

Revisiting Governance in a Changing Arctic Environment: An Alaskan Case Study

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ABSTRACT

This case study examines the evolution of Alaska’s tribal governments and the impact of the Alaska Native Claims Settlement Act on their ability to govern the land and resources upon which they depend. Viewed through the lens of human development, this paper argues that since tribal jurisdiction has been severed from tribal lands, Alaskan indigenous communities face unique obstacles to their ability to self-govern. These obstacles are exacerbated by the dramatic climate changes occurring in the Arctic. Alternative property regimes based as common property principles have the ability to make a difference in promoting human development, justice, and security in Alaska and the Arctic. However, the unique nature of the aboriginal land claims settlement has serious and consequences for tribal governance and renders these arrangements nearly impossible. Ironically, climate change may open doors to returning collective property rights to tribal governments in a limited way. At present, a handful of rural Alaskan communities face climate caused displacement. Communities forced to relocate to lands beyond the scope of the original land claims act should consider whether to construct new property arrangements that reflect common property and human development principles. If tribes can reestablish a land base over which to assert their governance authority, a rare opportunity exists to strengthen human capacity of northern indigenous peoples in meaningful ways.

Introduction

Alaska is the United States’ only Arctic state and home to more than two hundred indigenous tribes. These tribes remain highly dependent on a healthy natural environment for their continued survival. However, unlike tribes in the continental

United States, Alaskan tribes have no land base over which they can assert sovereign authority. The lack of territorial sovereignty limits tribal self-determination and creates environmental insecurities because it highlights the lack of control over lands and resources that remain integral to tribal identity and subsistence.

The enormous climatic changes experienced in the Arctic exacerbate these injustices and insecurities and underscore the need to create more equitable and sustainable property regimes. The relatively recent loss of territorial authority caused a commensurate loss of governance power for tribes, putting them at a disadvantage in efforts to create adaptive governance strategies that depend on cooperation among all levels of government – local, national and international. Additionally, the lack of governance ability over village lands and resources threatens the security of communities living on the edge of a rapidly changing environment because it limits their capacity to develop and implement meaningful response strategies.

This study examines the history and current status of tribal governance in Alaska. It employs a human development perspective while assessing tribal capacity to confront governance and climate change challenges. The Alaskan experience demonstrates that *economic development* alone does not provide tribes with sufficient capacity to sustain their livelihoods and cultures. Instead, when public policies focus on enhancing tribal governance capability based on principles of *human development*, communities demonstrate greater resilience and increased capacity to respond to climate change. Similarly, viewing governance capacity through the lens of human development rather than economic development facilitates a more accurate assessment of the ability of local governance institutions to promote local control and self-determination.

As this paper argues, one of the most pivotal components necessary to strengthening local governments is to increase local control by reestablishing the territorial jurisdiction lost by Alaskan tribes. Despite tremendous economic gains made by Alaska Native owned for-profit corporations, the loss of local control over critical lands and resources has destabilized local governance and impeded resiliency in indigenous communities living on the edge of a dramatically changing environment. Reestablishing legal ties to the land

to the greatest extent possible given the unique nature of land claims settlement in Alaska will arguably reinvigorate tribal governments with meaningful capabilities to self-govern. These revisions to property rights regimes are critical to efforts to promote Northern justice and security in the face of a highly uncertain future.

Human Development in Arctic Communities

The Human Development Paradigm

The concept of human development emerged in the 1970s as an alternative approach to combating global poverty and redressing structural inequities that inhibit well-being. Human development recognizes that policies that focus only on growing economic wealth ignore important measures of individual and community progress.¹ Rather than simply growing people's wealth, human development proponents argue the goal of development programs and projects should be to "enlarge people's choices"² by addressing the lack of education, poor health care, inequalities in economic, social and political rights, and other factors that hinder human progress.³ Instead of focusing on the expansion of "only one choice – income," human development suggests a path to enlarging "all human choices – whether economic, social, cultural, or political."⁴ 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.⁵

¹ Mahbub ul Haq, *The Human Development Paradigm*, in READINGS IN HUMAN DEVELOPMENT 22, 17-34 (Sakiko Fukuda-Parr & A.K. Shiva Kumar, eds., Oxford 2003).

² *Id.* at 17.

³ See, Sen, Amartya, *Foreword*, in READINGS IN HUMAN DEVELOPMENT, *supra* note 1, at 7

⁴ ul Haq, *supra* note 1, at 17.

⁵ ul Haq, *The Birth of the Human Development Index*, in READINGS IN HUMAN DEVELOPMENT, *supra* note 1, at 127.

Importantly, a human development framework accommodates the “rising aspirations of people”⁶ by taking decision making closer to the people through decentralizing government.⁷ At the same time, new patterns of global governance account for an increasingly connected world.⁸ 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 1990.⁹

Human Development in the Arctic

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”¹⁰ 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 well-being of communities, particularly tribal communities, remains troubled.

Recognizing the potential applicability of a human development approach to Arctic regions, in 2002 the Arctic Council, an international governmental organization comprised of eight member nation-states and six “permanent participants,”¹¹ called for

⁶ ul Haq, *The Human Development Paradigm*, *supra* note 1, at 28.

⁷ *Id.*

⁸ *Id.*

⁹ UNITED NATIONS, HUMAN DEVELOPMENT REPORT 1990: CONCEPTS AND MEASURES OF HUMAN DEVELOPMENT (1990).

¹⁰ Amartya Sen, *as quoted in* UNITED NATIONS, THE ORIGINS OF HUMAN DEVELOPMENT, *available on line at* <http://hdr.undp.org/en/humandeve/origins>.

¹¹ “Permanent Participants” are organizations representing Arctic Indigenous peoples and provide for their active participation in activities of the Arctic Council. These participants include the

the drafting of a Human Development report for the Arctic.¹² The Arctic Human Development Report (AHDR) was developed over a two-year period and outlines the state of Arctic human development. The document points out critical gaps in existing knowledge on the subject and generally introduces Arctic policy makers to the idea that human development may provide an appropriate framework for guiding public policy in the region.¹³

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 themselves.¹⁴

In terms of Arctic governance, the Report identifies the importance of property rights and the devolution of power to local governments¹⁵ as two critical components necessary to ensure rights of self-determination and sustainability of culture and environment in the Arctic. 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

Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the Inuit Circumpolar Conference, Raipon, and the Saami Council.

¹² *Summary of Major Findings*, NIELS EINARSSON, JOAN NYMAND LARSEN, ANNIKA NILSSON, ORAN R. YOUNG, EDS., ARCTIC HUMAN DEVELOPMENT REPORT (AHDR) 10-11 (Akureyri: Stefansson Arctic Institute, 2004).

¹³ *Id.*

¹⁴ *See id.* *See also*, Birger Poppel, Jack Kruse, Gérard Duhaime, & Larissa Abryutina, SLICA RESULTS, (Institute of Social and Economic Research, University of Alaska Anchorage, 2007). This study concluded that well-being in Arctic communities is closely related to job opportunities, locally available fish and game, and a sense of local control.

¹⁵ Richard Caulfield, *Resource Governance*, in AHDR, *supra* note 12, at 121.

privatization approaches . . . in North America and of alternative systems”¹⁶ and notes a rise in co-management systems that devolve power to local governments.¹⁷ In addition, the Report finds that lack of local governance directly affects human health in the Arctic.¹⁸ The Report 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.¹⁹

Case Study: Alaska Native Governance in a Changing Arctic Environment

The ability of Alaska tribes to assert inherent sovereign powers is significantly limited compared to tribes around the United States. The unique way in which land claims were settled in Alaska terminated the territorial reach of tribal governments, having profound consequences for the ability of tribal governments in Alaska to exercise rights of self-determination. These consequences dramatically impede the ability of governance structures to promote community well-being and resiliency in the face of climate changes.

a. Tribal governance generally

Indian tribes throughout the United States are considered by law to “possess attributes of sovereignty over both their members [personal jurisdiction] and their territory [geographic jurisdiction].”²⁰ Legally, tribes are considered to be “domestic dependent

¹⁶ *Id.* at 122, 135.

¹⁷ *Id.* at 127, 129.

¹⁸ *Id.* at 159.

¹⁹ *Id.* Since the Report was issued in 2004, there have been on-going efforts to operationalize its recommendations. The Arctic Social Indicators (ASI) project follows up on the work of the Arctic Human Development Report and seeks to devise indicators to track and monitor human development in the region. Joan Nymand Larsen, *Arctic Social Indicators (ASI): A Follow-up to the Arctic Human Development Report*, IASSA NEWSLETTER NORTHERN NOTES, (Fall-Winter 2006-2007). Their final report is due to the Arctic Council in November of 2009.

²⁰ DAVID CASE, *ALASKA NATIVES AND AMERICAN LAWS*, 385 (University of Alaska Press, 2d ed.), citation omitted.

sovereigns” within the United States, which means that while their authority to govern is preserved, the extent of that authority is defined by the U.S. Congress.²¹ In addition, tribes have a unique political relationship with the federal government wherein the federal government bears trust responsibility that requires it to act as a guardian over tribal governments and lands.²² Finally, the authorities of tribal governments over lands or matters involving tribal members, when recognized and upheld by the Congress, means that a state cannot regulate that same land or matter.²³ As discussed below, tribes in Alaska deviate from those norms in some very critical ways that impede their ability to govern to the same degree as other tribes.

b. The history of tribal land rights in Alaska

Tribal governments in Alaska were first recognized in 1867 when Russia sold the territory to the United States. The Treaty of Cession acknowledged the existence of aboriginal tribes, and subjected them to “such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes.”²⁴ This meant that from the time the United States purchased the territory in 1867 until 1971, when aboriginal land claims were settled, Alaskan tribes arguably fell within the normal parameters of Indian law norms: they retained inherent sovereign powers subject to limitation by the U.S. Congress, they were beneficiaries of a “trust” relationship with the federal government in which 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.

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

²¹ Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823).

²² Worcester v. Georgia, 31 U.S. (6 Pet.) 561 (1830).

²³ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

²⁴ Treaty of Cession, Art. III, Treaty of March 30, 1867, 15 Stat. 539, *cited in* CASE, *supra* note 20, at 46.

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.”²⁵ The status quo of aboriginal title was later preserved in the 1912 Territorial Organic Act.²⁶

The 1959 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. 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, and declaring that any state land selections under the new Statehood Act must be “vacant, unappropriated, and unreserved” at the time of selection.²⁷ 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.²⁸

The discovery of oil in northern Alaska provided the impetus to finally settle this critical issue. 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. From the perspective of the oil industry and Congress, there was great urgency to finalize land claims as quickly and

²⁵ Organic Act of May 17, 1884, ch. 53, Section 8, 23 Stat. 24-26, *cited in* CASE, *supra* note 20.

²⁶ Organic Act of August 24, 1912, 37 Stat. 512, as cited in LINXWILER, JAMES, “THE ALASKA NATIVE CLAIMS SETTLEMENT ACT: THE FIRST TWENTY YEARS,” (Paper given at the 38th Annual Rocky Mountain Law Institute, 1992).

²⁷ Alaska Statehood Act of July 7, 1958, Public Law No. 850508; 48 U.S.C. *cited in* LINXWILER, *id.* at 13.

²⁸ See *id.* at 15.

with as little litigation as possible.²⁹ Tribal leaders in Alaska looked at Native peoples to the south and what they saw alarmed them. Despite the promise of the federal government to guard over the lives and lands of Indian people, rampant poverty kept these communities in a cycle of dependency that often meant hopelessness and despair. Seeking to avoid this same fate, and to put their own people on a path to self-sufficiency, Alaska tribal leaders 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.³⁰ Aided by the oil industry, tribal leaders eventually secured passage of the Alaska Native Land Claims Settlement Act in 1971 (ANCSA).³¹

The Alaska Native Claims Settlement Act represented a dramatic departure from every other land settlement the federal government engaged in with tribes. In ANCSA, the United States government agreed to transfer fee simple title to 44 million of Alaska's 365 million acres of land if the tribes agreed to form state chartered corporations to take title to this land.³² As implemented, ANCSA created twelve regional corporations (and a multitude of village corporations) that each own title to a part of that land pie.³³ Each Native owned corporation is chartered under the laws of the state of Alaska.

c. ANCSA and development in Alaska

²⁹ The Alaska Native Claims Settlement Act, 43 U.S.C.A. 1601 *et seq.* § 2.

³⁰ Section 2 (b) of ANCSA directed that the land settlement should be rapid, certain, and in conformity with the real economic and social needs of Alaska Natives. The intent of Congress was to not 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.” See *id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* ANCSA created twelve land-owing regional corporations, but a thirteenth was formed to settle claims with Alaska Natives living out of state.

ANCSA was hailed as "the beginning of a great era for the Native people of Alaska."³⁴ Alaska Native leaders and others saw the Act as the means by which Alaska Natives could end dependence on transfer payments and government agencies that characterized reservation style settlements. ANCSA was deemed to have international significance as an "example of a major attempt by aboriginal peoples to establish a distinct and contemporary place for themselves in Western society."³⁵ The international community was also watching to see how new forms of land holding in Alaska might work elsewhere.³⁶

Initially, economic performance was poor, and little benefit was provided to the Alaska Native community.³⁷ This changed with amendments to ANCSA in 1991 that created better conditions for the Corporations to thrive. As a result, ANCSA has proven to be an extraordinary economic opportunity for Alaska Native people.³⁸ Alaska Native corporations have emerged as an economic powerhouse in the state, bringing economic development opportunities to indigenous communities that are unparalleled in history of Indian reservations in the rest of the United States.³⁹ In addition, ANCSA corporations provide a wide range of benefits to their shareholders ranging from employment to education to cultural preservation efforts.⁴⁰ For example, many of the Corporations have

³⁴ Jonathan M. Karpoff & Edward M. Rice, *Structure and Performance of Alaska Native Corporations*, 10 CONTEMPORARY POLICY ISSUES, 1992.

³⁵ *Berger Launches ANCSA Hearings: Focus on Native Sovereignty*, in ARCTIC POLICY REVIEW, (June 1984).

³⁶ *Id.*

³⁷ Karpoff & Rice *supra* note 34.

³⁸ For example, all of the regional and village corporations created by ANCSA paid out \$408 million USD in payroll and \$45.6 million USD in shareholder dividends in 2002. They also contributed \$6.4 million USD to charities and distributed \$4 million USD to scholarships. *See Report, Native Corporations Bring Big Economic Impact*, in ALASKA JOURNAL OF COMMERCE, May 21, 2004.

³⁹ *See for example*, Carl Marrs, *ANCSA, An Act of Self-Determination: Harnessing Business Endeavors to Achieve Alaska Native Goals*," CULTURAL SURVIVAL (Fall 2003).

invested in cultural heritage programs, and many have created foundations to support shareholder education. The Corporations have likewise been credited with creating a generation of Native leaders and role models who have been catalysts for positive change in their communities.⁴¹

The economic impacts of ANCSA are unquestionable and the Act has fulfilled its goals to provide Alaska Natives with the means to promote their own economic development. Their emergence as an economic force has translated to political power within the state of Alaska.⁴² Arguably, however, this power has been limited to an economic arena.⁴³ The Institute for Social and Economic Research at the University of Alaska finds, “Natives have more jobs, higher incomes and better living conditions, health care, and education than ever . . . [y]et they remain socially and economically disadvantaged and [are] several more times likely than other Alaskans to be poor and out of work.”⁴⁴ ANCSA’s failure to protect tribal governance while promoting economic development poses profound consequences for tribal well-being.

These consequences manifest in abnormally high rates of poverty, unemployment, and suicide for rural communities as compared to their urban counterparts in the state. For example, in July of 2008, Alaska as a whole had the 11th lowest poverty rate in the United States, at 10 percent but in some parts of the state, poverty reached upwards of 20 percent

⁴⁰ INSTITUTE FOR SOCIAL AND ECONOMIC RESEARCH, BENEFITS OF ANCSA AND SBA 8(A) PROGRAM, 12-13 (July 2009)(hereinafter ISER Report).

⁴¹ *Id.* at 9.

⁴² Marrs, *supra* note 39.

⁴³ This point is underscored by the recent flare-up between the state and Alaska Natives over subsistence rights. *See Subsistence Issues a Major Focus at Alaska Federation of Natives Convention*, Anchorage Daily News, October 19, 2009, at A1 (describing the recent conflicts between state agencies and subsistence users and the Native community), *see also, Feds Seek to Reshape Hunting and Fishing Rules*, Anchorage Daily News, October 24, 2009, at A1 (describing the efforts by the U.S. Department of the Interior to “retool” federal oversight of subsistence to better meet the needs of Native communities).

⁴⁴ ISER Report, *supra* note 40, at 6.

and in one community was as high as 34 percent.⁴⁵ Similarly, unemployment rates for March of 2009 were 9.3 percent statewide, but some rural communities experienced rates as high as 24.6 percent. Likewise, rural Alaska continues to experience abnormally high rates of suicide⁴⁶ and violent crimes, and substance and alcohol abuse remain serious problems.

The promise of economic development was not enough to overcome the impact of colonization and loss of culture experienced by Alaska Native communities. The sobering statistics cited above demonstrate that economic empowerment by itself cannot address the chronic effects of historical trauma experienced by these communities.⁴⁷ As noted by the Arctic Human Development Report, strengthening local governance is a necessary step to equipping local communities with the ability to address the impacts of these traumas because the lack of local control means a lack of ability to effectively respond to local crises.

ANCSA's Impact on Tribal Governance

ANCSA had serious, if unforeseen, consequences for tribal government capacity. As described above, prior to ANCSA, the lack of laws specific to the status of Alaska tribes

⁴⁵ Bethel's poverty rate reached 20 percent and Dillingham's was at 22 percent. The Wade Hampton area reached 34 percent poverty. Available in U.S. Census Bureau, Estimates for Alaska Counties, 2005.

⁴⁶ Among Alaska Natives, suicide was the fourth leading cause of death, with rates in males of 68 per 100,000, and in females of 26 per 100,000. Source: Justice Center, University of Alaska Anchorage. Available on line at http://justice.uaa.alaska.edu/forum/25/4winter2009/b_nvdrs.html

⁴⁷ Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families and Communities*, in 23 JOURNAL OF INTERPERSONAL VIOLENCE 3 (March 2008). This article proposes a new model for understanding trauma that acknowledges the multigenerational nature of distress in communities and its impact on an individual and community level. "Historical trauma" is defined as a "collective, complex trauma inflicted on a group of people who share a specific group identity or affiliation – ethnicity, nationality, and religions affiliation. It is the legacy of numerous traumatic events a community experiences over generations and encompasses the psychological and social responses to such events."

meant that arguably they fell within the rubric of federal Indian law principles. ANCSA's passage, however, created a dubious future for tribal governance in Alaska. Assuming tribes continued to exist post-ANCSA (as was later confirmed by the Secretary of Interior),⁴⁸ the law itself failed to specifically address the question of whether tribes maintained any sovereign authority over ANCSA lands.⁴⁹

The U.S. Supreme Court settled this question in 1998. The issue facing the Court in *Alaska v. Village of Venetie Tribal Government* was whether ANCSA-created, privately held land that was subsequently transferred to a tribal government could retain its status as a "dependent Indian community."⁵⁰ Such status would preserve the tribe's ability to govern these transferred lands.⁵¹ "Dependent Indian communities," like other reservation lands held in trust by the federal government for the benefit of tribes, are lands in which the abilities of tribes to assert territorial governance is preserved. Such lands must meet a "federal set aside" and "federal superintendence" requirement -- the lands in question must be occupied by an "Indian community" and the "Indian community" must be "sufficiently dependent on the Federal government that the federal government and the tribes rather than the states are to exercise primary jurisdiction over the land in question."⁵²

The Supreme Court determined that because ANCSA conveyed lands to "state-chartered and state regulated private business corporations," such lands did not meet the requirements for dependent Indian communities. As a result, the Court held that ANCSA

⁴⁸ Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C.A. §§ 479a, 479a-1, *cited in* CASE, *supra* note 20, at 15n116.

⁴⁹ *Berger Launches Hearings*, *supra* note 35.

⁵⁰ In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the U.S. Supreme Court determined that the statute terminated "dependent Indian community" status for ANCSA lands, thus erasing all efforts to retain tribal jurisdiction over such lands. Because this decision came almost thirty years after ANCSA's enactment, ANCSA's severance of tribal governance from tribal territory was arguably unforeseen.

⁵¹ *Id.*

⁵² *Id.*

severed tribal territorial jurisdiction over ANCSA lands.⁵³ ANCSA therefore “left [tribes] as sovereign entities for service purposes, but as sovereigns without territorial reach.”⁵⁴ 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.⁵⁵

Unlike other land settlements with aboriginal tribes, ANCSA did not reserve any ownership interest in the land or any substantial government authority over it to the tribes.⁵⁶ This unique lack of territorial jurisdiction is compounded by a similarly unusual limit on the ability of Alaska tribes to assert personal jurisdiction over their tribal members. In 1953, the U.S. Congress directed that a small number of states, Alaska among them, would now share jurisdiction with tribes over tribal members.⁵⁷ This policy represented a dramatic departure from the status quo of Indian law principles that deemed that when a tribe properly asserted its authority over its membership, a state was prevented from doing so. This shared jurisdiction has devastating consequences for tribal authority in Alaska because often times the state refuses to recognize such authority and regulates as if tribes did not exist.⁵⁸

The impact of lost territorial jurisdiction and seriously limited personal jurisdiction on tribal governance in Alaska is severe, but not entirely fatal. At a very fundamental level, the existence of tribes in Alaska is beyond dispute even without a land base. Tribes as

⁵³ *Id.*

⁵⁴ *Id.* at 526.

⁵⁵ Currently, the State of Alaska has fish and wildlife management authority on ANCSA lands, but recently, Alaska Natives have requested that ANCSA be amended to provide that authority to the federal government. *See supra* note 43.

⁵⁶ CASE, *supra* note 20 at 386.

⁵⁷ Public Law 83-280, 18 U.S.C.A. § 1151 *et. seq.*

⁵⁸ The state of Alaska has always had a difficult relationship with tribes, and in fact has refused to recognize their existence for many purposes. *See CASE, supra* note 20 at 431.

governments are involved with marine mammal management,⁵⁹ and tribal members as individuals are active in subsistence resource management.⁶⁰ On a federal level, there are renewed efforts to empower tribes by developing power sharing arrangements on domestic relations issues.⁶¹ Even at the state level, the Alaska Supreme Court has held that the State must share jurisdiction over personal relationships of tribal members with tribal governments, even in the absence of Indian country.⁶² However, the crippling effect on tribal governance in Alaska of the current status of the law must be addressed as we move forward on crafting governance regimes capable of promoting resilient communities in the face of climate change challenges.

⁵⁹ The Marine Mammal Protection Act of 1972 vested management authority for marine mammals with the federal government and prohibited all taking of marine mammals with few exceptions. Act of October 21, 1972, 16 U.S.C.A. §§ 1361 *et seq.* One exception allowed Alaska Natives to continue to harvest marine mammals for subsistence purposes (defined to also include the making and selling of traditional handicrafts made from marine mammals). *Id.* The law did not direct federal regulation of marine mammals until there was a biological showing that a population was in danger, which left a management vacuum that was soon filled by Alaska Native tribes who organized into a variety of “commissions,” including the Alaska Eskimo Whaling Commission, the Eskimo Walrus Commission, the Alaska Sea Otter Commission and the Alaska Native Harbor Seal Commission. These commissions now work hand in hand with federal and state biologists and regulatory agencies to manage certain marine mammal stocks in Alaska. Although these commissions have been successful at manifesting the government-to-government relationship between tribes and the federal government, the scope of that authority is limited to the species subjected to the agreement.

⁶⁰ One of the defining features of the right of self-determination for Arctic indigenous peoples is the right to continue cultural practices and subsistence traditions and this is profoundly true for Alaska Natives. Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) defined subsistence uses and users, and provided a means for those users to be involved in managing subsistence resources. Act of December 2 1980, 16 U.S.C.A. §§ 3111 *et seq.* ANILCA provided both a priority for subsistence uses of natural resources over other types of uses such as commercial or recreational harvesters, and a system of committees and councils to integrate local input into management practices. The state of Alaska established a similar scheme providing for local involvement into resource management, but does not provide a similar preference for subsistence uses. *See CASE, supra* note 20 at 292-97.

⁶¹ Nadra Kareem, *Obama Administration Tackles Violence Against Native Women*, available on line at <http://racereactions.about.com/b/2009/08/24/obama-administration-tackles-violence-against-native-women.htm>.

⁶² *John v. Baker*, 982 P.2d 738 (Alaska 1999).

Human Development, Arctic Governance and Property Rights

As a case study, the Alaskan experience clearly illustrates that development policies that emphasize economic wealth do not guarantee community or social well-being. Instead, the framework provided by a human development approach offers an alternative analysis that may prove far more productive to ensuring a better quality of life in Arctic regions. To adapt this framework to Alaska requires that we assess and adopt future public policies based on whether they enlarge “all human choices –economic, social, cultural, or political” and not just focus on expanding economic opportunities. To that end, the Arctic Human Development Report has articulated a dominant theme – promoting local self-governance is a critical pathway to promoting this range of choice for Alaska Native communities.

The growth in economic power that ANCSA provided Alaska Native people, while beneficial in fundamental respects, has deprived tribes of the capacity to vigorously address persistent social problems such as high suicide rates, poverty, unemployment and continued social exclusion. Nor has it been sufficient to protect cultural traditions rooted in subsistence ways. ANCSA hurt, rather than helped the ability of tribes to exercise all the attributes of sovereignty possessed by tribes throughout the rest of the country as it stripped away the historic ties between tribal governments and traditional lands. Without commensurate expansion of governance capabilities, the economic power ANCSA provided to the state has not proven, in and of itself, to be sufficient to promote resiliency in indigenous communities, particularly in the face of increasing challenges posed by climate change.

This paper argues that reattaching tribal governance capability to tribal lands is a key element of promoting effective governance in Alaska. In doing so, the opportunity to achieve the three human development goals articulated in the Arctic Human Development Report – fate control, cultural sustainability and environmental security – is greatly enhanced. First, in terms of fate control, reinstating territorial governance is integral to promoting local control and self-determination because it provides tribes with

a territorial basis for their sovereignty. Second, reestablishing such authority expands the opportunities for cultural sustainability and justice by providing Alaskan tribes with a similar ability to exercise traditional forms of governance as other tribes in the U.S.⁶³ Finally, by reinvigorating local governance control over natural resources upon which these communities depend, we enhance opportunities for environmental security.

Development and property rights

Property rights regimes bestow a range of benefits and commensurate responsibilities on property owners, including the right to use, sell, rent, profit from and exclude others.⁶⁴ Economist Daniel Bromley identified four distinct types of property regimes: state, private, common property, and open access.⁶⁵ State regimes are characterized by government ownership and control of access to land and resources. Private property regimes exist when the government has transferred property rights to individuals through sales or disposal programs.⁶⁶ Open access regimes are ones in which there is no definable structure of land rights and management responsibilities because either there is no existing system or the system in place breaks down (such as when one system is replaced by another).⁶⁷ This system is subject to resource exploitation of the type described by Garrett Hardin in his famous piece, “The Tragedy of the Commons.”⁶⁸

⁶³ W.N. Adger, *Scales of Governance and Environmental Justice for Adaptation and Mitigation of Climate Change*, 13 JOURNAL OF INTERNATIONAL DEVELOPMENT 924, 921-931 (2001). Adger argues that it is especially critical that local governments have enhanced decision-making authorities to govern their use and management of resources impacted by climate change.

⁶⁴ GARY LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 1 (1989).

⁶⁵ DANIEL BROMLEY, ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY 22 (1991).

⁶⁶ LIBECAP, *supra* note 62.

⁶⁷ *Id.* See also The WORLD RESOURCES INSTITUTE, TROPICAL FORESTRY: A CALL FOR ACTION 10 (1985), cited in Robert Repetto, overview, in PUBLIC POLICIES AND THE MISUSE OF FOREST RESOURCES 10 (Robert Repetto & Malcolm Gillis eds., 1988). Repetto attributes resource mismanagement to the displacement of common property regimes by open access systems, such as when indigenous regimes are displaced by undefined state or open access ones. See also, Gaim

Common property systems are the fourth type of regime. These systems are characterized by collective title to the land, where members of the collective or community have rights and duties to the land and resources.⁶⁹ A review of property regimes world-wide reveals that common property systems remain significant throughout much of the developing world.⁷⁰ Such systems typify the style of property rights associated with indigenous communities around the world, both past and present.⁷¹ 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.⁷² This type of regime typically encompasses a set of institutions, regulations, and management practices. The biggest difference between common property regimes and private property regimes are that the former vests rights within a community, not a private individual.

Historically, international economic development policies have reflected the belief that natural resources are best protected when privately owned.⁷³ Such policies have blurred the distinction between common property rights regimes and open access regimes.⁷⁴ The failure to account for differences in regime types has led to misinformed conclusions that

Kibreab, Common Property Resources and Resettlement, in Michael M. Cernea & Christopher McDowell, RISKS AND RECONSTRUCTION EXPERIENCES OF RESETTLERS AND REFUGEES 298 (World Bank 2000). Kibreab argues that the distinction between open access regimes and common property regimes is critical to creating appropriate development policies for displaced communities. Id.

⁶⁸ Garret Hardin, *The Tragedy of the Commons*, in SCIENCE, Dec. 13, 1968.

⁶⁹ BROMLEY, *supra* note 65, at 25-29.

⁷⁰ Fuys, Andrew, Esther Mwangi, & Stephan Dohrn, *Securing Common Property Regimes in a 'Modernizing' World: Synthesis of 41 Case Studies on Common Property Regimes from Asia, Africa, Europe and Latin America*, presented at the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia, June 19-23, 2006, available on line at http://dlc.dlib.indiana.edu/archive/00001898/00/fuys_andrew.pdf.

⁷¹ Repetto, *supra* note 67.

⁷² BROMLEY, *supra* note 65, at 25-29.

⁷³ See STROUP AND BADEN, NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT 16 (1983).

⁷⁴ BROMLEY, *supra* note 65, and Kibreab, *supra* note 67.

the best way to avoid environmental destruction is to codify and enforce property rights systems vest land ownership in individuals who will then care for the resource.⁷⁵

The failure of the international community to recognize the significant role that common property systems played in sustaining both the environment and cultures of local communities around the world is being slowly rectified. Increasingly, common property regimes are beginning to take their rightful place in the development discourse. Such regimes are now deemed to be effective in sustaining traditional livelihoods and customs, promoting environmental sustainability, and fostering and maintaining community organization and cohesion.⁷⁶ Similarly, there is emerging consensus about the ability of such systems to promote equity and justice.⁷⁷ By codifying the rights of local communities to engage in environmental governance as sovereign landowners, these communities are given a voice in public policy formation. In addition, the ability to exercise control over access and use of local resources minimizes community vulnerability and exclusion that comes from dependence on outside decision-makers.⁷⁸ While the evolution towards full recognition of common property rights and benefits such regimes have on environmental security is far from recognized, by expanding the discussion to include such systems we have similarly expanded the range of potential policy tools available to address governance challenges at all levels.

b. The future of property rights in Alaska

As a case study, Alaska illustrates the consequences of policies that focus solely on economic development and private property rights and fail to promote effective local governance capabilities. In the same way that development discourse has expanded to recognize alternative forms of property rights as a path to community justice and security,

⁷⁵ *Id.*

⁷⁶ Kibreab, *supra* note 67, at 308.

⁷⁷ *See for example*, Kibreab *supra* note 67, and Adger, *supra* note 63.

⁷⁸ Adger, *supra* note 63 at 928.

tribes in Alaska would also benefit from revisiting the issue of property rights as a means to securing their own futures. But there are huge impediments to reconnecting tribal governments to tribal lands. Property rights in Alaska are largely settled and ANCSA corporations are providing extremely valuable services to tribal members that cannot and should not be undone. However, rural Alaskan communities continue to face overwhelming obstacles to their sustainability because of on-going poverty, social exclusion, and racism. It is incumbent upon public policy makers and leaders at all level of governments to recognize these obstacles, and to work with local communities to address them.

Ironically, climate change may offer the opportunity to revisit existing property rights regimes in some Alaskan communities without threatening any of the existing land status arrangements. Climate change is endangering dozens of indigenous communities in Alaska who are experiencing accelerating erosion and flooding.⁷⁹ Currently, five of these communities have determined that relocation is the only solution to their on-going survival as a community.⁸⁰ The process (or lack thereof) involved with relocation highlights the urgent need to create new institutional responses when crafting community relocation strategies and to include local governments in decisions impacting their futures.⁸¹

These communities are possibly going to relocate to lands that are now in federal ownership and arguably beyond the reach or scope of the original land claims settlement act. If that is the case, there may be a possibility to create new property regimes such as common property where the tribal government takes title to the lands to be used by the tribe. If the terms of these land swap included language specifically stating the intentions of the federal government to designate these new village sites federal set-asides or subject to federal superintendence as articulated in the *Venetie* case, there may be a way to

⁷⁹ Bronen, Robin, *We Must Protect Communities Who Face Climate Change Displacement*, in THE GUARDIAN, April 17, 2009.

⁸⁰ *Id.*

⁸¹ *Id.*

reattach tribal governance to tribal lands. Much care would need to be taken to ensure that the interests of the ANCSA corporations affected by the land exchange are similarly protected. If the federal government can protect the economic development purposes behind ANCSA while remediating the adverse consequences to tribal governance authority, the communities most impacted by climate change may have a better chance to secure their own futures.

Conclusion

Climate change lays bare the vulnerabilities of Arctic communities – and reveals a rare opportunity to reestablish the connection between tribes and their lands to strengthen human capacity of indigenous peoples in very meaningful ways. As this case study illustrates, the failure of the land settlement to promote tribal governance capability at the same time it was promoting economic development has great and continuing consequence for community sustainability and resiliency. The Alaskan experience demonstrates the pressing need to ensure meaningful local governance and control, for communities on the front lines of a dramatically changing environment.