ALASKA NATIVE PERSPECTIVES ON THE ALASKA CONSTITUTION

WILLIAM L. IGGIAGRUK HENSLEY*
AND JOHN SKY STARKEY**

Part I is adapted from a panel discussion by Mr. Hensley on Friday, October 11, 2018

We, as the indigenous people who occupied this space now called Alaska for over ten thousand years, were essentially in the twilight zone of the minds of those who created the Alaska Constitution. I have looked at some of the videos where the participants of the Alaska Constitutional Convention waxed on about their experiences participating in the convention. And it was, maybe in their lifetime, a wonderful and great experience. But that experience in no way reflected the entire Alaska population. I knew many of the participants, including John Cross, who represented Kotzebue, my home village. John was a wonderful pilot. But in no way could he have represented the Inuit people of that region when it came to our thinking and our views on those issues that were important to us.

Many of us, even to this day, are just learning about our own histories, because it was basically the job of the Bureau of Indian Affairs to make sure we did not know who we were. We did not understand the ferocious impact of the first colonial period on the people of Alaska—the tremendous loss of life that took place, essentially the destruction of a people through disease, through starvation, and through enslavement. The Russians utilized our people, essentially as forced labor, to hunt the sea otter.

In the subsequent battles over our lands leading up to ANSCA in 1971,[1] most of us had virtually no knowledge of the history of the Russian

* Mr. Hensley is the Distinguished Visiting Professor in the Department of Business and Public Policy at the University of Alaska Anchorage. He was born in Kotzebue and lived with his parents, John and Priscilla Hensley, and their large family in the Noatak delta area as a boy. He attended the University of Alaska in Fairbanks and graduated with a degree in Political Science from George Washington University in Washington, D.C. He was elected to the Alaska House of Representatives just months after graduation. He then ran for the Alaska Senate

period prior to 1867, or what came after the United States "purchased" Alaska because that history was not taught. So when we got into the battle over who owned Alaska, we were really fighting with one hand tied behind our back because we were ignorant of the history that was so key to forming our arguments before Congress. We did not know that there were less than 800 Russians in Alaska at any one time. How many Europeans does it take to establish sovereignty over a subcontinent-sized territory? The Russians had just a thin presence on the Aleutian Coast, and the Gulf of Alaska Coast down to Sitka. During that time, when the doors shut at night in the Russian fort, the Russians were inside and the Indians were outside with a cannon pointed at them. The Russians did not have control. That is history, but it is not ancient history.

Between 1867 and 1924, we had no rights as citizens of the United States. We could not own land. We could not vote. We could not file for a mining claim in our own territories. The reality is that we lived in a colonial world. We did not understand the nature of what took place in our past starting with Sheldon Jackson who was paid both as an agent of the Presbyterian church and as a government official. We did not understand the power of church and state that began to impinge on our lives. That power began to determine what was right and what was wrong, what was sinful and what was legal. And of course, we were expected to learn English so that we could be a better fit "for the social and industrial life of the white population of the United States, and to promote [our] not-too-distant assimilation."[2] There is a question being debated these days about whether this forced assimilation was like a genocide. Although that is not a word that we have used, the term is somewhat appropriate in that the idea smacks of eliminating differences,

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and served a full four-year term, in addition to a subsequent two-year term. Mr. Hensley served on the Board of Regents for the University of Alaska from 1984 to 1987 and was awarded an Honorary Doctor of Laws by the University in 1980. He worked on the NANA Regional Corp. (NRC) board for 20 years and was president of NANA Development Corp. and president of the parent company. He also spent ten years with Alyeska Pipeline Service Company and retired as Manager of Federal Government Relations in Washington, D.C.

** Mr. Starkey received his J.D. from the University of Oregon School of Law in 1986 and his B.S. from North Carolina State University in 1984. His legal practice focuses on tribal rights, especially in regards to hunting and fishing subsistence rights. Mr. Starkey is an enrolled member of the Cheyenne River Lakota tribe.

1. *See* 43 U.S.C. § 1601(b) (2018) (outlining how the Alaska Native Claims Settlement Act (ANCSA) addresses "the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property").

2. *See* Gary C. Anders, *Social and Economic Consequences of Federal Indian Policy: A Case Study of the Alaska Natives*, 37 ECON. DEV. & CULTURAL CHANGE 285, 300 n.2 (1989).

eliminating languages, eliminating institutions, as well as eliminating art and music and other meaningful parts of our culture.

We tried to make adjustments because that is just the way life is. When an invasive species like a bird or plant comes around, the indigenous species have to make adjustments as best as they can. Our predecessors decided that they ought to start learning how to use the political system, how to vote, and how to take some responsibility for what was happening in their environment.

But at the same time, the very bases of our existence were being ruthlessly destroyed. The whaling world contributed to the livelihood of thousands of people up north who depended on the 30,000 bowhead whales and the tens of thousands of walruses that were hunted for ivory and later reduced to ten percent of what they were before. Then the non-Natives began to sell alcohol because it was so profitable. It had tremendous impacts on our people.

In southeast Alaska, indigenous people had managed to figure out ways to control the streams for thousands of years. Certain peoples had rights to utilize those streams productively. But after 1867, the canned salmon industry built canneries all the way from southeast Alaska to my hometown of Kotzebue, which is above the Arctic Circle. They basically began to privatize salmon through the use of fish traps. This caused great distress among those people who depended on the salmon for their livelihood. On top of that, the Migratory Bird treaties[3] criminalized our need to hunt migratory birds in the spring for a change of diet. And, of course, we were not consulted on that issue. Nevertheless, we tried to be good citizens. We fought in World War II and we fought in the Korean War. My own parents joined the Alaska Territorial Guard. We wanted to protect our country.

As time went on, we began to lose our majority within the population. By 1950, there were about 128,000 Alaskans. By 1960—the year after statehood—the population was 226,000, and we were now in the minority. And, of course, that was common throughout the West. The formation of states in the western United States took place as soon as the Indians were put into reservations and under control, and enough non-Native population came to form a government. That is the American process. It was not our idea, but did anybody take the time to go out to our villages and learn to speak our languages to try to explain what was happening and what was going to happen? I doubt it.

All of this is part of the history that brought us to the Alaska Constitutional Convention. The truth of the matter is that we were not

3. *E.g.*, Migratory Bird Treaty Act of 1918 (MBTA), 16 U.S.C. §§ 703–712 (2018).

there at the Alaska Constitutional Convention in 1955. It was before my time, so I do not know why our people did not see the significance and importance of the work that was being done with the constitution. At that time, there were Alaska Native politicians, including the first Alaska Senate President.

The issues that still plague us today have their roots in the Alaska Constitution. Concerns about land, languages, participation in our educational system, and the importance of fish and game to our lives are absent in the document. If the Alaska Constitution had just included a few key phrases, that could have made a great deal of difference.

The new constitution had real deficiencies. There was no recognition whatsoever of the tribal governments that existed at the time. None. And let me give you an example of how the constitution affected my hometown. Before statehood we had a tribal government. As soon as the fourth class city, Title 29,[4] came into effect, the non-Natives organized a city government, quickly took control, and invited the Bureau of Land Management to survey the land. They did not give us a real choice about whether it should be a general townsite or a Native townsite, and before we knew it, they had bought up the entire spit on which Kotzebue is located. They paid $50 or $75 or $100 per lot for property that today that is worth $40,000 or $50,000 per lot. So today we have become squatters and renters because of what they did. The reality is that the Alaska Constitution did not even have any kind of mechanism for regional planning that could have been useful for us.

At the time of the Alaska Constitutional Convention, there were still elements of racism. It was only ten years before that they had passed the Indian civil rights law that eliminated the signs that said "no dogs or Natives allowed" or "Natives only" or "Natives need not apply."[5] There were property covenants in Rogers Park and Turnagain where we were not allowed to buy a lot unless we were servants. In Juneau, the only thing we had for elders was a pioneer home. Well the pioneer home was, sadly, not for us. But I did fight to get some facility for our elders in Kotzebue, and I had to do it under the pioneer home law because that was the only thing we had going on for elderly people. But the law said "applicability to natives—any Alaska Native receiving aid from the US government is hereby ineligible." We could not get in the pioneer home.

4. Title 29 of the Alaska Statutes addresses Municipal Government. ALASKA STAT. § 29.04.030 (2018).

5. The Alaska Anti-Discrimination Act was adopted by the Territorial Legislature in 1945. Act of Feb. 21, 1945 Alaska Sess. Laws ch. 2, 35–36 (codified at ALASKA STAT. §§ 18.80.200-.295).

But the good news is that this is America. And thank God that Secretary of State Seward decided that Alaska should become part of the United States. Had we stayed with the czar, we would have literally no rights whatsoever. Our land rights would be about as deep as a reindeer could chew. There would be nothing like what we have today, insofar as our land is concerned. But the reality was that we had to fight the miners and the businessmen, and the forest product industry, who did not believe we had the ability and the sense to manage our own affairs. They never thought that we would be able to help manage Alaska.

The Alaska Constitution is a great constitution. It would have been greater had it recognized the fact that we were here and had been here for a long time. But we were not truly participating with only one out of fifty-five delegates.[6] Our thoughts, values, history, and issues were simply not reflected in the Alaska Constitution.

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I will focus my comments mostly on Article 8 of the Alaska Constitution because that section would have had been significantly different if there had been greater Alaska Native representation at the convention.

But first, I would like to consider the Preamble to the Alaska Constitution. The Preamble says,

> We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska.[7]

Muktuck Marston raised an issue with the use of the word "pioneer" in the Preamble. He pointed out how Alaska Natives were excluded from that Preamble. And out of fairness and justice, he argued that there should be a provision in the Constitution that acknowledged the issue of fishing sites for Alaska Natives and how they deserved control and title.[8] People were walking in and taking those rights without regard for Alaska Natives. The proposal to acknowledge historical fishing rights was defeated, and indeed, it never even came to a vote at the convention.

6. Frank Peratrovich was the only Alaska Native delegate to the Alaska Constitutional Convention. *History of Klawock Cooperative Association*, KLAWOCK COOP. ASS'N, http://www.klawock.org/about.html (last visited Jan. 13, 2019).

7. ALASKA CONST. pmbl.

8. VICTOR FISHER, ALASKA'S CONSTITUTIONAL CONVENTION 137–39 (1975).

Instead, the delegates cast it aside and declared that fishing sites would be a federal issue. This ignored the fact that there were 100 million acres of state land that were going to be under state control, separate from any federal action. Everyone at that convention either knew or should have known that the subsistence way of life was essential to one quarter of Alaska's population. A quarter that was not represented at that convention.

In contrast, if you look at the Hawaii Constitution, its preamble states, "We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an Island State, dedicate our efforts to fulfill the philosophy decreed in the Hawaii state motto, 'Ua Mau ke Ea o ka ʻ Āina i ka Pono.'"[9] What a difference in preambles. What a difference a few delegates made in their constitution.

Article 8 is the part of the Alaska Constitution that defines the use of natural resources for the state. One of the prime motivations of the people that wanted statehood was to be in control of the development of natural resources, including fishing as well as mining, without interference by the federal government. The basic thrust of Article 8 is to promote the development of resources consistent with beneficial uses. There is the "common use" clause, which has been interpreted similar to the public trust doctrine, but there is absolutely nothing explicitly about subsistence hunting and fishing in there. To the contrary, what is in Article 8 is the enshrinement of equal protection to ensure that natural resources can be developed by all;[10] there is no special privilege for natural resources for Alaska Natives.

In contrast, if one looks at the Hawaii Constitution, there is a provision that directly addresses Native Hawaiians' rights: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by [the native Hawaiian] tenants."[11] I suggest to you again that Article 8 would have been significantly different if there had been substantial Alaska Native participation during the constitutional convention. Rights to subsistence hunting and fishing were intentionally *not* included and the issue was left to the federal government.

This becomes even more important in Alaska than other places. Tribes in the "lower 48" have reservations. They have Indian country, they have self-determination, and they have places where they can

9. HAW. CONST. pmbl.

10. ALASKA CONST. art. VIII, § 17 ("Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.").

11. HAW. CONST. art. XII, § 7.

protect their culture and their hunting and fishing and other resources. In Alaska, the prevailing thought is that the State of Alaska has the authority to manage even Native lands. In current practices, the State of Alaska, the Board of Game, and the Board of Fisheries—dominated by commercial and sport interests—regulates those lands including the 40 million acres of ANSCA lands. So Article 8 becomes even more important than in other states where Native Americans have some control over their lives.

So what would happen now if the Alaska Supreme Court took into consideration the fact that the Alaska Natives—a quarter of the population—were largely excluded from the constitutional process? The Alaska Supreme Court does sometimes look at historical factors—the historical context of the constitution when it was enacted. But to my knowledge—and I have read nearly all the cases that have to do with Article 8—there has never been any kind of explicit, or even implicit, recognition about this exclusion, about the failure to look at Native American hunting and fishing rights in the constitution.

If you look at the way Article 8 has been interpreted—or the constitution in general—there are only a few cases where the Alaska Supreme Court has acknowledged the historical and continuing context of the importance of subsistence hunting and fishing, not only as to nutritional and economic values, but culturally. One was *Frank v. State*,[12] which enshrined, under First Amendment religious freedoms, the right to take moose for potlatches. There, the Court did rely on the importance of cultural practice but as a religious freedom,[13] and not under Article 8. And then in *Alvarado v. State*,[14] which secured the right for Alaska Natives to have Native people on juries, the Court again looked at the cultural differences between Native villages and urban areas. But again, this was a due process claim and not one arising under Article 8.[15]

In the Article 8 context, it is interesting to look at the early cases when the Alaska Supreme Court Justices were closer to the origins of the Alaska Constitution. In *State v. Tanana Valley Sportsmen*,[16] for example, the Alaska Supreme Court explicitly recognized in a footnote the continued importance for the culture and the well-being of Native villagers to have opportunities to hunt and fish on their lands.[17] Then, in the 1980s and 1990s, the court made several decisions that interpreted Article 8 as related to subsistence hunting and fishing rights. In cases like *McDowell*

12. 604 P.2d 1068 (Alaska 1979).
13. *Id.* at 1073.
14. 486 P.2d 891 (Alaska 1971).
15. *Id.* at 899.
16. 583 P.2d 854 (Alaska 1978).
17. *Id.* at 859 n.18.

v. State,[18] the Court interpreted several sections in Article VIII to require equal access to fish and wildlife resources for all Alaskans, regardless of residency. The Court acknowledged the importance of subsistence uses for Alaskans regardless of residency, however, *McDowell* set up a chain of events and decisions which diluted protections for the subsistence way of life in rural Native and non-Native communities.[19]

The worst case that interprets subsistence rights under the Alaska Constitution in my opinion is not *McDowell*, but rather the 1995 case *State v. Kenaitze Indian Tribe*.[20] Until the *Kenaitze* decision, state law recognized that giving a priority for hunting and fishing to subsistence users who lived near the resources is important when those fish and wildlife resources are in short supply. But in *Kenaitze*, the Court held that it violates the constitutional provisions in Article VIII to consider how close the fish and wildlife resource is located to where the user lives.[21] To take proximity of the resource to where the subsistence users live would be to take "residency" into account and would *per se* be a violation of equal protection.[22] In my view, this superficial application of *McDowell*'s residency-focused approach to equal protection analysis ignored the reality that traditional subsistence uses occur in the traditional hunting and fishing areas close to a village. Even worse, in my view, in the same case the Court found that it was *not* a violation of equal protection to deny the Kenaitze Indian tribe the right to hunt in their traditional territory even though other tribes elsewhere in the state have that right. The Court upheld the classification of the land and waters in the Kenaitze Tribe's traditional hunting and fishing area as a "non-subsistence area" where it is illegal for the State to implement the protections for subsistence hunting and fishing that remain in State law.[23] There was no analysis by the Court about the cultural and historical context of the lands as related to the tribe's traditional way of life. The Court simply held that there is no right to have "convenient" access to subsistence resources.[24] There was no acknowledgement that subsistence uses by Alaska Natives are closely tied to their traditional territory.[25]

18. 785 P.2d 1 (Alaska 1989).

19. John Sky Starkey, *Protection of Alaska Native Customary and Traditional Hunting and Fishing Rights Through Title VIII of ANILCA*, 33 ALASKA L. REV. 315–28 (2016).

20. 894 P.2d 632 (Alaska 1995).

21. *Id.* at 639.

22. *Id.*

23. *Id.* at 642.

24. *Id.* at 640.

25. I also want briefly respond to the suggestion the Alaska Constitution should be amended to deal with these concerns. Following *McDowell*, there were actually five special sessions where they tried to get a constitutional amendment

But on the bright side of things, the current Alaska Supreme Court in recent decisions—one originally decided by Judge Tan when he was on the Superior Court bench in the *Manning* case[26]—have started to roll back the restrictive equal protection analysis somewhat and begin to recognize that the state subsistence laws are intended to protect the traditional subsistence way of life. The Supreme Court, in a recent decision,[27] actually held that the subsistence statute protects a "traditional culture and a way of life." But that case is based on state laws. It does not acknowledge the failure of the Alaska Constitution to even consider subsistence users. I think that might be the fault of lawyers for not making these arguments and raising them in this context. My ultimate goal as a lawyer in representing Alaska Natives would be to convince the Alaska Supreme Court to take a look at the exclusion of Alaska Natives from the convention process and to read into Article 8 an implicit right for subsistence hunting and fishing by all people in Alaska—Alaska Natives and others—who are actually and genuinely living that way of life.[28]

on the ballot that would recognize subsistence as a constitutional right. There were two special commissions that made recommendations for statutory and constitutional changes. To enact those changes, however, it was necessary to have the support of two-thirds of both the House and Senate. We could not get it. So constitutional change may be possible, but it has certainly been an exhausting and unsuccessful process so far.

26. *State Dept. of Fish and Game v. Manning*, 161 P.3d 1215, 1223 n.38 (Alaska 2007) (the subsistence laws may include the purpose of "preserving a traditional culture and way of life.").

27. *Alaska Fish and Wildlife Conservation Fund v. State*, 289 P.3d 903, 909 (Alaska 2012).

28. One way the court could take the traditional and cultural history of Alaska Natives into account is to apply the so-called "Indian canon" method of interpretation used by the federal courts since the 1800's. *See, e.g.*, Chicksaw Nation v. United States, 534 U.S. 84, 88 (2001) (describing the Indian canon as "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit"). Under that approach, courts should interpret treaties and statutes impacting Native Americans from the perspective of what the Native Americans would believe was going to happen from the treaty, and therefore giving all the benefit of the doubt over ambiguities in favor of the Native interests. If applied in Alaska, this would require considering what subsistence users at the time would have believed the constitution was protecting. None of the Alaska Natives at the time would have thought or approved of a constitution that takes away their way of life.