities present "some of the major impacts to the watershed in terms of no-point source pollution" (Yukon River Inter-Tribal Watershed Council 2002, 11;

Lovgren 2004). Distant Early Warning (DEW) stations, construction sites erected during the construction of the Alaska Highway and the Trans-Alaska pipeline and military bases and training areas remain sources of ongoing contamination (Yukon River Inter-Tribal Watershed Council 2002, 11). Similarly, mining activity along the River, both historic and contemporary, is another source of contamination throughout the drainage, as are sewage sites and landfills (Yukon River Inter-Tribal Watershed Council 2002, 13).

6.2. THE YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL

In the late 1990s, residents of Yukon River communities gathered together out of common concern for the health of their people. The perception that cancer rates were rising, and concern about the on-going nature of pollution from the military, mining, and waste sites brought representatives of the communities together in 1995 to discuss how to address the River's health and strategize about its future protection (Wheeler 1998, 1; Yukon River Inter-Tribal Watershed Council 2002, 1). In 1996, tribes and tribal organizations from the watershed met in Anchorage to organize a summit to address these critical issues (Wheeler 1998, 1). At that time, it was decided that the first summit should involve tribal governments, who would convene first amongst themselves prior to engaging other sovereigns.

It has to be the tribal governments, because the government is people and your people on the land make up that government . . . that's just the basis of anything intertribal, that's where you get the power . . . you don't give your power and authority away by having state or federal represent you, that's not being sovereign . . . from the very beginning that this commission is created, it has to stand on our Native perspective of the world . . . if we're going to protect the river we have to protect the land and everything around it (Statement of Randy Mayo, Wheeler 1998, 2-3).

In December of 1997, members of more than thirty Alaskan tribes and Canadian First Nations met in the community of Galena (Wheeler 1998, 3). The meeting was historic in that it was the first time representatives from Yukon River communities gathered in common concern

for the future of the watershed and the people living there. The goal of the meeting was to “organize, address, discuss and plan for environmental stewardship of the Yukon River” (Wheeler 1998, 9). The meeting was held in accordance with the traditional, cultural processes of the participants. From the outset, people decided to conduct the meeting in a traditional manner, doing away with more formal western meeting rules in favor of operating on a consensus basis (Wheeler 1998, 11).

During the three-day Summit, participants voiced their growing concerns about threats to the River, the environment and the wildlife posed by human activity (Wheeler 1998, 13-18). The result of the three-day meeting was the creation of the Yukon River Inter-Tribal Watershed Council (YRITWC). The founders of the YRITWC sought to “give voice, power, and ultimately governing authority to constituent members on issues impacting the environmental quality of the River and its watershed” (HPAIED 2005). The mission of the YRITWC is to “initiate and continue the cleanup and preservation of the Yukon River for the protection of our own and future generations of our Tribes/First Nations and for the continuation of our traditional Native way of life” (Yukon River Intertribal Watershed Council). The organization’s vision is simple: to be able to drink water directly from the Yukon River (Yukon River Intertribal Watershed Council).

A formal treaty binds the member governments of the YRITWC on both the Canadian and the Alaska side of the border (Yukon River Inter-Tribal Watershed Council 2002, 2). Fifty-three Alaska Native tribes and 14 Canadian First Nations have signed the treaty accord (YRITWC About Us). The accord’s purpose is to “plan, monitor, protect and enhance the environmental integrity of the Watershed and the cultural vitality of its peoples through cooperation, communication and education (Yukon River Intertribal Watershed Council ,

Accord). The YRITWC has implemented a series of programs described below to achieve that purpose.

The YRITWC is governed by an Executive Committee comprised of 14 representatives, 7 from Alaska and 7 from Canada (YRITWC About Us). The Board of Directors is comprised of the “indigenous peoples gathered at the bi-annual summit meetings (YRITWC About Us), and the summit meetings are the equivalent of the meeting of the Board of Directors (YRITWC Accord). These Summit meetings are required under the YRITWC Accord and results in setting the organization’s agenda for the next two years (YRITWC Accord).

Since its formation, the YRITWC has become the primary entity along the river responsible for collecting scientific and traditional data about water quality. This work began in 2006, when the YRITWC entered into a formal, government-to-government relationship with the U.S. Geological Survey, the federal agency responsible for conducting hydrologic research (Yukon River Inter-Tribal Watershed Council 2002, 3). This agreement has been renewed bi-annually, with the most recent signing taking place in Mayo, Canada in 2013 (Participant Observation notes). Under this agreement, the Science Department at the YRITWC operates an extensive observing program to monitor climate change through testing water chemistry and permafrost thickness along the River (MOU USGS YRITWC 2009, renewed 2013). The Science Department at the YRITWC operates an on-going training program for local residents to collect water quality data (YRITWC KI-2). The result of this work is that YRITWC operates one of the largest indigenous observing networks in the world, spanning the length of the River with 39 fixed water quality sites and between 11-20 permafrost observation grids that employs over 100 local science technicians and 23 indigenous governments (located on both the Canadian and Alaska side of the River) (YRITWC ION history). The scientific data and traditional

knowledge gathered as part of this observing network resulted in the production of water quality reports for 25 communities in 2013 (YRITWC Reports).

In addition to the Science Department, the YRITWC has operated a Solid Waste program since 2004 with funding from the United States Environmental Protection Agency. The YRITWC has a solid waste program to work with communities to haul waste out of the river communities to be properly recycled. YRITWC also operates a Brownfields program to conduct site-specific cleanup services for contaminated properties within member communities. Historically, the YRITWC operated a renewable energy program that provided technical training for community residents in renewable energy technology.

In 2011, the YRITWC initiated a project to reassert authority over water quality. The Watershed Council sought continued protections for water quality and determined that the next step was to “assert and implement indigenous water rights” (Proposed framework for an Inter-Tribal Yukon River watershed plan emphasizing water quality standards, Yukon River Intertribal Watershed Council 2012). YRITWC staff explained the leadership’s motivation in initiating a governance strategy at the 2011 biennial summit:

As we create water quality standards and define what we expect clean water to be, we will then be able to apply that on the river. We are making our own decisions about our own lives rather than allowing someone else that control. This governance project is a way of regaining the ground lost in ANCSA. It is a way of describing to the government that this water is part of us, it is our connection to this place on the planet. If you can’t make the decisions for yourself and apply them, you are not sovereign and not self-determining. The governance project puts us in the decision making seat (YRITWC KI-1).

Wilson conceives of the notion of water sovereignty as the “right and ability of individuals and groups to define their own relationship to water in a manner consistent with the socio-cultural and ecological systems they inhabit” (Wilson 2012, 110). Asserting indigenous water rights is one path toward water sovereignty.

In order to initiate a water rights strategy, the leadership of the YRITWC adopted a resolution calling for the development of a “strategy to assert and implement indigenous water rights” (YRITWC Water Rights Resolution 2011). As part of this resolution, YRITWC staff was directed to draft a plan to establish water quality standards that could apply to the entire watershed. This plan was to be based on both indigenous knowledge and scientific data (YRITWC Water Rights Resolution 2011). As the lead staff on the governance strategy explains,

The Inter-Tribal watershed plan will combine the best of modern science and the traditional environmental knowledge of the indigenous governments and people of the Yukon River. The purpose of the plan will be to improve and protect the Yukon River to sustain the coming generations of people, fish, wildlife and plants of the Yukon (YRITWC KI 5)

Over the next two years, the legal team of the YRITWC worked closely with the YRITWC Executive Council, the communities, and the YRITWC Science Department to create a water quality plan. The staff reviewed developing versions of the water quality plan with the Executive Council in October 2012 and February 2013. The Executive Council received the final draft in April 2013. In May 2013, the staff circulated the draft plan to the member governments and communities throughout the watershed. YRITWC staff traveled to some of the member communities and held weekly community teleconferences in June and July 2013 to explain what was in the plan and why, answer questions, and receive comments and feedback. Based on that feedback, a final draft was prepared for submission to the delegates at the 2013 Summit for their approval. According to the staff leading the development of the water governance strategy, the goal of the water quality plan was to “improve water quality throughout the watershed and assert the inherent rights of the Indigenous governments along the river to participate meaningfully in decisions that affect the river’s water quality” (YRITWC KI 5). The

draft plan suggested a set of water quality standards to reduce toxic contaminants in the river's water to levels that reflect the fact that the people of the Yukon not only drink the water of the watershed but also consume significant amounts of fish from the river (YRITWC KI 5). The development of a water quality plan was to be the first step in asserting an increased role for the tribes in water quality (YRITWC KI 5).

By setting water quality standards, and by being the primary collectors of the data required to both set and monitor those standards, the YRITWC was in a position to use their scientific data to leverage a role for itself into the watershed's water governance regime. Staff of the YRITWC explained that although the YRITWC did not set out to collect "scientific" data, the benefit of doing so quickly became clear (YRITWC KI-1). Collecting water quality data and developing the ability to express this in scientific terms became a way for indigenous people to express their needs to western scientists and land managers. This staff member explained,

'I love the land' doesn't cut it in the western world. If you walk into a [federal agency] office and say, 'I love the land,' you will quickly get dismissed. Science is a key to this because it gives a way for people who are non-Native to understand. A number they can read. [Scientific] 'standards' to [non-Natives] means 'I love the land and I want clean water' to us. When we use scientific standards, we can describe what we mean [I love the land] by what we want [clean water that is measurable] (YRITWC KI 1).

The idea that by using science, the YRITWC could assert their vision for the river, became the foundation for both the development of a watershed wide water quality plan, and also the water governance strategy.

6.3. 2013 SUMMIT: GOVERNANCE THROUGH INNOVATION

The development of a water quality standards plan was the first step in the overall water rights strategy. The second step was to create a legal roadmap to guide the YRITWC member communities in asserting a legal right to govern water quality, based on their inherent tribal sovereignty. A YRITWC staff member described the motivation that tribes had to engage in

managing water quality standards as the awareness that non-indigenous governments were making decisions about the use and quality of the waters within the YRW, and that the tribes were not part of this decision making process (YRITWC KI 5). Similarly, working with the tribes, the legal team developed a goal for the governance strategy to reverse this trend and to involve tribes as governments in water quality management (YRITWC KI 5).

The lack of territorial authority presents the most formidable obstacle to tribal water quality governance. As described above, had the Alaska tribes retained territoriality, they could have applied for the right to govern water quality through the U.S. EPA's Treatment as State program. However, the lack of land rights was not fatal to tribal involvement, and in fact the question is not whether the right to govern water quality exists, but how to actualize that right and thus help YRITWC communities realize their vision of being able to drink water directly from the Yukon (YRITWC KI 5). In the absence of a clear statutory path forward, a YRITWC staff member identified the challenge facing tribes: "[to] leverage the water rights and existing institutions and relationships into a co-governance arrangement with the other governments in the basin, in which the Tribes and First Nations have a meaningful role in decisions that affect the health of the river and their ways of life" (YRITWC KI 5).

To answer this challenge, the legal team of which I was part created a framework to support shared governance between sovereigns. As a first step, the strategy recognized three primary obstacles to tribal governance of waters within the Yukon River basin. First, by severing tribal authority over lands, ANCSA prevents the application of the well-developed legal doctrine of Indian water rights that is available to tribes in the continental U.S. that would have otherwise allowed Alaska tribes to use that doctrine as a basis of governance. Second, the U.S. Supreme Court's finding in *Venette* that there is no "Indian Country" in Alaska creates additional

legal impediments to tribal governance over water resources. Third, the State of Alaska has consistently fought tribal exercises of sovereignty in other arenas such as domestic relations, boding poorly for their view on ceding any ground on tribal rights to manage lands and waters.

To overcome these impediments, the legal team determined it is necessary to string disparate threads together to build a case for shared governance that relied first on partnering with the federal government and hoping that the State of Alaska would eventually get on board. The first strand of the analysis relies on the fact that Alaska courts and federal officials continue to recognize Alaska tribes as sovereign governments with regard to their own members. This is important to the ability of tribes to position themselves as sovereign rights-holders in a governance regime, potentially giving them a seat at the decision-making table. This represents a fundamental shift in conventional environmental management in Alaska where tribal members are engaged as stakeholders and brought as public members during the public process.

The second strand relies on the doctrine of federal reserved water rights – whereby public lands reserved by the U.S. federal government for specific purposes, such as conservation units set aside within the Watershed under ANILCA – means that water resources must be managed in a way necessary to fulfill those same purposes. ANILCA designates a large portion of the lands (and therefore, under the reserved water rights doctrine, waters on those lands) as conservation units to be managed in ways that protect subsistence activities, water quality, and fish and wildlife habitat. This means that water resources within conservation units in the YRW must be managed in a way to support traditional subsistence uses in the Yukon, and protect river flow and quality essential to those uses.

The third strand relied on the fact that the YRITWC was the agency in charge of collecting water quality data along the river. This gave YRITWC the unique status as the

organization with the most scientific information on the state of the Yukon River. The final piece was the statutory framework that could facilitate a cooperative management framework. As described in Chapter 5, Section 809 of ANILCA specifically provides for the Secretary of the Interior to enter into cooperative agreements “or otherwise cooperate with other federal agencies, the State, Native corporations, other appropriate persons and organizations and . . . other nations to effectuate the purposes and policies of this title” (Smith et al. 2001, 33). Although this section does not specify tribes as governments, when combined with the common law principle of federal trust authority that mandates that the federal government engages with tribes as governments, tribes have a strong claim to make in calling for a government-to-government relationship when managing water rights.

Woven together, these steps could be the foundation for a framework for governance that envisioned sharing power amongst tribes, the federal and state agencies. As a YRITWC staff member described the legal team’s approach, a water rights strategy includes both a legal argument and a scientific data based component:

Federal agencies are managing significant stretches of the Yukon River under *federal* reserved water rights for purposes that include conservation and protection of subsistence rights. The Alaska Tribes of the Yukon should rightly seek significant participation as federally recognized governments in the decisions on how to manage these lands and, especially, reserved water rights for these purposes. The ultimate aim is to achieve a government-to-government relationship with FWS and Interior in shared decision-making or cooperative management of these reserved water rights to protect the water quality of the Yukon River under ANILCA (YRITWC KI 5).

As a result of the Ninth Circuit’s decision in *Katie John v. United States*, the federal government has management authority over much of the land in the watershed. *Katie John v. U.S. (Katie John I)*, 247 F.3d 1032 (9th Cir. 2001). In *Katie John I* several Alaska Natives and the Village Council of Mentasta sued the U.S. in 1994 claiming that the U.S. Fish and Wildlife

Service was not managing navigable waters as public lands and therefore not conforming to the subsistence protections afforded to public lands under ANILCA.

After *Katie John*, the Secretary of the Interior retained the authority to manage navigable waters within federal conservation units in accordance with the legal doctrine of “federal reserved water rights.” *Katie John v. United States (Katie John II)*, 720 F.3d 2014, 1221 (9th Cir. 2013). This doctrine means that “reserved waters” are to be managed for the same purposes as the adjacent lands: (1) to promote a rural subsistence priority; (2) to protect fish and wildlife; (3) to protect and improve the river’s water quality (for functioning habitat for fish and wildlife); and (4) to honor and implement international agreements (such as the Pacific Salmon Treaty commitments within the Yukon River) (*Katie John*, 720 F.3d at 1229–30 (discussing the federal reserved water rights doctrine which allows the United States to reserve waters appurtenant to federally reserved lands to fulfill the purposes of that reservation, which may include the protection of fish and wildlife)). Although this gave the United States Fish and Wildlife Service management authority over river stretches within and adjacent to federal lands within the Yukon River Basin, the court avoided the question of whether allotment lands could support any claims to water governance (*Katie John*, 720 F.3d at 1243 (“we need not decide whether Alaska Native allotments can give rise to federal reserved water rights”).

Most of the lands within the Watershed are to be managed by the U.S. government who has a trust responsibility to engage in government-to-government relations with tribes, even in the absence of a land base. The door is open for constructing co-management regimes, especially against the backdrop of Section 809 of ANILCA that authorizes the Secretary of the Interior to do just that.

The fact that the tribes and Council are in possession of the majority of scientific data about water quality within the Yukon watershed puts the tribes in a unique position (YRITWC KI 1). Tribes possess the science, and thus should have a seat at the table. The approach taken by the Council is unique in that it forges a pathway to self and shared governance through knowledge and science instead of relying on a specific statutory right to governance (Biennial Summit notes 2013). It is also seen as a way of reconnecting with lost tribal traditions of self-governance and wellbeing.

Things are in a circle, connected. You cannot separate clean air and water from healthy communities. You can't separate healthy communities from healthy families, and you can't separate education from why we care about the birds and animals. That's why all of the efforts are not just to do something for the river, but to do something for our community, ourselves, our children.

In Alaska you ended up with a redefinition of what traditional governance was and you eliminate the land as a piece of that governance discussion. You took away a piece of the heart of what makes indigenous people who they are how they managed themselves how they lived and survived as subsistence people. So the governance "dis-balance" occurred in a very artificial way. The native people have never given up their relationship with their environment, to their lands so it is still central to their governments. [The water quality plan] is a piece of what is going to be recaptured as the governance of Native people moving forward. They never gave [water rights] up, never lost it. They just need to reclaim it as a piece of how they govern themselves and how they manage the resources which is so fundamental to their long term success (YRITWC KI 4).

The tribes, through the Council, have developed an innovative approach to compensate for these obstacles by building institutions and knowledge to support their capacity to become critical governance partners. This innovation is critical; even if the tribes living along the Yukon were able to put land back into trust status as a result of the *Akiachak* decision. Because of the non-contiguous land ownership patterns within the Yukon watershed, and the resulting overlapping complicated layers of federal, state and tribal governance, no single land-owner or sovereign can function in ignorance of the others.

Given all of the limitations faced by the tribes living along the Yukon, the most appropriate strategy as suggested by the legal team and adopted by the Summit participants is to advocate for the creation of a model of shared governance over water quality. The co-management approach taken by the YRITWC can be an appropriate institutional response to resource management challenges (Berkes 2009, 1692-1792; Cash, D, Adger, W.N., Berkes, F., Garden, P., Lebel, L., Olsson, P. Pritchard, L. Young, O. 2006, 8). Co-management empowers local decision-making (or governance) capacity, and fills voids left by public agencies that may not have the knowledge base to adequately manage a resource or region (Berkes 2009, 1692-1792). This is precisely the situation facing the communities within the Yukon River watershed. As “owners” of the scientific and traditional water quality data within the basin, Yukon tribes are situated to assume a governance role and share decision making authority with the federal and state agencies managing resources within the watershed. Implementing a framework for shared governance creates an efficient partnership whereby tribal knowledge and scientific data becomes the basis for sharing management authority within the watershed.

The success of this approach, however, depends in large part on the willingness of the state and federal governments to grant them access to the decision-making processes regarding water quality. This dependence on outside interests to recognize the inherent authority of tribes to regulate water quality is unique to Alaska tribes, because the very real fact remains that if the tribes living along the Yukon River had the right to govern the lands upon which they live, their ability to govern the water quality would have been a far simpler and more straightforward process. In addition, the lack of an Alaska Native preference precludes the participation of tribal governments in the subsistence regulatory process. The failure of Alaska to engage with tribes as sovereigns cripples the abilities of these governments to act to protect water quality. It is early

in this process, and too soon to know how successful this effort will be, but clearly the Tribes have assumed the responsibility of carving a role for themselves in water governance.

Alaska tribes living along the Yukon River do not have the specific statutory authority to co-manage the resources within the watershed. They lack opportunity to seek Treatment as State status to secure the rights to govern water quality. Nor do these tribes have the statutory opportunity under ANILCA to participate as tribal governments in management of the river's subsistence resources. Even if they were able to put traditional lands back into federal trust status, those lands would not include the entire watershed. Protecting subsistence opportunities requires cooperation with adjacent land managers at both a state and federal level (Gallagher 1988, 91). This type of cooperation is YRITWC's goal, as they sought to create a shared governance regime that would ensure the best water quality standards be applied throughout the Yukon River watershed.

The strategy behind the YRITWC's efforts to gain a foothold into the watershed's water quality management was rooted in the fact that the communities are the primary "owners" of water quality data. Thus, the YRITWC and its member tribes found themselves in a unique position to seek a seat at the management table. These efforts build on the actions of the YRITWC and its member communities to ensure good water quality by first taking the steps necessary to understand the state of the river and second by cleaning it up. By 2013, sixteen years after the YRITWC was created, over forty of the 55 Alaska member tribes operated at least one environmental program funded by the United States Environmental Protection Agency: solid waste disposal, backhaul (hauling waste out of the community), and water quality monitoring programs. There is an asymmetry here: the Yukon tribes are the sole collector of water quality data, but lack the authority to either enact or enforce water quality standards.

There is also a discrepancy: tribes in the Lower 48 states have the ability to acquire that authority.

The previous chapter describes the governance strategy adopted by the YRITWC to create a framework for member tribes within Alaska to “recover their own distinctive cultures and institutions of self-government as a basis for their development and place in the world” (Anaya 2012, para 25). By engaging in water quality management, the tribes sought to overcome the obstacles to self-governance created under ANCSA. Although the YRITWC is limiting itself to water quality issues, the exercise of self-governance has broader implications. As the Special Rapporteur on the Rights of Indigenous Peoples noted in a 2012 visit to Alaska, the loss of land is directly tied to the loss of economic and cultural foundations for tribal communities “given the centrality of land to cultural and related social patterns” (Anaya 2012, para 39). Moreover, the Rapporteur found that the specific economic and social transformations brought about by ANCSA have “bred or exacerbated social ills among indigenous communities, manifesting themselves, for example, in high rates of suicide, alcoholism and violence” (Anaya 2012, para 62).

The two-pronged approach to water rights – creating a scientific water quality plan based on western and traditional science, and a legal strategy to forge a path forward into water quality governance – was endorsed at the 2013 YRITWC Summit in Mayo, Canada in early August of 2013. During the Summit, many of the participants spoke of the need to take care of the water (Biennial Summit notes 2013). Participants generally spoke of the need to do so through passing tribal ordinances and through endorsing the water quality plan that was presented at the Summit (Biennial Summit notes 2013). An expert consultant attending the Summit noted that building tribal capacity depends on “gathering data, including traditional knowledge,” and that “collecting

knowledge and making sure it flows into the future is part of the tribes' inherent responsibility to the land and communities" (Biennial Summit notes 2013). Likewise, all of the participants agreed that the communities along the watershed needed to unify around the issues of clean water and self-governance, and that collectively they would have more power (Biennial Summit notes 2013).

CHAPTER 7: EXPANDING GOVERNANCE: ENHANCING TERRITORIAL AND NON-TERRITORIAL AUTHORITY TO INCREASE TRIBAL GOVERNANCE.

Chapter 6 presented a case study of how a consortium of communities and governments in Alaska are attempting to create systems that “hold people up” instead of holding them back. It outlined with work of the YRITWC to address two of the types of losses associated with the lack of tribal territoriality. The YRITWC water quality management strategy, if successful, builds community capacity to address the transformations brought about under ANCSA by strengthening local governance and so overcomes some of the consequences of the lack of tribal territoriality through non-territorial means.

The YRITWC is not alone in the effort to overcome the impacts of the loss of territoriality. There is a “bustling movement around the state [in which] tribes are being more assertive in strengthening their relationship with the federal government” (Expert KI 2). The push to self-government reflects a growing awareness that if tribes are to ensure the best fates and futures for their communities, they need the governance tools necessary to achieve those goals.

[People] want to be able to be where they are from. Self-government is part of that. It allows people to figure out options to make things happen . . . when people are engaged in something more meaningful, more impactful and positive for the community, it gives them a more positive outlook on life and makes them want to build a good community. There is a connection to the land and a tribal form of government and the community doesn’t want an external government telling them what to do. It is this sense of self-government that happens when we are involved in our own prevention programs and managing our own resources that reduces social ills and in the long run saves the state money and resources (Expert KI 2).

This chapter describes the ways in which tribes throughout the state (not just those involved with the YRTIWC) are advocating for public policy responses to address the lack of tribal capacity to engage in subsistence management, public safety regulation and climate change planning. Creating “systems that hold our people up instead of holding them back” requires not

only community driven efforts towards self-determination and fate control, but public policies that support these goals (Wark 2014). This chapter focuses on public policy proposals that will seek to increase tribal governance authority in both territorial and non-territorial ways.

The first part of this chapter examines efforts to regain governance authority through increasing territoriality. The chapter describes the effort to align U.S. policy on trust lands (“Indian Country”) in Alaska to conform to how that policy is applied throughout the continental United States. The chapter then describes an attempt to increase non-territorial authority through creating shared governance frameworks in federal legislation. The Ahtna Co-Management Act is a proposal to amend United States law to create a regional co-management structure to better protect subsistence resources in Interior Alaska. If successful, this statute could alter the face of Alaskan wildlife management regimes through a non-territorial approach, but one that reflects tribal participation as sovereign governments (rights holders), not just as stakeholders in the governance process.

7.1. RECREATING TERRITORIALITY IN ALASKA: BUILDING INDIAN COUNTRY THROUGH PLACING LAND INTO TRUST

As stated in Chapter 5, lands transferred to Alaska Native Corporations under ANCSA lost their status as Indian Country. However, other lands within the state remain in Indian Country status. The *Venetie* decision included a footnote where the Court made this allowance:

Other Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a ‘dependent Indian communit[y]’ under our interpretation of [18 U.S.C.] 1151(b), or if it constitutes “allotments” under [18 U.S.C.] 1151(c).

This footnote leaves open the possibility that some lands within Alaska could be the basis for tribes to assert territorial authority, even if “the scope of territorial jurisdiction is . . . limited to allotments and restricted town site lots” (Case 2005 at 154). Although the amount of Indian

Country in Alaska is unknown, some estimate that millions of acres could currently exist in this status (Landreth and Dougherty 2012; Attorney General's Advisory Committee 2014, 138). Despite this legal fact, at present, no tribes are relying on allotment or trust lands to assert geographic jurisdiction for purposes of self-governance. One speculative reason for this is because the amount of land involved is limited. Allotments and townsites were granted as relatively small tracts of land, in the 10s and sometimes 100s of acres. While cumulatively, the number of allotments and townsites may reach into the millions of acres, each individual parcel is too small. Likewise, generally, individual Alaska Natives, not tribal governments, hold title to these allotments and townsites.

However, a recent federal court decision opens the possibility for creating more Indian Country in Alaska, and may open the door to such lands being governed by tribes (*Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195, 197 (D.D.C. 2013)). Until 2014, Alaskan tribes were subject to an exception in federal regulations that allow lands to be taken back into trust status by the Department of Interior, which then opens the door to these lands being reclassified as “Indian Country” capable of sustaining tribal territorial authority.

The history behind this regulation dates back to the 1800s when the United States government pursued policies designed to assimilate Native Americans into non-Native culture. One of these policies aimed to dismantle Indian reservations piece by piece. The General Allotment Act (24 Stat. 388 (1887)), otherwise known as the Dawes Severalty Act, allowed parcels of land within the borders of Indian reservations, transforming commonly held land into to private parcels to be owned by individual Indians for agricultural and grazing purposes. Although protected from sale and local taxation for a short period of time, much of the land allotted under this Act was quickly lost to these individuals who were not able to pay taxes on

their lands. Reservations were carved up and the tribal land base was fractionated, making tribal self-governance difficult if not impossible (Pommersheim 2013, 522, 525). The amount of reservation land held in trust for indigenous tribes fell from 138 million acres in 1887 to 52 million acres in 1934 (Pommersheim 2013, 522).

In 1934, U.S. Indian policy turned away from efforts to assimilate Indians into non-Native society, and instead began an era of self-determination that recognized and respected the unique sovereign status of tribes. Policies of assimilation were replaced with policies of self-determination and federal law began the slow shift of building tribal capacity to support self-governance. One example includes the Indian Reorganization Act of 1934 (IRA), which included a provision (section 5) authorizing the Secretary of the Interior to take privately held lands taken back into trust status upon petition by a tribal member or tribal government. In 1936, this provision was extended to the Territory of Alaska (79 Fed. Reg. 24649 (May 1, 2014)). Section 5 has never been legislatively amended to exclude Alaska, even by the Alaska Native Claims Settlement Act (79 Fed. Reg. 24650).

After ANCSA's passage, the Native Village of Venetie's tribal government requested that lands conveyed to its village corporation be transferred back into trust status pursuant to IRA Section 5. In response, an Associate Solicitor for Indian Affairs denied the request, finding that ANCSA intended to "permanently remove all Native lands in Alaska from trust status" (as cited in 79 Fed. Reg. 24650). Two years later, this position was codified into federal regulation, and tribes in Alaska lost the ability to petition the federal government to take lands into trust status. 45 FR 62034 (Sept. 18, 1980).

That position became the subject of litigation in 2007 when four Alaskan tribes sued to challenge what became known as the "Alaska Exception" *Akiachak Native Community v.*

Salazar, 935 F. Supp. 2d 195, 197 (D.D.C. 2013). Six years later, the Federal District Court ruled in favor of the tribes, finding that Congress did not explicitly prevent Alaskan tribes from petitioning to have lands put into trust and thus, the Alaska Exception violated the rights of Alaska tribes to enjoy the privileges and immunities “available to all other federally recognized tribes by virtue of their status as Indian tribes.” (935 F.Supp 2d at 210-211).

Currently, the State of Alaska is appealing the *Akiachak* decision arguing that ANCSA eliminated Indian Country and that “trust land and Indian country could confuse Alaskans and nonresidents who could be subject to a patchwork quilt of legal and regulatory authorities, depending on where they are and whether they are a tribal member or nonmember” (Demer 2015). Despite the on-going appeal, the U.S. Department of Interior issued final regulations to eliminate the Alaska exception and open the door to petitions to place lands back into trust 79 FR 24648 (May 1, 2014). The U.S. Department of Interior justifies its efforts as consistent with the policy of “honoring of principles of tribal self-reliance and self-governance” (79 FR 24651). Likewise, the federal register notice specifically identifies the need to promote self-determination by expanding the land base available to tribal governance. The U.S. Department of Interior’s comments in the proposed regulation evidence their belief that increasing trust lands in Alaska would provide this additional source of authority for tribes. *Id.*

In a legal review of the proposed change to land into trust regulations, the Alaska Federation of Natives determined that this regulation could result in an increase in Indian Country, and therefore an expansion of tribal jurisdiction.

If the decision in the *Akiachak* case is affirmed on appeal, Tribes in Alaska will be able to request that the Secretary take land into trust, and if granted, tribes’ ability to regulate alcohol, respond to domestic violence, and generally protect the health, safety, and welfare of tribal members will be enhanced.

Trust status offers a number of benefits that are not available through other avenues. Tribes and tribal member activities on trust lands are generally beyond the reach of all state and local taxes. The lands, whether developed, leased (with the consent of the Secretary of Interior) or not developed or leased, would be entitled to all the protections of the ANCSA land bank, plus more, including protection from exercise of eminent domain, special review under environmental laws, and additional agency support. A trust land base is also often a significant factor in determining the amount of federal program funds are allocated to a tribe (AFN White Paper on *Akiachak*).

As a matter of policy, two federal reports are calling for increased Indian Country in Alaska to expand governance authority for tribal communities and their efforts to combat community violence. The 2013 Indian Law and Order Commission Report identified particular recommendations to combat violence in Indian Country. Three out of five of the recommendations involved expanding the territorial land base available to tribes for self-governance:

- Amend ANCSA to provide for lands transferred under that Act to be included as Indian Country under federal law.
- Clarify and affirm that Native allotments and townsites are Indian country.
- Amend ANCSA to allow regional corporations to transfer lands to tribal governments and provide that those lands can be put back into trust status, reinvigorating their status as trust lands and therefore capable of sustaining tribal governance (Indian Law and Order Commission 2013).

One year after the ILOC issued its report, the U.S. Attorney General called for dramatic changes in the way communities deal with violence against American Indian and Alaska Native children. Specifically, the Attorney General called for amending the federal definition of Indian Country to “clarify (or affirm) that Native allotments and townsites are Indian Country (Attorney General's Advisory Committee 2014, 138). This report states,

There is an archipelago of land—individual Indian allotments and commonly held lands within Alaska Native town sites—that ANCSA did not affect. These are geographies over which the federal government retains a trust responsibility, and they should be fully recognized as Indian country. These parcels are significant—conservative estimates place their total area somewhere between four and six million acres. If a land base is what is

needed to exercise criminal jurisdiction (and other kinds of land-based jurisdiction), the change would clarify that at least some Alaska Tribes do have a land base. Furthermore, these lands are a foothold from which Indian country in Alaska can be expanded (Attorney General's Advisory Committee 2014, 138).

The federal government has made clear its position that territorial authority is vital to the ability of tribes to govern the wellbeing of their people. The combined reports by the U.S. Indian Law and Order Commission and the U.S. Attorney General, and the efforts by the U.S. Department of Interior to increase Indian Country, all recognize that territoriality is necessary for self-determination. However, even with this renewed enthusiasm for expanding geographic tribal jurisdiction in Alaska, tribal territorial sovereignty will never mirror that of Indian Reservations in the continental United States. Lands in Alaska are “carved up into a complex mosaic of federal, state and native ownerships [that] . . . created a land ownership pattern that has been called ‘irrational’ and a ‘patchwork quilt’” (Gallagher 1988, 92). The complexity of natural resource management and the competing and often overlapping jurisdictions means that effective governance in a regional setting requires cooperation and agreements between all three layers of sovereigns – tribes, state and federal governments. It is with this awareness that I describe the next effort to increase tribal authority over fish and game management.

7.2. RELYING ON NON-TERRITORIALITY: LEGISLATION TO CREATE SUBSISTENCE CO-MANAGEMENT REGIMES

The failure of the federal and state subsistence management systems to protect Alaska Native hunting and gathering traditions led to a movement within the Alaska Native community to integrate tribes as partners in subsistence management. In a white paper prepared by the Alaska Federation of Natives (AFN) for the 2012 presidential and congressional transitions, AFN stated that “the legal framework governing subsistence in Alaska significantly hampers the ability of Alaska Natives to access their traditional foods” (AFN White Paper). Blaming both the

federal and state governments for failing to protect subsistence for Alaska Natives, AFN is currently pushing for new legislation to ensure a “Native” or “tribal” subsistence preference throughout Alaska (White Paper at 4-5).

The Alaska Native Subsistence Co-Management Demonstration Act of 2014, also known as the Ahtna Co-Management Demonstration Act, proposed a new co-management structure for the Ahtna region in Interior Alaska (Ahnta Co-Management Demonstration Act). This proposal would amend ANILCA to provide for co-management on traditional lands within this specific region, integrating tribal governance and doing away with the dual system of management currently in place Alaska (Ahnta Co-Management Demonstration Act). This bill would “remedy this injustice” according to the President of the Tanana Chiefs Conference (Isaacs Testimony, Ahnta Co-Management Demonstration Act). Citing the failure of the State of Alaska and the federal government to protect subsistence resources, Dr. Rosita Worl urged Congress to adopt approaches more similar to the successful approaches adopted through the MMPA that authorizes co-management of subsistence resources in order to “ensur[e] the conservation of wildlife populations, and to ensure that Ahtna tribal members . . . continue their tribal hunting way of life” (Ahnta Co-Management Demonstration Act).

Shortly after the bill was introduced in the United States House of Representatives, the State of Alaska, through the Commissioner of Fish and Game, made it clear that the state did not support this effort. In a letter to Representative Don Young – the legislation’s sponsor – Commissioner Cora Campbell wrote “[t]he Alaska Constitution is unambiguous in reserving to the people for common use fish, wildlife and waters, while at the same time mandating a sustained yield of those same resources” (Medred 2014). However, the State’s position fails to acknowledge that tribes can be viable, valuable partners in fish and game management.

7.3. ENHANCING “LOCAL SELF-GOVERNMENT” AT THE STATEWIDE LEVEL

At a statewide level, integrating tribes into governance frameworks is complicated given that state law does not recognize tribes as forms of local governments, even as the state’s constitution emphasizes the importance of local control (see section 5.4.2, *supra*). As described in section 5.3.2., there are many efforts to create co-management regimes for different resources (mostly marine mammals) and on a regional basis throughout Alaska and the circumpolar north. In addition to the YRITWC case study focused on in this research, the Ahtna co-management bill described above is a good example of an effort to construct an institutional co-management regime for subsistence resources within a region of Alaska.

True co-management requires constructing power-sharing arrangements between all relevant sovereigns; the federal, state and local tribes must become partners in sharing power (Berkes 2009, 1692-1792; Cash et al. 2006, 8). This approach finds a receptive audience with federal agencies who have a common law and statutory responsibility to recognize tribal governments as governments as the basis of any co-management partnership. The approach has received a less than receptive audience at a state wide level, where there is no commensurate legal obligation to work with tribes. Instead, because of the lack of a statutory requirement to treat tribes as governments, the relationship between the state and tribes is dependent on the political personalities at play. As a result, these relationships are highly unstable and change depending on the changes in state leadership.

For example, in 1998, former Governor Tony Knowles recognized that rural Alaska faced immense challenges due to the lack of effective governance in rural communities. Governor Knowles convened a statewide commission to study the issue, which issued its final report in 1999. That report contained a series of recommendations ranging from state recognition of

tribes, to strengthening local self-governance, to protecting and resolving conflicts over subsistence management, to cooperating with tribes seeking to put land into trust status (Commission on Rural Governance and Empowerment 1999).

Directly following the Commission's report, Governor Knowles' administration issued an Executive Order, called the Millennium Agreement, that formally recognized Alaska tribes, and their right of self-governance and self-determination (State of Alaska 2001). The Millennium Agreement likewise proposed creating a permanent state-tribal forum to institutionalize communication and cooperation between tribes and the state government (State of Alaska 2001). Two years after the Agreement was issued, a new governor (Frank Murkowski) was elected and the Agreement was effectively tabled with none of the recommendations or action items having been implemented. That governor was followed by two more administrations, both of which failed to take any action to implement terms of the Millennium Agreement.

Frustrated with the lack of progress on rural and tribal governance, in 2013, a group of Alaskans gathered in Anchorage, Alaska for a two-day meeting to revisit the 1999 Rural Governance Commission's (RGC) report. Participants agreed that the issues raised in 1999 report remained as vital, and as unanswered now as they were then. The group that gathered in December of 2013 included eleven of the original commissioners and 40 individuals from around the state. All present agreed that the original 1999 RGC Report to the Governor could have been drafted either fifty years ago, five years ago, or five weeks ago. The group called for taking strategic action to dismantle the unequal treatment of rural governments. As a first and fundamental step, the State of Alaska should clearly and officially recognize tribes as local governments, and partner with tribal governments to create local laws and policies that address the range of issues associated with community violence. Likewise, instead of suing tribes to

curtail their authority, the reconvened group called for the State to support the efforts of local communities to protect public safety through developing and implementing tribal codes and ordinances, and by according full faith and credit to tribal court enforcement of these local laws (Demer 2014). The group called for the state to share governance authority with local tribal governments (Demer 2014).

The reconvened Rural Governance Commission found that it is fatally flawed public policy to cut off “local control of lands that had been stewarded by Alaska Natives for thousands of years” (Demer 2014). The notion of sharing governance is particularly appropriate in the Arctic regions. The Arctic Governance project has called the Arctic a “governance barometer” and a region in which there is a growing need for innovation in governance, and the Arctic is a region that has “consistently push[ed] the edges of governance innovation” (Poelzer and Wilson 2014). Top among the requirements of this innovation is to foster trust among the key actors (Fondahl and Irlbacher-Fox 2009, 7). One way to foster this trust is to end the litigation between the State of Alaska and tribes over jurisdictional control (Demer 2014).

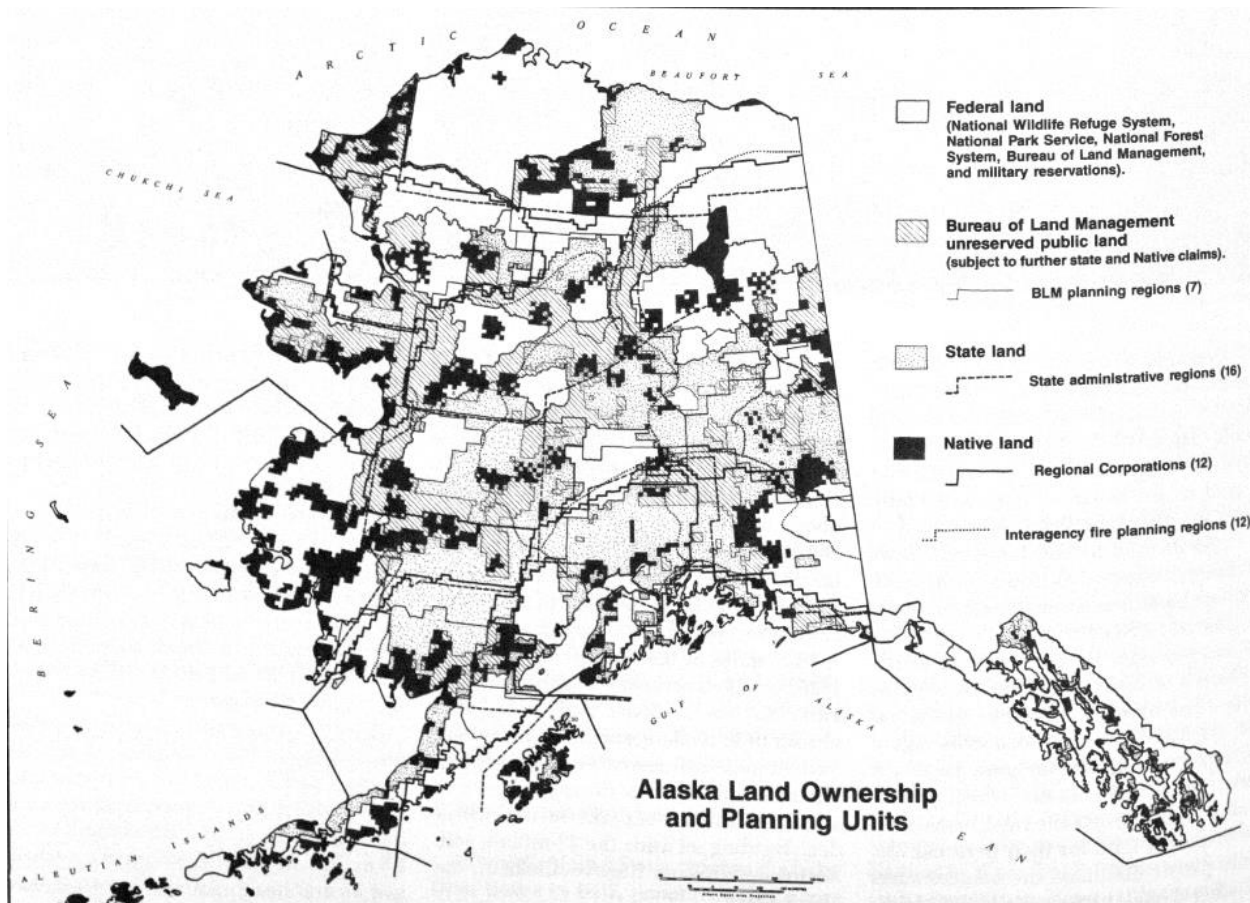
7.4. RESTRUCTURING TERRITORIALITY: LAND AND NON-TERRITORIAL APPROACHES TO RE-INVIGORATING TRIBAL GOVERNANCE AUTHORITY

This chapter describes the efforts of tribal governments, organizations and allies to reinstate tribal governance authority through improving both territorial and non-territorial authority. Tribes are seeking the right to increase the land base over which land based authority can be asserted through opening up the process of putting land back into trust status for Alaska tribes. The State of Alaska is continuing to object to this effort, but even if tribes were successful, securing territorial authority may not be sufficient in and of itself to meaningfully expand tribal governance authority for at least two reasons.

First, the ability to petition the U.S. government to put lands back into trust status does not guarantee any particular outcome in terms of whether and how much land might ultimately become trust lands. The process for petitioning to put land into trust remains uncertain (Strommer, Osborne, and Jacobson 2015, 522). In addition, the State of Alaska would share jurisdiction with tribes over lands that would be put into trust status and thus, even if tribes prevail in this litigation, the final result may not be exclusive tribal authority over these new trust lands (Strommer, Osborne, and Jacobson 2015, 521).

Second, even if lands were placed back into trust status there would not be a sufficient amount of land to wholly and exclusively sustain the needs of a tribal community. As figure 7.1 demonstrates, lands in Alaska are parceled out in a “highly complex” pattern of landownership (Gallagher and Epps 1988, 371) that results in something of a checkerboard. Throughout the state, the federal and state governments, and village and regional corporations own many small segments of adjoining parcels (Gallagher and Epps 1988, 371).

FIGURE 7.1: ALASKA LAND OWNERSHIP UNITS



(Gallagher and Epps 1988, 370).

This style of land settlement necessitates cooperation between landowners because there is an insufficient land-base over which a single sovereign can exercise exclusive management jurisdiction. Adaptive co-management regimes are capable of responding to this jurisdictional obstacle because these regimes offer a way to structure formal cooperative relationships between adjoining land-holding sovereigns (Fikret 2009; Adger, Brown, and Tompkins 2006; Adger 2001; Cash, D, Adger, W.N., Berkes, F., Garden, P., Lebel, L., Olsson, P. Pritchard, L. Young, O. 2006). This creates a structural approach to sharing governance for the benefit of a commonly held goal, such as preserving subsistence resources or managing water quality in

watersheds that cross jurisdictional boundaries, such as the Yukon River (Brabets, Wang, and Meade 2000; Dube et al. 2012; Lomax et al. 2012). It is a strategy that is consistent with governance goals in the Arctic (Poelzer and Wilson 2014; Fondahl and Irlbacher-Fox 2009). Finally, the integration of local governance is consistent with principles of governance embodied in the Alaska State Constitution (Hickel 2002).

CHAPTER 8: DEPLOYING FATE CONTROL AND HUMAN RIGHTS AS POLICY GOALS.

Multi-layered governance that facilitates relationships vertically across local, regional, national and international borders is becoming an aspirational trend in Arctic governance (Poelzer and Wilson 2014, 186). Adaptive co-management structures, such as those created by the Marine Mammal Protection Act of 1971 (see chapter 5) and those proposed by the Ahtna Co-Management Bill (see chapter 7) are increasingly recognized as a way to construct multi-level systems of governance that devolve power to “bodies closest to the problem” (local communities) (Fondahl and Irlbacher-Fox 2009, 12). This trend has not been without its challenges,

Although the devolution of authority brings great benefits to Northern regions and peoples, especially given the long history of colonization and control by southern-based governments, the transfer of authority also brings many challenges. Both the human and financial capacity of Northern governments is stretched as they attempt to take on the many new roles demanded by devolution. Building capacity in Northern regions is an on-going priority, both now and in the future (Poelzer and Wilson 2014, 219).

Expanding governance capacity is a critical adjunct to the efforts to increase tribal authority over lands and resources as described in Chapter 7. Assessing the capacity of tribes to self-govern requires determining “the capacity of the government to . . . formulate and implement policies, and the respect of the citizens and the state for the institutions that govern” (Kaufman & Kraay, 1999). This chapter suggests that determining tribal governance capacity requires two foundational steps. First, national and subnational governments should adopt a human rights based approach to institute structural changes that integrate tribal governments as partners in decision making processes as rights holders, not stake holders. Second, human development frameworks are highly relevant policy frameworks within which to structure relationships between indigenous and settler governments because fate control is recognized as a cornerstone measure and goal of tribal governance capacity.

This chapter concludes this research with a single, salient lesson: governance matters. In an increasingly complicated world composed of a variety of governance institutions, it is not enough that indigenous communities have secure title to the lands they occupy. The authority and capacity to govern, to generate revenues through taxation, and to regulate activities within local communities is critical to the ability of communities to navigate the changes posed by an increasingly varied and unpredictable environment and economic conditions. Land governance, not just land ownership, is a key attribute that should be considered when creating property rights regimes.

8.1. TERRITORIALITY AND HUMAN RIGHTS: RIGHTS-HOLDERS, NOT STAKEHOLDERS

This section describes how the loss of territoriality impedes the capacity of Alaska tribes to assert their collective human right to self-determination and fails to recognize tribal rights to self-governance. The Arctic region where this case study exists is governed by “domestic laws and policies of general application, and by international treaties and customary norms . . . includ[ing] human rights covenants (Bankes and Koivurova 2014, 226). Such laws and norms call for the recognition of tribal self-governance, and yet tribes remain unable to meaningfully exercise these rights for the reasons described in preceding chapters. The practical effect of this is that tribes are not regarded as “rights-holders” and therefore lack the mechanism to engage in decision-making processes as governments. Instead, tribal participation is tantamount to that of a stakeholder, where tribal members as individuals participate in decision-making processes alongside the general public. The failure to recognize tribes as rights-holders has negative consequences for the capacity to assert the right to collective self-determination.

“Human rights can be a means of attaining the rights to self-determination, self-government, the maintenance and development of culture, and holding land collectively” (Iyall

Smith 2008, 1821). A variety of international instruments embody these rights. In 2007, the United Nations adopted the U.N. Declaration on the Rights of Indigenous Peoples (United Nations 2007). Initially, the United States voted against adopting the UN DRIP, but has since endorsed it, with “concerns” (Bankes and Koivurova 2014, 236).

This Declaration contains important provisions regarding the governance rights of indigenous communities. Among the many articles that support self-governance and self-determination, Article 3 specifically recognizes self-determination as a right to freely determine political status, and to freely pursue economic, social and cultural development (United Nations 2007). Article 4 describes the right of indigenous peoples to self-government “relating to their internal or local affairs” as a function of the right of self-determination (UN DRIP 2008). Article 5 recognizes the rights of indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while fully participating in those same institutions of the state in which they reside (UN DRIP). Article 18 states that indigenous people have the right to participate in decision making through their own representatives, and the right to maintain and develop their own indigenous decision making institution (United Nations 2007). Article 26 recognizes the importance of governing traditional lands and resources for indigenous communities, and articulates the on-going rights to own, use, develop and control the lands they possess (United Nations 2007). Although this instrument is a declaration and does not have the force of law, several domestic courts have referred to the UN DRIP within proceedings, including courts located throughout the Arctic (Bankes and Koivurova 2014). Similarly, the Declaration is relied on within international debates over international whaling (Bankes and Koivurova 2014).

The International Labor Organization (ILO) Convention No. 169 of 1989 is a binding treaty agreement that establishes the right of indigenous peoples to maintain and develop their societies and calls on other governments to “develop, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples” (ILO 1989, at art. 2(1)). It articulates an obligation on the part of nation-states to adopt special measures to safeguard “their persons, institutions, property, labour, cultures and environment” (ILO 1989, at art. 4(1)).

In 2014, the U.N. General Assembly adopted an “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples” (United Nations 2014). Through this document, the UNGA reaffirmed support for the UN Declaration on the Rights of Indigenous Peoples, and urged states that have not yet ratified the ILO 169 to do so.

The Organization of American States (OAS) is likewise in the process of preparing a legal instrument to protect the human rights of indigenous peoples (Bankes and Koivurova 2014). The OAS and its associated Inter-American Commission on Human Rights (IAHCR) has taken an active role in protecting land and resource rights of indigenous groups in South and Central America (Bankes and Koivurova 2014). Similarly, the Inuit have brought one petition before the IACHR arguing that their human rights were violated as a result of climate change (Bankes and Koivurova 2014). This petition was unsuccessful, but brought Arctic issues into this regional human rights framework for the first time.

Protecting the rights of indigenous Alaskans through this channel will not be easy because the United States is not a party to the Inter American Convention on Human Rights

(AHDR II). Koivurova and Bankes argue that although the United States is not a party to that convention, the IACHR may still impact on U.S. policies

“...it is clear that the decisions of the [Inter-American Court of Human Rights] influence the [Inter-American Commission on Human Rights] in its deliberations and in its interpretation of the cognate provisions of the American Declaration of the Rights and Duties of Man. The United States [is] subject to the jurisdiction of the Commission with respect to the Declaration by virtue of their membership in the OAS” (Bankes and Koivurova 2014).

Therefore, while the U.S. may not be directly subjected to jurisdiction of a future IACHR instrument that protects the human rights of indigenous peoples, if the IACHR does implement such an instrument, this could potentially guide international policy development throughout the Americas.

Human rights norms “of general application” (i.e., not specific to indigenous communities) also provide a basis from which to analyze the rights of Alaska Natives to self-determination. The right of self-determination, or “the right of peoples to freely determine their political status and to pursue their economic, social and cultural development” is guaranteed in a variety of international legal instruments. The International Covenants on Civil and Political Rights (ICCPR) (United Nations 1966) and on Economic, Social and Cultural Rights (ICESCR) (United Nations 1966b) address issues of collective rights that impact on indigenous peoples. The ICESCR includes a provision recognizing that all peoples have a “right to freely pursue their economic, social and cultural development” and the ICCPR acknowledge the rights of minority groups to “enjoy their own culture and use their own language” (Carpenter and Riley 2014, 173). Increasingly, in light of the principles expressed in the UN Declaration of Human Rights, the UN bodies that implement the ICESCR and the ICCPR are specifically addressing indigenous issues, and have adopted a consistent practice of requiring states to address indigenous rights within

their regular reports to the U.N. Human Rights Committee (Bankes and Koivurova 2014). This not only “mainstreams” the significance of the UNDRIP in international human rights law, but also solidifies its significance as a human rights norm (Bankes and Koivurova 2014).

Even as international instruments are increasingly recognizing indigenous rights as human rights, most Arctic states have “not done much to advance [these] rights on the basis of international law standards at home” (AHDR II). The Arctic Governance Project found that Arctic states fail to live up to international good governance standards (Alfredsson 2013, 195). Six of the eight Arctic countries have not ratified the ILO Convention No. 169 that could serve as a legal basis for integrating tribes as rights holders into governance frameworks. The AHDR II identifies the issues of national governments incorporating human rights standards into domestic law, particularly as those rights involve indigenous communities and issues of natural resources governance (Bankes and Koivurova 2014).

In addition, the international community and domestic governments could take an approach to policymaking adopted in the international development arena. In that arena, the United Nations recognizes the value of adopting a “rights-based approach.” In 2003, the UN Development Group adopted the UN Statement of Common Understanding on Human Rights Based Approaches to Development Cooperation and Programming. The “Common Understanding” is founded on three basic principles:

1. All development programs should further the realization of human rights;
2. Human rights standards guide development cooperation and programming; and
3. Development cooperation contributes to the development of the capacities of “duty bearers” to meet their obligations of “rights holders” to claim their rights.

The UN describes a human rights based approach (HRBA) as determining the relationship between individuals and groups with valid claims (rights holders) and state and non-state actors with correlative obligations (duty bearers) (United Nations n.d.). The nature of a

HRBA is to strengthen the capacities of rights holders to make their claims, and duty bearers to meet their obligations. Governments have three levels of obligations: (1) to respect a right; (2) to protect that right; and (3) to fulfill that right (United Nations n.d.).

A rights-based approach transforms the tenor and language of governance from that of “stakeholder” to “sovereign” or rights-holders, and from “clientelism” to “citizenship” (Davis 2009, 181). It likewise allows indigenous tribes to claim their right to govern based on a statutory and constitutional “government-to-government” that is likewise consistent with obligations under international human rights treaties and instruments.

The Alaskan experience, particularly that of the YRITWC, illustrates an imbalance in governance that can be analyzed, understood, and remedied by applying a “rights based” approach to governance, one that acknowledges that tribal governments are sovereigns, not stakeholders. This approach is consistent with international human rights law on the rights of indigenous peoples to self-determination and self-governance. Self-determination is a legal principle and right of every sovereign in the international legal community, including indigenous communities, as they exist within external nation-states (Henriksen 1999).

The lack of enforceable international instruments acknowledging the collective rights of indigenous communities to self-determination and to governing traditional lands makes it even more critical that states affirm these rights on their own accord. Just as a human right to development is increasingly taking hold in development discourse, acknowledging a human right to self-governance over lands and resources as a component of the collective right of self-determination for indigenous communities is one avenue for doing so. In addition, this approach is consistent with the Arctic human development “fate control” goal and measure as described in the next section.

Alaskan tribes, as sovereigns, have a right to self-government and self-determination. The state has a commensurate obligation to respect, protect and fulfill those rights. By integrating tribal governments as full partners in managing the resources upon which they depend, tribal communities will be better situated to exercise fate control and the right to self-determination.

8.2. TERRITORIALITY AND HUMAN DEVELOPMENT

The lack of territoriality creates impediments to human development, particularly to the achievement of “fate control” – an important development goal for the Arctic. This dissertation described the consequences of the lack of territoriality on the capacity of tribal governments to promote wellbeing through public, enforceable policies. This “incapacity” impacts on many aspects of community wellbeing – from public safety to climate change to food security to environmental quality. Although re-establishing territorial authority over lands and resources is seen as a critical component of rebuilding tribal governance capacity, there are similar efforts to enlarge this capacity through the application of human development frameworks and goals in the Arctic.

Analyzing the capacity of local governments to govern their communities aligns closely with the efforts of human development advocates to advance “fate control” as an indicator of and goal for community wellbeing. Chapter 3 describes the history of applying human development in the Arctic. In 2004, the Arctic Council identified fate control, or the idea that the ability of people and communities to “guide their own destiny” is a vital component of community wellbeing for northern communities (AHDR 2004; ASI 2009). In the years subsequent to the Arctic Human Development Report (AHDR), a series of projects attempted to operationalize the findings and create indicators to measure wellbeing in the Arctic. The Arctic Social Indicators

(ASI) report was launched in 2009, and attempted to define each of the six “domains” of wellbeing in the North: fate control, connection with nature, community viability (all three from the AHDR), literacy, longevity and gross domestic product per capita (from the traditional human development approach). The ASI accounted for all six realms at both an individual and community level.

The ASI defines “fate control” as the ability for people and communities to control their own fates and destinies (Larsen, Schweitzer, and Fondahl 2009, 130). Within the domain of fate control, the ASI developed indicators to measure collective and individual fate control through examining: (1) the percentage of indigenous members in governing bodies (municipal, community, regional) relative to the percentage of the total indigenous people in the total population; (2) the percentage of surface lands legally controlled by the inhabitants through, for example, public governments, and Native corporations (tribes were not mentioned); (3) the percentage of public expenses within the region (regional government, municipal taxes, community sales taxes) raised locally; and (4) the percentage of individuals who speak a mother tongue (whether Native or not) in relation to the percentage of individuals reporting corresponding ethnicity (ASI 2009). Thus, the ASI determined that fate control would be measured by political representation, land ownership, ability to raise revenue for local use, and language viability. This next section analyzes these indicators, and offers suggestions to more appropriately tailor these measures to assess governance capacity.

The first indicator would measure the extent of political participation by indigenous peoples relative to their overall population as a way of ascertaining political power. This straightforward number fails to reflect the political power of indigenous communities in a greater decision-making body. As nations within a more politically powerful state, Alaska Native

councils and tribes will not gain the political power sufficient to ensure their wellbeing simply by securing proportional representation in state and federal governing bodies (Manuel and Posluns 1974). As a matter of simple math, Alaska Native communities will always remain a numeric minority and within a democracy, where majority rules, the idea that the government is constituted by Alaska Natives in proportion to their overall populations does not ensure that the concerns of this numeric minority will be addressed. The lack of a numeric majority is not as fatal to tribal political power in areas where tribes have territorial authority, even if they are a numeric minority. For example, even if the numbers of indigenous people living in the state of Minnesota are far outweighed by the numbers of non-indigenous people, the interests of the tribes are protected by virtue of the territorial control they can exercise over lands within their jurisdiction. Alaska tribes do not have this same capacity.

The second indicator is designed to measure the ability to control lands and resources by ascertaining the extent to which these rights are legally enforceable (Larsen, Schweitzer, and Fondahl 2009, 241). However, the use of land ownership as a proxy for control over land is problematic and over-simplistic because, as described in this research, land ownership is fundamentally different than land governance. The reliance solely on land ownership as a measure fails to account for the issue of territoriality, which is critical to the ability of tribes to govern wellbeing, and without territoriality, tribes cannot raise revenues for their own local use. Measuring “the percentage of surface lands legally controlled by . . . public governments or Native corporations” fails to adequately reflect territoriality. This is especially true given that lands transferred under ANCSA to Native corporations resulted in the loss of tribal territorial governance and left Alaskan tribes with no authority to tax or regulate ANCSA lands. So although Native corporations are able to “legally control” some aspects of lands they own – for

example they can use lands in ways they choose and exclude non-shareholders from these lands – other forms of “legal control” (taxation and regulation) that are normally exercised by a sovereign are not available to tribal governments. As demonstrated in this dissertation, the lack of such authority means that tribes have lost “control” over lands and resources upon which they depend. The ASI indicator fails to reflect this reality. A better approach to evaluate the extent of decision-making power and economic control within communities would be to measure the degree to which natural resource co-management agreements exist, or other such frameworks for enhancing and strengthening local self-governance authority over lands and resources.

The third indicator would assist in determining the financial resources available to local communities that require a revenue base from which to sustain self-governance. The ability of local governments to raise taxes gets to the heart of sovereign authority as described earlier in this dissertation. The ASI describes the economy of the Arctic as impacted by both colonialism and globalization; this holds true for Alaska. Alaska’s export-based economies perpetuate colonial economic patterns while the value of Alaska’s natural resource wealth places the state at the center of a global economy. Alaska has a strong state government that controls the range of fiscal options available to political subdivisions, and likewise controls access to critical subsistence resources that are essential parts of village economies. To fully recognize the range of fiscal controls that local governments can assert, this indicator should include a broader based assessment of local economies, including how revenues are generated and spent within and for the communities. It should also include a measure of the extent of reliance on subsistence resources as a component of the local economy.

The fourth indicator would reflect how well government policies support the use of languages within cultures and communities. As a component, the issue of language access as

one of the measures of fate control becomes relevant. As defined by the ASI, this indicator measures the percentage of individuals who speak a mother tongue in relation to the percentage of individuals reporting a corresponding ethnicity. However, as written, this indicator overlooks the very real fact that people who speak their “mother tongue” must also be able to access critical services. The lack of linguistically appropriate services means that access to basic services such as health care and other social services are effectively denied to Alaskans whose first language is not English. To incorporate these concerns, this indicator should also measure the extent of public policies and programs supporting language preservation and language access rights for limited English proficient Alaskans.

Finally, the approach adopted by the ASI does not provide a means to measure governance capacity and this is an important component of the successful devolution of power (Poelzer and Wilson 2014). Determining governance capacity likewise depends on an assessment of the extent to which local governance institutions are culturally appropriate and legitimate in the eyes of their members (Zellen 2009; Cornell and Kalt 2003; Cornell and Kalt 1998). Likewise, capacity can be measured by the existing state and federal policies that recognize tribes as a sovereign, governing partner. This recognition is a predicate for creating power sharing arrangements (formal and informal) with local communities and a determination of the extent of local governance structures and institutions that are consistent with cultural values and traditions (Cornell and Kalt 1998; Cornell, Kalt, and Henson 2008; Cornell et al. 1999). All of these factors combine to identify, measure and support governance capacity, and should be integrated into human development frameworks for America’s Arctic communities.

8.3. HUMAN RIGHTS AND HUMAN DEVELOPMENT: TRIBAL SELF GOVERNANCE IN ALASKA

The consequences of the loss of territoriality to the capacity of Alaskan tribes are multi-dimensional as described within these pages. So too is the response. This dissertation describes two of those responses, one that relies only on the initiative and inherent authority of tribes as demonstrated by the efforts of the YRITWC, and the other that seeks statutory and regulatory expansions of both territorial and non-territorial authority.

As described in this research, the loss of authority over traditional lands that were transferred under the Alaska Native Claims Settlement Act of 1971 has had four distinct consequences for the ability of tribes to exercise the right of self-determination and the capacity to promote fate control and human development. Tribes lost the authority to regulate fish and game populations, rendering communities food insecure. Tribes cannot petition to manage water quality or air quality because of the loss of authority over land. Tribes are unable to promulgate policies that would help their communities adapt to climate change. And finally, tribes are not able to control for the public safety of their own communities.

The loss of authority has left tribes with a predicament. Lacking either territorial authority or the statutory authority to govern the arenas described above, tribes have been forced to either propose legislative changes to transform public policies, such as to statutorily craft a co-management regime through the Ahtna Wildlife Co-Management proposal, or to litigate cases in order to expand protections for tribal territorial and non-territorial authority including *Akiachak v. Department of Interior*, *John v. Baker*, and *Simmonds v. Parks*.

Alongside these approaches, tribes have developed innovative approaches to assert their legal rights as governments to self-govern. This research provides a study of one of these instances of how tribes are forging creative pathways into governance. As documented in these

pages, the ultimate goal of this effort is to promote a system of shared governance, or adaptive co-management that frames a government-to-government relationship between tribes and the federal and state governments as sovereigns.

Adaptive co-management sets forth a framework for sharing power at varying levels of government, and as described above, is an increasingly recognized trend in Arctic governance, including resource management. Co-management regimes provide a framework for “devolving” power and authority across layers of governments, including tribal governments (see Chapters 3 and 5). Some adaptive co-management structures already exist in Alaska, most specifically in the realm of marine mammal management. These frameworks, however, are limited management for a single species and have not yet been applied on a regional basis in Alaska. The Ahtna co-management approach, should it become law, would for the first time provide Alaska tribes with a formal decision making role in regional management decisions.

An additional benefit to crafting co-management regimes is that such regimes do not necessarily depend on a land base because they are contracts or compacts to share governance between parties to the co-management agreement. Adaptive co-management is thus a way of allocating governance and delegating authority that is non-territorial in nature. These forms of power sharing arrangements are increasing in number throughout the north, where “normal” notions of territoriality may not apply (Poelzer and Wilson 2014).

Even though land governance is not a necessary pre-condition to co-management, it does offer tribes a stronger position from which to negotiate a seat at the table (Panelist, Alaska Native Land Law Continuing Legal Education 2014). In addition to the added leverage that territorial authority would bring to tribes, the idea of tribal territoriality is vital to the ability of tribes to sovereignty and fate control. Florey notes,

Territorial power represents a stand in favor of tribal autonomy and against the colonialist and assimilationist policies that have, throughout U.S. history, attempted to separate tribes from their land. To relinquish all territorial aspects of tribal power would be, in many ways, to abandon the most important facets of tribal sovereignty (Florey 2010, 600).

However, even if Indian Country were reinstated to a larger degree throughout Alaska, this will not in and of itself cure the effects of the loss of territoriality because of the complexity of land ownership. Public policies designed to address issues of community and tribal wellbeing must respond to the very real ways that the loss of lands have impacted communities as described here. Appropriate policy responses should rely on reinstating the land base from which tribes can assert sovereign authority, and on adopting innovations in governance to integrate tribal governments as sovereign partners.

The burden to reach the ideals of local self-governance is not borne by Alaska's tribes alone. As self-determination is a right under international law, the State of Alaska is obligated to recognize this right when Alaskan tribes seek to exercise it. The State's own constitution endorses local governance, and thus is a mandate to comport our practices with our principles. The challenge is to develop a mechanism that would facilitate state recognition and cooperation with tribal governments, to the same degree as in urban communities and rural, non-tribal governments. This endeavor would enhance the capacity of tribal governments to adopt policies that promote human development and fate control.

As a matter of domestic law, Alaskan courts recognize that tribes have "non-territorial authority" over tribal members and may retain some amount of territorial authority. As a matter of policy, adaptive governance frameworks offer institutional ideas about integrating local communities into resource decisions. As a matter of right, international human rights and human

development theories recognize that tribes have a right to engage in self-government and self-determination.

Taken together, these points illustrate the connections between land, governance, and wellbeing that are necessary to understand in order to create public policies that support the capacity of tribal communities to promote wellbeing and the right of self-determination. Land is vital to governance, but governance must move beyond territoriality as a defining aspect of capacity. Governance frameworks that integrate multiple layers of governments, local, statewide, regional and international, will be vital to ensuring the adoption of public policies that respond to the extraordinary changes local communities throughout Alaska's Arctic will face in the future. However, these frameworks must integrate tribes as governments, not as stakeholders, in order to ensure that tribes have the right to engage in self-determination and the capacity to guide the fates and futures of their communities.

8.4. GOVERNANCE MATTERS: LESSONS FROM ALASKA

While the experiences of Alaska tribes may be unique to the state, the lessons learned have application in a number of contexts. First, communities and even small nation-states experiencing climate caused threats to their homelands face the potential of permanent relocation (Bronen and Chapin 2013; Bronen 2011, 357-365; Peninsula Principles 2013). Any movement towards relocating these communities and nation-states should consider the issue of governance. Second, issues of governance should likewise be considered when communities face displacement as a result of development decisions. In both situations, decision makers should consider *how* these communities will relocate. Will they relocate as a diasporic community and be absorbed as a people within their new homes, with no ability to self-govern? Will they relocate onto lands that will support self-governance, even if that self-governance is to be

defined to any degree by their new host country? This research highlights the need to consider these questions, the questions of self-governance, throughout the process so as to protect the wellbeing of community members into the future.

In addition, there are areas of the world where land rights disputes between settler and indigenous communities are not yet settled (United Nations Permanent Forum on Indigenous Issues 2014; Susskind and Anguelovski 2008). The lessons of ANCSA, that land ownership does not confer land governance authority, are instructive for this situation as well. As demonstrated by the Alaskan experience and documented with these pages, there are most assuredly economic benefits that accrue when private property rights are vested within indigenous communities, but these benefits alone will not provide governments with the means necessary to govern for their wellbeing. The right of indigenous peoples to self-govern is a right recognized by the international community, and the capacity to govern is a necessary component of this right, as recognized by human development scholars. Governance matters to the abilities of indigenous governments around the world to govern for their own fates and futures.

Property Rights, Governance and Development in the Alaskan Arctic Consent Form

Researchers:

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Dr. Diane Hirshberg, Institute of Social and Economic Research, UAA (local research advisor). 907-786-5413 or dhirshberg@uaa.alaska.edu

Description:

My name is Mara Kimmel and I am a graduate student studying the relationship between land, governance and community development. I am studying the efforts of the Yukon River Intertribal Watershed Council to increase the involvement of the Watershed's communities in watershed governance. I am especially interested in better understanding the connections between land rights, self-governance and community development.

You are being asked to participate in a research project exploring the linkage between land rights, governance and community development. Your participation will involve only an interview with me. If you agree to participate, the information you provide will be part of a PhD dissertation examining that relationship within Alaskan communities. I am asking for your participation because you have part of the leadership of the Yukon River Intertribal Watershed Council.

The interview should only take about 20-30 minutes to complete. I will ask you approximately 10 questions about the Watershed's Council governance project.

Voluntary Nature of Participation:

Your participation in this study is voluntary. You may stop at any time and you do not have to answer any questions you don't want to. Nothing will happen to you if you choose not to answer any questions or if you decide not to participate.

Confidentiality:

Your responses to the questions will be confidential. The interview will not be taped, but the research will take notes. These will be kept in a secure file cabinet in the primary researchers' office to which only they have access. Data will be compiled in such a way that you cannot be identified unless you agree to be. We will not attach your name, address, or any other identifiable information about you to any of your responses, or to any reports or publications describing the results of this study.

Potential Benefits and Risks:

Your participation in this study requires a small commitment of time on your part. However, if you decide to participate, your willingness to share your experiences and knowledge may provide valuable insights for improving the development of public policies affecting local governance. There are no foreseeable risks or benefits to you personally with respect to your personal or professional status from participation in this study.

Contact People

If you have any questions about this study, please contact Mara Kimmel at 907-350-0786. If you have any questions or concerns about your rights as a research participant, please contact Dr. Dianne Toebe, Compliance Officer, at (907) 786-1099.

Signature

Your signature below means that you have read the information above and agree to participate in this study. If you have any questions, please feel free to ask them now or at any time during the study.

Signature _____ Date _____

Print Name _____

A copy of this consent form is attached for you to keep.

To Whom It May Concern:

Mara Kimmel is currently working with the Yukon River Intertribal Watershed Council as part of her graduate studies at Central European University. Ms. Kimmel is writing a PhD dissertation that examines the connection between property rights, governance and development in the Arctic. Her work with the YRITWC will provide the basis for a case study that will focus her research and findings.

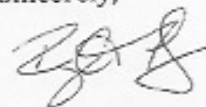
The YRITWC is an Indigenous grassroots organization of 70 Tribes and First Nations dedicated to the protection and preservation of the Yukon Watershed. We provide the Tribes and First Nations with technical assistance and training to promote the health of the Watershed and its inhabitants.

Ms. Kimmel is assisting the YRITWC with our watershed governance project. At the 2011 biennial summit, the Executive Council of the YRITWC directed staff to develop a long-term strategy to increase opportunities for involvement in water quality management. As part of her work with us, Ms. Kimmel is assisting our legal team and staff to compile information on existing governance structures and institutions within the Watershed. This involves some community contact and will likely include conversations with tribal leaders and YRITWC leadership and staff as necessary to more fully understand how the communities wish to be involved in governance.

We understand that Ms. Kimmel will likely rely on the information and knowledge she gains from this experience to inform her research. We are confident that Ms. Kimmel will treat the information she obtains from staff and leadership with the utmost of integrity, and will respect the needs and directives of the communities and the organization when conducting her research and drafting her results.

If you have any questions, please don't hesitate to contact me at (907) 258-3337.

Sincerely,



Ryan Toohey, PhD
Science Director at the YRITWC



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DATE: March 27, 2015
TO: Mara Kimmel
FROM: University of Alaska Anchorage IRB
PROJECT TITLE: [373297-4] Property Rights, Governance and Development
SUBMISSION TYPE: Closure/Final Report
ACTION: APPROVED
DECISION DATE: March 27, 2015

The Final Report to the Institutional Review Board regarding your study has been received.

This completes the documentation for this project with the Institutional Review Board. Thank you for your work with the Board for the protection of human subjects research and congratulations on the successful conclusion of your research.

Sharilyn Mumaw, M.P.A.

Research Integrity & Compliance Officer



Ethical Research Committee

Central European University
Nador utca 9
1051 Budapest
Hungary
rajaramp@ceu.hu

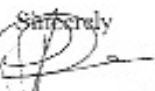
22 May 2015

Dear Dr Kimmel,

Ethics Review 2014-2015/5/RD

As Chair of Central European University's Ethical Research Committee, I can confirm that we accept the ethical review of the project conducted by the Institutional Research Board at the University of Alaska. The Committee understands that your project did not deviate from the plan as proposed to that IRB, and no further ethical review is merited.

Sincerely,



Prem Kumar Rajaram
Chair, Ethical Research Committee

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