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PLAYING REINDEER GAMES: NATIVE ALASKANS AND THE FEDERAL TRUST DOCTRINE

*Terese Dillingham**

The Reindeer Industry Act of 1937 established a de facto Native Alaskan monopoly in the reindeer industry as a means of subsistence that would allow Native Alaskans to remain self-sufficient and continue to practice their traditional customs. In 1997, the Ninth Circuit held that the Reindeer Act did not preclude non-Natives from owning and selling reindeer, thereby opening the reindeer industry up to non-Natives. The unique Native Alaskan culture of the Seward Peninsula, which depends upon the reindeer industry, is in jeopardy as a result of competition it now faces from non-Natives. The federal government has a fiduciary obligation to protect the cultural welfare of Native Alaskans as a result of the trust relationship that exists between the federal government and Native Americans. The federal government has yet to take action to fulfill that fiduciary obligation to the Native Alaskan reindeer herders of the Seward Peninsula.

INTRODUCTION

As a result of U.S. expansion into the Alaskan territory, the natural food supply of Native Alaskans was diminished and Native Alaskans struggled to meet their basic subsistence needs.¹ In addition, the federal government hoped to educate and “civilize” Native Alaskans and assimilate them into the American economy.² As a result, the federal government introduced reindeer to the Seward Peninsula of

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¹ See RICHARD O. STERN ET AL., BULLETIN 59, *ESKIMOS, REINDEER AND LAND* 22-24 (1980).

² See DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 286 (1984); Rhonda Wadeson, *Influence of the Introduction of Reindeer to the Seward Peninsula, Alaska* (visited Mar. 14, 1998) <<http://reindeer.salrm.alaska.edu/reinhist.htm>>.

Alaska in 1891 as a way to both provide for and assimilate Native Alaskans into American culture.³ Native Alaskans were taught reindeer herding and encouraged to pursue it in place of more traditional customs.⁴ As time passed, however, Native Alaskans were unable to compete with non-Natives and were gradually pushed out of the industry.⁵ Competition from natural forces, changes in herding practices and regional economic conditions resulted in a near collapse of the reindeer industry in the early 1930s.⁶ The federal government passed the Reindeer Industry Act (Reindeer Act) in 1937 to re-establish the reindeer industry under Native Alaskan control.⁷

Congress intended the Reindeer Act to provide a "means of subsistence for the Native Alaskans."⁸ Congress believed that the reindeer economy should be developed according to Native Alaskan values and mandated that the reindeer enterprises be operated by Native Alaskans in their "native way" in their "native lands."⁹ The subsidies given to the Native Alaskan herders under the Reindeer Act were designed to stabilize the economy and foster the growth of a dependable source of cash income and employment in isolated rural villages.¹⁰ The Reindeer Act intended to allow Native Alaskans to remain in their native land and continue to practice their traditional subsistence way of life.¹¹ The goal of the Reindeer Act was to ensure Native Alaskan self-sufficiency.¹²

In 1997, the Ninth Circuit held in *Williams v. Babbitt* that the Reindeer Act did not pertain to unique Native Alaskan concerns and ruled that the interpretation of the Reindeer Act by the Interior Board of Indian Appeals (IBIA) to exclude non-Natives from entering the reindeer industry was not entitled to deference because of the grave constitutional concerns it raised.¹³ The reasoning of the Ninth Circuit in the *Williams* case, however, failed to consider the trust relationship that exists between the federal government and Native Alaskans. As a result of this trust relationship, the federal govern-

³ See CASE, *supra* note 2, at 286; STERN ET AL., *supra* note 1, at 24.

⁴ See Wadson, *supra* note 2.

⁵ See *id.*

⁶ See CASE, *supra* note 2, at 209.

⁷ See *id.*; Reindeer Industry Act, 25 U.S.C. §§ 500-500n (1994).

⁸ 25 U.S.C. §§ 500-500n.

⁹ See CASE, *supra* note 2, at 286 (citing 81 CONG. REC. 9480 (1937)).

¹⁰ See *id.* at 208; STERN ET AL., *supra* note 1, at 24.

¹¹ See CASE, *supra* note 2, at 208; STERN ET AL., *supra* note 1, at 24.

¹² See CASE, *supra* note 2, at 207.

¹³ 115 F.3d 657, 662 (9th Cir. 1997).

ment has a fiduciary obligation to maintain and protect the economic and cultural welfare of the Native Alaskan reindeer herders.

This Comment examines the trust relationship between the federal government, Native Alaskans, and the reindeer industry in light of the *Williams* decision. Section I explores the history of Native Alaskan culture and reindeer herding on the Seward Peninsula of Alaska. The *Williams* decision and the Ninth Circuit's finding that the Reindeer Act does not pertain to unique Native Alaskan interests is examined in Section II. The existence of a federal trust obligation to protect Native Alaskan subsistence culture is analyzed in Section III. Section IV examines constitutional challenges made to legislation favoring Native Americans, and Section V illustrates how the federal government and the Ninth Circuit have previously protected nontraditional Native American practices to the exclusion of non-Natives. Section VI argues that reindeer herding has been incorporated into the unique Native Alaskan culture of the Seward Peninsula. As a result, the federal government has a fiduciary duty to maintain and protect the economic and cultural welfare of the Seward Peninsula Native Alaskan reindeer herders. This fiduciary duty is established and defined by the Reindeer Act, and survives constitutional challenges, as Native Alaskans are considered a political group rather than a racial group. Furthermore, the federal government has chosen in the past to protect other types of activities introduced to provide for and assimilate Native Americans into "western" culture. Finally, in conclusion, this Comment argues that in light of the *Williams* decision and other challenges facing the reindeer industry in Alaska, the federal government must take action to maintain the economic and cultural viability of the Native Alaskan reindeer industry on the Seward Peninsula in order to fulfill its fiduciary obligation to Native Alaskans.

I. NATIVE ALASKAN CULTURE AND REINDEER HERDING ON THE SEWARD PENINSULA

A. *Native Alaskan Culture and the Subsistence Way of Life*

Native Alaskans have occupied the Seward Peninsula of western Alaska for thousands of years.¹⁴ Today, the Seward Peninsula remains a sparsely populated, rural place that is unconnected to the state's

¹⁴ See STERN ET AL., *supra* note 1, at 19.

central road system.¹⁵ The Seward Peninsula's harsh climate, great distances to other food sources, high regional unemployment among Native Alaskans, and Native Alaskans' relative lack of cash reserves combine to make reliance on natural resources a necessity.¹⁶ As a result, Native Alaskans on the Seward Peninsula live in small, independent villages organized around subsistence economies based on raising reindeer, hunting, fishing, and gathering wild resources.¹⁷ Native Alaskans depend predominately on fish, marine mammals, reindeer/caribou, and berries for their nutritional needs.¹⁸ Conservation and perpetuation of subsistence resources are a way of life and are mandated by custom and tradition.¹⁹ Resources are taken strictly on an as-needed and as-available basis.²⁰

The "western" meaning of subsistence "connotes the bare eking out of an existence, a marginal . . . way of life."²¹ The term suggests only what is necessary for the physical survival of an individual or community.²² However, within the Native Alaskan community, subsistence has a much larger meaning.²³ Subsistence is intricately tied to the Native Alaskan culture and helps to define their entire way of life.²⁴ For Native Alaskans, the subsistence way of life involves a complex web of relationships that define and distinguish their traditional culture as a system of collective and cooperative economic and social relationships.²⁵ This culture encompasses an interdependence between generations, spiritual significance in exchanging goods with other community members, and an understanding of the intricate connections between humans, animals, and the environment.²⁶ Native Alaskans do not act only for themselves, but for many others in the

¹⁵ See Telephone Interview with Harry Bader, Professor, Dep't. of Animal Science, Reindeer Research Program, Univ. of Alaska Fairbanks (Jan. 8, 1998 & Feb. 2, 1999).

¹⁶ See William M. Bryner, Note, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 296 (1995).

¹⁷ See CASE, *supra* note 2, at 360.

¹⁸ See *id.*

¹⁹ See Mary Kancewick & Eric Smith, *Subsistence in Alaska: Towards a Native Priority*, 59 UMC L. REV. 645, 666 (1991).

²⁰ See *id.*

²¹ See David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. COLO. L. REV. 1009, 1009 (1989) [hereinafter *Subsistence and Self-Determination*].

²² See Bryner, *supra* note 16, at 295-96.

²³ See *Subsistence and Self-Determination*, *supra* note 21, at 1009.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*; Bryner, *supra* note 16, at 301.

village as well.²⁷ For Native Alaskans, subsistence is a system of social interaction and a mechanism through which cultural values can be transmitted.²⁸ Subsistence lies at the heart of the Native Alaskans' unique and long-standing culture.²⁹

B. *Effects of Outside Cultures*

The arrival of the Russians in the 1700s and increasing contact with outside cultures has forced Native Alaskans to supplement their traditional subsistence way of life in order to meet their basic needs.³⁰ In 1867, Russia sold the Alaskan territory to the United States.³¹ Shortly thereafter, Reverend Sheldon Jackson, a Presbyterian missionary, came to Alaska and established a mission on the Seward Peninsula.³² Jackson observed the Native Alaskans of the Seward Peninsula struggling against a diminishing natural food supply, which included caribou, marine mammals, and berries.³³

A combination of factors most likely caused the decline in the natural food supply on the Seward Peninsula during the late 1800s.³⁴ The introduction of firearms to the area, the establishment of commercial markets by non-Natives, and natural cyclic population fluctuations are all possible causes.³⁵ The decline in caribou, depended on for food, clothing, sinew, and various tools, forced changes in the Native Alaskans' subsistence customs.³⁶ Seward Peninsula Native Alaskans substituted fish and marine mammals such as seals, walrus, and whales into their diet, and moved to new locations.³⁷ Some decline in Native Alaskan populations did occur.³⁸ Moreover, marine mammal populations began to decline due to increased use by Native Alaskans and over-hunting by non-Natives who had established commercial markets for whales and whale by-products by 1850.³⁹ Whalers and

²⁷ See Kancewick & Smith, *supra* note 19, at 666.

²⁸ See Bryner, *supra* note 16, at 299.

²⁹ See *id.*

³⁰ See Ben Summit, *The Alaskan Native Claims Settlement Act (ANCSA): Friend or Foe in the Struggle to Recover Alaska Native Heritage*, 14 T.M. COOLEY L. REV. 607, 609 (1997).

³¹ See CASE, *supra* note 2, at 56.

³² See Wadeson, *supra* note 2.

³³ See STERN ET AL., *supra* note 1, at 19, 24.

³⁴ See *id.* at 22.

³⁵ See *id.*

³⁶ See *id.* at 23.

³⁷ See *id.*

³⁸ See STERN ET AL., *supra* note 1, at 23.

³⁹ See *id.*

hunters began to decimate the bowhead whale, walrus, caribou, and fur seals without regard for the subsistence lifestyle of the Native Alaskan population.⁴⁰ Native Alaskans found it more and more difficult to meet their basic subsistence needs.⁴¹

In 1884, Congress passed the Harrison Act, establishing a form of government for the Territory of Alaska.⁴² Within this new governmental structure, Jackson became the first General Agent of Education.⁴³ Jackson attempted to stop the depletion of Native Alaskan food sources and help Native Alaskans adjust and integrate into the American economy.⁴⁴ He made it his goal to assist Native Alaskans by establishing a resource base and providing a form of economic development for them.⁴⁵ Jackson had heard of reindeer being raised by Siberian Natives on the eastern coast of Russia and thought reindeer herding could be an excellent way to accomplish his goals.⁴⁶ He formulated a plan to introduce reindeer to Alaska and teach reindeer herding to the Native Alaskans.⁴⁷

Reindeer (*Rangifer tarandus*) are domesticated caribou.⁴⁸ Although similar, there are fundamental differences in the behavior of reindeer and their wild cousins, caribou.⁴⁹ Reindeer have been present in Eurasia for thousands of years and are believed to have been domesticated there for at least 7000 years.⁵⁰ Their domesticated nature make reindeer different from caribou because they need to be tended on the range to keep them safe from predators and may need to be driven to a better grazing area if their current area becomes sparsely vegetated.⁵¹ Reindeer tend to be smaller than caribou, with shorter legs, and are lighter in color.⁵² Reindeer have a life expectancy of ten to fifteen years, but mortality factors including disease, predators, and unpredictable weather impact life expectancy rates.⁵³ The

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Wadeson, *supra* note 2.

⁴³ See *id.*

⁴⁴ See STERN ET AL., *supra* note 1, at 24.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See STERN ET AL., *supra* note 1, at 4.

⁵⁰ See Wadeson, *supra* note 2.

⁵¹ See *id.*

⁵² See STERN ET AL., *supra* note 1, at 4.

⁵³ See *id.* at 5.

environmental conditions of the Seward Peninsula and the needs of the Native Alaskans there presented an ideal situation for the introduction of reindeer.⁵⁴

Jackson presented a plan to Congress to introduce reindeer and teach Native Alaskans reindeer care and management, which would provide a renewable food source to the Native Alaskans as an alternative to government subsidies.⁵⁵ Congress approved the plan and the first sixteen reindeer were brought from Siberia in 1891.⁵⁶ The Teller Reindeer Station was established at Port Clarence and reindeer were distributed to missions on the Seward Peninsula.⁵⁷ Each mission school received a small herd for teaching purposes.⁵⁸ The schools used the introduction of reindeer as a means for Native Alaskans to learn English,⁵⁹ to eliminate the need for nomadic hunting, and to establish Native Alaskans in a limited commercial enterprise.⁶⁰ Native Alaskan girls were taught sewing and housework, while Native Alaskan men and boys apprenticed as reindeer herders.⁶¹ Reindeer herding required five years of schooling and each apprentice earned the calves of two female reindeer per year.⁶² Along the way, reindeer were introduced to many other villages.⁶³ By July 1896, there were 1175 reindeer on the Seward Peninsula.⁶⁴

In addition to being a food source, reindeer were used to carry mail, passengers, and supplies.⁶⁵ For example, in 1899, two reindeer postal routes, one from St. Michael to Kotzebue and another from Eaton Station to Nome, were established.⁶⁶ Reindeer were less expensive to maintain than dog teams because food had to be obtained for the dogs, whereas reindeer could graze freely.⁶⁷ Large numbers of people arrived on the Seward Peninsula, when gold was discovered at Nome in 1898, and reindeer became an important source of meat.⁶⁸ In fact,

⁵⁴ See *id.* at 22-23.

⁵⁵ See Wadeson, *supra* note 2.

⁵⁶ See *id.*; STERN ET AL., *supra* note 1, at 24.

⁵⁷ See STERN ET AL., *supra* note 1, at 24.

⁵⁸ See *id.*

⁵⁹ See Wadeson, *supra* note 2.

⁶⁰ See CASE, *supra* note 2, at 208.

⁶¹ See Wadeson, *supra* note 2.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See STERN ET AL., *supra* note 1, at 26.

⁶⁵ See *id.* at 29, 31; Wadeson, *supra* note 2.

⁶⁶ See Wadeson, *supra* note 2.

⁶⁷ See *id.*

⁶⁸ See STERN ET AL., *supra* note 1, at 29.

in 1900, the demand for reindeer was greater than the supply, and meat had to be purchased from Siberia.⁶⁹

In 1902, Russia stopped exporting reindeer to Alaska.⁷⁰ At that time, 1280 reindeer had been imported.⁷¹ By 1904, there were ten reindeer stations in Alaska.⁷² However, a government investigation by the Department of Interior (DOI) found that a majority of the reindeer in Alaska were owned by non-Natives and missions, not by Native Alaskans.⁷³ As a result, Jackson resigned from his position and a new government policy to put more reindeer directly into Native Alaskan hands was established.⁷⁴

From the beginning of the reindeer program, the Office of Education carefully restricted the sale and slaughter of female reindeer in an effort to maintain Native Alaskan ownership of the reindeer.⁷⁵ Female reindeer could be owned by the government or Native Alaskans, but the missions were prohibited from selling them to non-Natives without government approval.⁷⁶ By 1910, there were approximately 27,000 reindeer located in thirty stations.⁷⁷ In addition to supplying food, reindeer had become "the most important feature of the industrial work of the Bureau of Education among the natives of northern and western Alaska."⁷⁸ The reindeer herds continued to increase in size and by 1914, they numbered approximately 57,800 animals.⁷⁹ Of these, approximately 37,800 were in small herds owned by individual Native Alaskan families.⁸⁰

It was not impossible, however, for non-Natives to acquire reindeer, and the percentage of non-Native ownership of reindeer again began to increase.⁸¹ By the 1920s, the Lomen brothers, non-Native entrepreneurs, had become the largest reindeer herd owners in Alaska.⁸² Several allegations of market monopolization, price gouging, and range

⁶⁹ See *id.*

⁷⁰ See *id.* at 17.

⁷¹ See *id.*

⁷² See Wadeson, *supra* note 2.

⁷³ See STERN ET AL., *supra* note 1, at 17, 34.

⁷⁴ See *id.* at 17, 35, 37.

⁷⁵ See CASE, *supra* note 2, at 208.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ See CASE, *supra* note 2, at 208.

⁸¹ See STERN ET AL., *supra* note 1, at 37-38.

⁸² See *id.* at 40-41.

overuse by the Lomens prompted the U.S. government to sue them.⁸³ The government alleged that its contract with the mission prevented the sale of reindeer to the Lomens.⁸⁴ The government lost their case and thereafter, the Lomens and other non-Natives acquired Native-owned reindeer and consolidated the small herds into larger, more economically efficient herds.⁸⁵

Native Alaskans attempted to compete with non-Native herders.⁸⁶ For example, in 1928, four Native Alaskan herders joined their herds together and started an association known as The Reindeer Company.⁸⁷ This and other Native Alaskan companies were unsuccessful because management was complicated, and Native Alaskans lacked commercial experience and expertise.⁸⁸ In 1936, in response to the competition from non-Natives and against intense Native Alaskan opposition, the government consolidated the remaining Native Alaskan herds into large "unit" herds, issued shares of stock to the former Native Alaskan owners (one share for each reindeer), and hired the former owners as herders.⁸⁹ A disastrous decline in the herds followed, accompanied by substantial racial tension between the Native Alaskan and non-Native herders.⁹⁰ One speculated cause for the reindeer decline was that less diligent herding practices had permitted reindeer to assimilate into wild caribou herds.⁹¹ Another speculated cause was that consolidating family herds into large unit herds and stock companies was not compatible with Native Alaskan cultural values and eliminated pride in family herd ownership.⁹² Furthermore, range depletion and over-grazing, predators, disease, and human over-killing also contributed to the reindeer population decline.⁹³ By this time, the Nome gold rush had ended, the Great Depression had set in, and the market for reindeer meat outside Alaska had disappeared.⁹⁴ The reindeer industry was on the verge of collapse.⁹⁵

⁸³ See *id.* at 54, 59.

⁸⁴ See *id.*

⁸⁵ See CASE, *supra* note 2, at 208.

⁸⁶ See Wadeson, *supra* note 2.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See CASE, *supra* note 2, at 209.

⁹⁰ See *id.* at 209, 229 n.109.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See CASE, *supra* note 2, at 209; STERN ET AL., *supra* note 1, at 53, 66.

⁹⁵ See CASE, *supra* note 2, at 209.

C. *The Reindeer Industry Act of 1937*

In an effort to remedy the collapsing industry, Congress passed the Reindeer Act in 1937.⁹⁶ The Secretary of the Interior was directed to acquire all non-Native owned reindeer and reindeer equipment and place it in trust for the Native Alaskans, distribute the reindeer and equipment to Native Alaskans, and prevent future alienation of reindeer to non-Natives.⁹⁷ The Reindeer Act gave the Native Alaskans government aid, facilitated the purchase of all non-Native owned herds, and established significant barriers to non-Native involvement in the reindeer industry.⁹⁸ Native Alaskans were given free grazing privileges on federal lands.⁹⁹ The Reindeer Act also established a revolving loan fund to finance the reindeer business and permitted the Secretary of the Interior to delegate his administrative authority over the reindeer to Native Alaskan organizations.¹⁰⁰ Furthermore, the Reindeer Act established criminal sanctions for a violation of the statute and authorized the expenditure of \$2 million by the Secretary of the Interior in carrying out the provisions of the Reindeer Act.¹⁰¹ The Reindeer Act essentially established a de facto monopoly for Native Alaskans in the reindeer industry.¹⁰²

The Reindeer Act was intended to provide a "means of subsistence for the Native Alaskans."¹⁰³ The Reindeer Act was to achieve that goal by establishing a reindeer herding industry under Native Alaskan control.¹⁰⁴ Congress believed that the reindeer industry should be developed according to Native Alaskan values and mandated that the reindeer enterprises be operated by Native Alaskans in their "native way," in their "native lands."¹⁰⁵ The subsidies given to the Native Alaskan herders under the Reindeer Act were designed to stabilize the economy and foster the growth of a dependable source of cash income and employment in isolated rural villages.¹⁰⁶ After a period of study, Congress appropriated \$720,000 to purchase reindeer in 1939.¹⁰⁷

⁹⁶ See *id.*; Reindeer Industry Act, 25 U.S.C. §§ 500–500n (1994).

⁹⁷ See 25 U.S.C. §§ 500, 500a, 500g, 500i; CASE, *supra* note 2, at 209.

⁹⁸ See 25 U.S.C. §§ 500a, 500e, 500i, 500m.

⁹⁹ See *id.* § 500m.

¹⁰⁰ See *id.* §§ 500e, 500h.

¹⁰¹ See *id.* § 500i; FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 411 (1941).

¹⁰² See 25 U.S.C. § 500; *Williams v. Babbitt*, 115 F.3d 657, 661 (9th Cir. 1997).

¹⁰³ 25 U.S.C. § 500.

¹⁰⁴ See CASE, *supra* note 2, at 286.

¹⁰⁵ See *id.* (citing 81 CONG. REC. 9480 (1937) (remarks by Rep. Green)).

¹⁰⁶ See *id.* at 208; STERN ET AL., *supra* note 1, at 24.

¹⁰⁷ See COHEN, *supra* note 101, at 411.

Opposition to the Reindeer Act was directed predominately at the \$2 million appropriation attached to it.¹⁰⁸ The intent of the legislation, the status of the Native Alaskans, or the authority of the federal government to promote their cultural and economic welfare were not challenged.¹⁰⁹

D. *The Reindeer Industry Today*

Today, the reindeer industry is still concentrated on the Seward Peninsula.¹¹⁰ Herding activity takes place on twelve ranges, covering almost 55 million acres across federal, state, Native Alaskan corporation, and private lands, including units of the National Park Service and the U.S. Fish and Wildlife Service.¹¹¹ More than ninety percent of reindeer found in Alaska graze on the Seward Peninsula due to the general absence of a permanent or major migratory presence of wild caribou.¹¹²

At the local level, the reindeer industry makes a vitally important contribution.¹¹³ A reindeer herder is identified as such by his village; he is known by, and his social interactions are based on, this label.¹¹⁴ His personality and character are secondary features.¹¹⁵ Within the village, the reindeer herder is a major employer and leader, and ensures the care of his family.¹¹⁶ The reindeer owner is an important contributor to the village economy.¹¹⁷ He usually employs male relatives to work at reindeer handling stations and to make regular checks on his herd during the winter.¹¹⁸ Women and girls are hired to cook and clean at handling stations.¹¹⁹ It is common practice to pay workers in reindeer meat.¹²⁰

Many reindeer herders, however, do not generate sufficient income from reindeer herding to provide their total yearly income and food

¹⁰⁸ See CASE, *supra* note 2, at 287.

¹⁰⁹ See *id.*

¹¹⁰ See STERN ET AL., *supra* note 1, at 1.

¹¹¹ See Telephone Interview with Harry R. Bader, *supra* note 15.

¹¹² See STERN ET AL., *supra* note 1, at 22; Telephone Interview with Harry R. Bader, *supra* note 15.

¹¹³ See STERN ET AL., *supra* note 1, at 119-21.

¹¹⁴ See *id.* at 104.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 121-24.

¹¹⁷ See *id.* at 119-21.

¹¹⁸ See STERN ET AL., *supra* note 1, at 119-20.

¹¹⁹ See *id.* at 120.

¹²⁰ See *id.*

supply.¹²¹ As a result, reindeer herders are also usually involved in other subsistence activities, such as hunting and fishing, or may operate another business in order to meet their subsistence needs.¹²² Many reindeer herders indicate that the food and income that the herding provides for their family and other village members are their main motivation to continue herding.¹²³

Reindeer herding does compete with the traditional subsistence activities of the herders because calving time coincides with subsistence hunting.¹²⁴ The reindeer need to be watched during the calving season to keep predators away.¹²⁵ As a result, herders choose camp sites to accommodate both reindeer and hunters, and herding activities are scheduled to minimize conflict with subsistence activities.¹²⁶ In addition, Native Alaskans have incorporated their traditional customs into those they have been taught.¹²⁷ For example, reindeer herding tasks are usually combined with subsistence activities, such as berry picking, fishing, or setting traps.¹²⁸ Another example is clipping the reindeer antlers.¹²⁹ When the herders begin this task, requiring thirty-six hours of labor, the women of the village pick willow leaves and soak them in seal oil.¹³⁰ The leaves are dried and delivered to the herders on the grazing lands as a source of energy.¹³¹ This practice is a traditional hunting custom.¹³² Thus, while there are differences in the actual tasks being performed (i.e., hunting or herding) many of the relationships, interactions, and customs are the same.

Reindeer are an excellent protein source.¹³³ They also provide antler velvet and hides to consumers.¹³⁴ Natives Alaskans eat more reindeer or caribou meat than beef, pork, or chicken.¹³⁵ Reindeer meat is high in protein (twenty-seven percent) and low in fat (one percent),

¹²¹ See *id.* at 125.

¹²² See *id.*

¹²³ See STERN ET AL., *supra* note 1, at 125.

¹²⁴ See *id.* at 10.

¹²⁵ See *id.*

¹²⁶ See *id.* at 9, 10.

¹²⁷ See Telephone Interview with Harry Bader, *supra* note 15.

¹²⁸ See STERN ET AL., *supra* note 1, at 9-10.

¹²⁹ See Telephone Interview with Harry Bader, *supra* note 15.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See STERN ET AL., *supra* note 1, at 137.

¹³⁴ See *id.* at 139-40.

¹³⁵ See *id.* at 135-36.

compared to twenty-two percent protein and five percent fat in lean beef.¹³⁶

Today, reindeer herding is the single most significant component of Alaska's livestock industry.¹³⁷ Reindeer in the state number approximately 27,000.¹³⁸ There are more reindeer within the state of Alaska than the total number of cattle, swine, and sheep combined.¹³⁹ The primary commercial center for reindeer product sales is the community of Nome, with a year-round population of approximately 4000.¹⁴⁰ Other primarily Native Alaskan communities on the Seward Peninsula involved in the reindeer industry include White Mountain, Teller, Brevig Mission, Shishmaref, and Deering.¹⁴¹ The total population of these villages is approximately 1450.¹⁴² Thus, today on the Seward Peninsula alone, approximately 5450 Native Alaskans are significantly impacted by and depend upon the reindeer industry.

The reindeer industry is currently facing several difficult challenges. For example, between 1985 and 1996, the caribou population dramatically increased from a low of 70,000 to the current population of 485,000.¹⁴³ Consequently, major incursions of migratory caribou herds have occurred on the Seward Peninsula with increasing frequency.¹⁴⁴ More than 80,000 of these caribou migrated through reindeer ranges of the eastern Seward Peninsula in the winter of 1997, displacing reindeer and competing for winter forage.¹⁴⁵ This caribou influx is likely to recur as the caribou population peaks.¹⁴⁶ Approximately 4000 to 5000 reindeer were reported lost to the migratory caribou herds in 1997 and approximately four herds, or 8000 to 10,000 reindeer, were reported lost in 1998.¹⁴⁷

¹³⁶ See *id.* at 137.

¹³⁷ See ALASKA AGRICULTURAL STATISTICS SERVICE, U.S. DEP'T OF AGRIC., ALASKA AGRICULTURAL STATISTICS 22 (1997).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See STERN ET AL., *supra* note 1, at 128; Telephone Interview with Harry Bader, *supra* note 15.

¹⁴¹ See STERN ET AL., *supra* note 1, at 129; Telephone Interview with Harry Bader, *supra* note 15.

¹⁴² See Telephone Interview with Harry Bader, *supra* note 15.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See Telephone Interview with Drew H. Shain, Assistant Professor, Dept. of Animal Science, Reindeer Research Program, Univ. of Alaska Fairbanks (Mar. 19, 1998 & Feb. 1, 1999).

¹⁴⁷ See *id.*

Migratory caribou herds are not the only challenge to Native Alaskan reindeer herders today. Until very recently, all reindeer herding on the Seward Peninsula was done by a free-range system, where the reindeer are allowed to graze freely on open federal lands.¹⁴⁸ Recently, several feed-lot reindeer operations have been established along the state highway system.¹⁴⁹ These operations are similar to cattle feed-lot operations in the continental United States where the animals are kept within a fenced-in area.¹⁵⁰ These operations are located closer to transportation and distribution systems, making it cheaper to get products to market.¹⁵¹ They are purely commercial and are not integrated into the Native Alaskan culture.¹⁵² Their success remains to be seen as they are still developing. In addition, after the Ninth Circuit decision in *Williams v. Babbitt*, Native Alaskan reindeer herders are now also facing competition from non-Native herders.¹⁵³

II. *WILLIAMS v. BABBITT*: OPENING THE REINDEER INDUSTRY TO NON-NATIVE ALASKANS

In 1997, the Ninth Circuit held in *Williams v. Babbitt* that the Reindeer Act did not pertain to unique Native concerns.¹⁵⁴ Additionally, it ruled that the interpretation of the Reindeer Act by the IBIA to exclude non-Natives from entering the reindeer industry was not entitled to deference because of the grave constitutional concerns it raised.¹⁵⁵ Consequently, the reindeer industry has been opened up to non-Natives.

A. *Background*

In 1986, Williams, a non-Native, informed the Bureau of Indian Affairs (BIA) Area Director in Alaska that he intended to import reindeer from Canada for commercial purposes and asked if his plan would violate the Reindeer Act.¹⁵⁶ The Area Director referred the

¹⁴⁸ See STERN ET AL., *supra* note 1, at 142–44; Telephone Interview with Drew H. Shain, *supra* note 146.

¹⁴⁹ See Telephone Interview with Drew H. Shain, *supra* note 146.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ 115 F.3d 657, 666 (9th Cir. 1997); see Telephone Interview with Drew H. Shain, *supra* note 146.

¹⁵⁴ See *Williams*, 115 F.3d at 664, 666.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 659.

inquiry to the Regional Solicitations Office, which held that Williams's plan would not violate the Reindeer Act, because nothing in the Reindeer Act specifically prohibits non-Natives from owning and selling reindeer.¹⁵⁷ The Regional Solicitor further noted that the Reindeer Act's prohibitions on selling reindeer to non-Natives only apply to two categories of reindeer: (1) reindeer owned by the government; and (2) reindeer owned by Alaskan Natives.¹⁵⁸ The Regional Solicitor held that these restrictions did not apply to Williams's imported Canadian reindeer and found Williams was free to sell his reindeer to anyone.¹⁵⁹ The Area Director officially adopted the Regional Solicitor's interpretation and the Native Alaskan reindeer herders appealed to the IBIA.¹⁶⁰ The IBIA acknowledged that the Reindeer Act says nothing regarding non-Native ownership of reindeer.¹⁶¹ Nevertheless, it held, based on the Reindeer Act's policy, structure, and legislative history, that the statute "must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved."¹⁶²

The U.S. District Court for the District of Alaska upheld the IBIA's interpretation and the non-Native herders appealed.¹⁶³ The Ninth Circuit reversed the district court and held that the IBIA construction of the Reindeer Act raised grave constitutional concerns under the Equal Protection Clause.¹⁶⁴ Therefore, according to the Ninth Circuit, the Reindeer Act does not preclude non-Natives in Alaska from owning and importing reindeer.¹⁶⁵ The BIA appealed the Ninth Circuit decision to the Supreme Court.¹⁶⁶ The Supreme Court denied certiorari.¹⁶⁷

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* "Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior . . . , and live reindeer in Alaska, and the increase thereof, owned by the said natives . . . shall not be sold or transferred . . . to anyone other than . . . natives of Alaska . . ." Reindeer Industry Act, 25 U.S.C. § 500i (1994).

¹⁵⁹ *See Williams*, 115 F.3d at 659.

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See Williams*, 115 F.3d at 666.

¹⁶⁵ *See id.*

¹⁶⁶ *See Kawerak Reindeer Herders Assoc. v. Williams*, 118 S. Ct. 1795, 1795 (1998).

¹⁶⁷ *See id.*

B. Ninth Circuit Analysis

According to the Ninth Circuit's analysis, despite the fact that the Reindeer Act does not explicitly prohibit reindeer ownership by non-Natives, it was necessary to construe the Reindeer Act subject to a number of countervailing considerations.¹⁶⁸ First, under *Chevron U.S.A., Inc. v. Natural Resource Defense Council*, a statutory interpretation adopted by an agency while adjudicating a dispute is entitled to substantial deference.¹⁶⁹ An agency is entitled to *Chevron* deference largely because Congress has delegated interpretive authority to it and because the agency has superior expertise in its particular area.¹⁷⁰ As the DOI administers the Reindeer Act¹⁷¹ and the IBIA exercises final decision-making authority for the Secretary of the Interior concerning challenges to administrative actions by BIA officials, there is no dispute according to the court that the IBIA's interpretation of the Reindeer Act is entitled to *Chevron* deference absent other considerations.¹⁷²

The court's second countervailing consideration was the requirement that statutes favoring Native Americans be liberally construed in their favor.¹⁷³ In *County of Yakima v. Confederated Tribes*, the Supreme Court stated that when faced with two possible statutory constructions, the "choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" ¹⁷⁴

In addition, the court recognized that for the past sixty years, Native Alaskans have had a de facto monopoly in the Alaskan reindeer business, which adds the force of a long-standing construction to the merit of the IBIA's interpretation.¹⁷⁵ This monopoly was developed under the supervision of the DOI.¹⁷⁶ The court concluded that

¹⁶⁸ See *Williams*, 115 F.3d at 660.

¹⁶⁹ 467 U.S. 837, 842-43 (1984).

¹⁷⁰ See *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696 (1991).

¹⁷¹ See Reindeer Industry Act, 25 U.S.C. §§ 500-500n (1994). "The Secretary of the Interior is hereby authorized to promulgate such rules and regulations as, in his judgment, are necessary to carry into effect the provisions of this subchapter." *Id.* § 500k.

¹⁷² See *Williams*, 115 F.3d at 660 n.3.

¹⁷³ See *id.* at 660.

¹⁷⁴ 502 U.S. 251, 269 (1992).

¹⁷⁵ See *Williams*, 115 F.3d at 661.

¹⁷⁶ See *id.*

based on these factors, the IBIA's interpretation of the Reindeer Act to exclude non-Natives is not "unreasonable."¹⁷⁷

Weighing on the other side, however, the court considered the equal protection issues raised by the appellants.¹⁷⁸ The court stated that it would expect Congress to spell out its intent to exclude a majority of the population in Alaska from engaging in a particular enterprise.¹⁷⁹ The court then assessed the question of the extent to which a court is bound to defer to an agency's interpretation where that interpretation raises difficult constitutional concerns.¹⁸⁰ To which the court answered, courts are required to "skeptically" scrutinize constitutional objections to a particular agency interpretation, and only if the agency's proffered interpretation raises serious constitutional concerns may the court refuse to defer under *Chevron*.¹⁸¹ Therefore, according to the Ninth Circuit, whether or not the IBIA's interpretation of the Reindeer Act was entitled to *Chevron* deference turned on the seriousness of the constitutional questions it raised.¹⁸²

The court, however, disregarded the second countervailing consideration requiring that statutes favoring Native Americans be liberally construed in their favor. The court stated that while at least the District of Columbia Circuit regards this liberal construction rule as a substantive principle of law,¹⁸³ the Ninth Circuit regards it only as a "mere guideline"¹⁸⁴ and a "canon of construction."¹⁸⁵ The court also stated that "as a result, if the IBIA's interpretation does not prevail despite *Chevron's* help, the less powerful liberal construction guideline will not save the day."¹⁸⁶ However, what the Ninth Circuit failed

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 660.

¹⁷⁹ See *id.* at 661.

¹⁸⁰ See *Williams*, 115 F.3d at 661.

¹⁸¹ See *id.* at 662 (citing *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 574 (1988)). In *DeBartolo*, the Court rejected the National Labor Relation Board's (NLRB) interpretation of § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), that would have prohibited certain handbilling by unions. See *DeBartolo*, 485 U.S. at 574. The Court stated that although the NLRB was entitled to *Chevron* deference, it refused to defer to the NLRB because its interpretation raised serious First Amendment questions. See *id.* The *DeBartolo* case did not involve Native American issues.

¹⁸² See *Williams*, 115 F.3d at 663.

¹⁸³ See *id.* at 663 n.5 ("[T]he liberality rule . . . involving native Americans derives from principles of equitable obligations and normative rules of behavior, rather than from ordinary statutory exegesis." (quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991))).

¹⁸⁴ See *id.* (citing *Shields v. United States*, 698 F.2d 987, 990 (9th Cir. 1983)).

¹⁸⁵ See *Williams*, 115 F.3d at 663 n.5 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 770 (1985) (White, J., dissenting)).

¹⁸⁶ See *id.*

to consider in its analysis was the existence of a federal trust obligation to protect Native Alaskan economic and cultural welfare.¹⁸⁷

III. THE FEDERAL GOVERNMENT'S TRUST OBLIGATION TO PROTECT NATIVE ALASKAN SUBSISTENCE CULTURE

A. *Trust Relationship and Fiduciary Responsibilities*

Federal Native American jurisprudence is distinguished by a "trust" relationship between the federal government and Native American tribes.¹⁸⁸ Chief Justice John Marshall first described the trust relationship between Native American tribes and the federal government as resembling "that of a ward to his guardian."¹⁸⁹ As a result, selected tenets of the common law of trusts have been applied to the relationship ever since.¹⁹⁰ This trust relationship is possible because Native American tribes occupy a unique position in our governmental system.¹⁹¹ They are separate governmental entities to which the U.S. Constitution does not apply.¹⁹² Thus, the relationship between the federal government and Native American tribes is an unusual combination of governmental and trust interactions.¹⁹³

Despite their tribal sovereignty, however, Native American tribes are still subject to the plenary power of Congress and general acts of Congress apply to their members.¹⁹⁴ The only exception is when a general law conflicts with specific privileges granted to Native Americans by treaty or statute.¹⁹⁵ In those instances, the general law applies only if Congress has manifested a specific intent to override the special privilege.¹⁹⁶ Despite tribal sovereignty, the trust beneficiary status afforded Native American tribes provides both benefits and limitations.¹⁹⁷ The federal trust responsibility imposes fiduciary duties of fair dealing and protection of Native American lands and resources

¹⁸⁷ See *United States v. Berrigan*, 2 Alaska 442, 442 (D. Alaska 1905).

¹⁸⁸ See H. BARRY HOLT & GARY FORRESTER, *DIGEST OF AMERICAN INDIAN LAW: CASES AND CHRONOLOGY* 41 (1990).

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 19.

¹⁹² See *id.*

¹⁹³ See HOLT & FORRESTER, *supra* note 188, at 19.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

on the federal government.¹⁹⁸ However, those duties also restrict the use of Native American property and prohibit certain tribal actions.¹⁹⁹

The primary instrument for carrying out the federal trust responsibility to Native Americans has been the BIA, located within the DOI.²⁰⁰ At one time, the BIA represented virtually the entire governing authority in Native American territories, particularly when assimilation was the goal of federal Native American policy and tribal self-government was discouraged.²⁰¹ Today, the activities of the BIA are more narrowly directed toward the fulfillment of the federal trust responsibility to Native Americans, especially in education and management of tribal resources.²⁰²

Government actions toward Native Americans must adhere to "exact-ing fiduciary standards" and reflect good faith and fair dealing.²⁰³ Courts have become increasingly more specific regarding the relationship between Native Americans and the federal government.²⁰⁴ Where statutory trust responsibilities have been established, courts have held the federal government to the fulfillment of those responsibilities.²⁰⁵ Courts have found breaches of these trust responsibilities by the federal government and have awarded monetary damages to Native American tribes.²⁰⁶

In 1983, the Supreme Court held in *United States v. Mitchell* that statutes and regulations mandating the pervasive involvement of the Secretary of the Interior in management of Native American timber created fiduciary obligations on the part of the federal government.²⁰⁷ Furthermore, the Court held that breach of these obligations by the federal government may give rise to monetary damages.²⁰⁸ Similarly, in 1986, the Court of Claims awarded damages to the Navajo Tribe for the federal government's failure to follow statutory and regulatory standards in managing tribal timber resources.²⁰⁹ Although most cases

¹⁹⁸ See HOLT & FORRESTER, *supra* note 188, at 19.

¹⁹⁹ See *id.*

²⁰⁰ See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 42 (1981).

²⁰¹ See *id.* at 43.

²⁰² See *id.*

²⁰³ See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); HOLT & FORRESTER, *supra* note 188, at 41-42.

²⁰⁴ See HOLT & FORRESTER, *supra* note 188, at 19.

²⁰⁵ See *id.* at 42.

²⁰⁶ See *id.*

²⁰⁷ See *id.*; *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983).

²⁰⁸ See *United States v. Mitchell*, 463 U.S. at 226; HOLT & FORRESTER, *supra* note 189, at 42.

²⁰⁹ See *Navajo Tribe v. United States*, 9 Ct. Cl. 336 (1986); HOLT & FORRESTER, *supra* note 188, at 42.

finding trust responsibilities have involved the handling of money, federal government responsibilities are broader.²¹⁰

The Supreme Court held in 1913, in *United States v. Sandoval*, that affirmative governmental trust duties are found in the federal statutes relating to Native Americans and that Congress determines the extent of the trust relationship.²¹¹ Therefore, the federal government's trust responsibilities only arise when the federal government explicitly recognizes them in its enactments.²¹² Thus, there must be a statutory trigger before the federal government will incur trust obligations.²¹³

B. Federal Trust Responsibilities and Native Alaskans

Thus, the federal trust relationship with Native Americans has served as a basis for federal governmental actions toward Native Americans and their property.²¹⁴ Modern courts are holding the federal government to established statutory trust responsibilities.²¹⁵ In *United States v. Berrigan*, a trust relationship between the federal government and Native Alaskans was first specifically recognized where the District Court of Alaska held that Native Alaskans are "wards of the United States."²¹⁶

1. Judicial Recognition of Federal Trust Responsibilities

The courts have recognized a federal trust responsibility to protect the subsistence economy and culture of Native Alaskans.²¹⁷ In *People of Togiak v. United States*, the court interpreted ambiguous provisions of the Marine Mammal Protection Act (MMPA) in light of the long history of Native Alaskan subsistence exemptions in federal treaties and statutes which allowed Native Alaskans to take marine mammals despite the moratorium placed on takings by non-Natives.²¹⁸

²¹⁰ See HOLT & FORRESTER, *supra* note 188, at 42. The Indian Nonintercourse Act of 1790 established a trust relationship between the Passamaquoddy Tribe and the federal government requiring the federal government to protect the title to Passamaquoddy aboriginal land, as a trust obligation, even though the Tribe was not recognized by the United States, and therefore was not eligible for federal Native American services. See *id.*

²¹¹ 231 U.S. 28, 46 (1913).

²¹² See Bryner, *supra* note 16, at 307.

²¹³ See *id.* at 307-08.

²¹⁴ See HOLT & FORRESTER, *supra* note 188, at 43.

²¹⁵ See *id.*

²¹⁶ 2 Alaska 442, 442 (D. Alaska 1905).

²¹⁷ See CASE, *supra* note 2, at 293.

²¹⁸ See Endangered Species Act of 1973, 16 U.S.C. § 1531 (1994 & Supp. III 1997); 470 F. Supp. 423 (D.D.C. 1979); CASE, *supra* note 2, at 290, 293.

The court held the federal government to its responsibility to preserve Native Alaskan subsistence values, stating “[t]hese various responsibilities impose fiduciary duties upon the United States including the duties so to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities against interference by the States.”²¹⁹

The courts also found a federal trust responsibility in *North Slope Borough v. Andrus*, where Native Alaskans challenged a proposed federal oil and gas lease sale in the Beaufort Sea.²²⁰ The lower court held that the responsible federal agency had not obtained an adequate “biological opinion” prior to making the lease sale decision as required under the Endangered Species Act (ESA).²²¹ Failure to do so, the court stated, was a breach of the federal trust responsibility imposed by the Native Alaskan exemption under the ESA.²²² On appeal, the District of Columbia Circuit held that the federal government’s responsibility to Native Alaskans was met when the federal leasing agency had both “acted responsibly” toward the environment and given “purposeful attention” to the interests of the Native Alaskans.²²³ The court concluded that the agency had done both in this case.²²⁴ Thus, when pitted against competing public interests, the federal trust responsibility emerges as an important but not overriding consideration.²²⁵ The extent of the federal trust obligation is defined by the statute.²²⁶

2. Federal Government Recognition of Trust Responsibilities

Furthermore, the federal government has also recognized a federal trust responsibility to protect Native Alaskan subsistence culture and economy through various subsistence exemptions found in federal conservation treaties and statutes.²²⁷ Legislation since the Reindeer Act, including the Alaska Native Claims Settlement Act (ANCSA) and the Alaskan National Interest Lands Conservation Act

²¹⁹ *People of Togiak*, 470 F. Supp. at 428.

²²⁰ 486 F. Supp. 332 (D.D.C. 1980), *rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980); *CASE, supra* note 2, at 293.

²²¹ *See North Slope Borough*, 486 F. Supp. at 344; *CASE, supra* note 2, at 293.

²²² *See North Slope Borough*, 486 F. Supp. at 344; *CASE, supra* note 2, at 293.

²²³ *See North Slope Borough*, 642 F.2d at 612; *CASE, supra* note 2, at 293.

²²⁴ *See North Slope Borough*, 642 F.2d at 612; *CASE, supra* note 2, at 293.

²²⁵ *See CASE, supra* note 2, at 293.

²²⁶ *See Bryner, supra* note 16, at 307-08.

²²⁷ *See CASE, supra* note 2, at 293-94.

(ANILCA), form a continuous pattern of congressional efforts to promote Native Alaskan cultural and economic well-being.²²⁸

a. *Alaskan Native Claims Settlement Act*

ANSCA, enacted in 1971, extinguished Native Alaskan land claims, established Native Alaskan corporations, and divided federally held Alaskan lands among the corporations.²²⁹ Although ANSCA did not address Native Alaskan subsistence directly, a joint Senate and House conference committee report indicated that the Secretary of the Interior was expected to protect Native Alaskan subsistence rights once ANSCA was in place.²³⁰ The DOI failed to act by 1980, prompting Congress to address the subsistence issue with ANILCA.²³¹

b. *Alaska National Interest Lands Conservation Act*

ANILCA invokes the federal authority to protect Native Alaskan "physical, economic, traditional, and cultural existence."²³² ANILCA establishes a Native Alaskan subsistence right on federal lands, and forms the basis for Alaska subsistence laws and regulations.²³³

ANILCA creates a preference for subsistence uses by establishing two tiers of regulations.²³⁴ In the first tier, if fish and game populations are sufficient to satisfy all subsistence users, regulations must grant a priority to subsistence uses over all other uses.²³⁵ In the second tier,

²²⁸ See *id.* at 294.

²²⁹ See Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1603, 1605-1607 (1994 & Supp. II 1996); Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 308 (1995).

²³⁰ See *Subsistence and Self-Determination*, *supra* note 21, at 1016.

²³¹ See *id.*

²³² Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111 (1994 & Supp. III 1997).

The Congress finds and declares that: (1) 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; . . . [and] (4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by native and non-Native rural residents

Id.

²³³ See Sacks, *supra* note 229, at 311.

²³⁴ See Bryner, *supra* note 16, at 309.

²³⁵ See *id.*

if such populations are insufficient to satisfy all subsistence users, limitations may be placed on subsistence uses.²³⁶ If a resource is insufficient to satisfy all subsistence uses, then the following criteria are to be applied in allocating the available resources among subsistence users: (1) customary and direct dependence as the mainstay of livelihood; (2) local residency; and (3) the availability of alternative resources.²³⁷ In addition, ANILCA provides a remedy for violations of its subsistence preference by authorizing a private civil action against the state or federal government in which the plaintiff may demand enforcement of ANILCA's requirements, including preliminary injunctive relief.²³⁸

ANILCA declares that Native Alaskan culture is worthy of legal protection.²³⁹ First, it explicitly states that "the continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional and cultural existence."²⁴⁰ Second, ANILCA permits preliminary injunctive relief, suggesting harm to subsistence may constitute an irreparable injury.²⁴¹ Third, ANILCA encourages private actions to enforce its provisions by awarding attorneys' fees to prevailing plaintiffs.²⁴²

Thus, the preservation of Native Alaskan culture has long been recognized as a legitimate object of federal concern.²⁴³ The special trust between the federal government and Native Alaskans imposes a fiduciary duty on the federal government to protect Native Alaskan subsistence culture.²⁴⁴

IV. CONSTITUTIONAL CHALLENGES

As in the *Williams* case, non-Natives often challenge Congress's power to legislate favorable treatment to Native Americans under the federal trust responsibility.²⁴⁵ The trust relationship between the federal government and Native American tribes is historically founded in the Indian Commerce Clause of Article I and the Treaty Clause of

²³⁶ See *id.* at 310.

²³⁷ See Kancewick & Smith, *supra* note 19, at 658.

²³⁸ See Bryner, *supra* note 16, at 310.

²³⁹ See *id.*

²⁴⁰ *Id.*

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See Bryner, *supra* note 16, at 305.

²⁴⁴ See *id.* at 306.

²⁴⁵ See generally *Morton v. Mancari*, 417 U.S. 535 (1974); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

Article II of the U.S. Constitution.²⁴⁶ Under the Indian Commerce Clause, the U.S. Supreme Court has found Congress's power to be quite broad, encompassing measures that both harm and help Native Americans.²⁴⁷

A. *Morton v. Mancari: Preference for Native Americans Is Political Not Racial*

One set of cases that challenged Congress's power argued that a given federal government action violated the equal protection clause of the Due Process Clause of the Fifth Amendment.²⁴⁸ In the central case on this issue, *Morton v. Mancari*, the Supreme Court addressed an equal protection challenge to a law benefiting Native Americans.²⁴⁹ In *Mancari*, non-Native American employees of the BIA argued that a BIA employment preference for Native Americans (authorized by a statute allowing Native American preferences) violated the equal protection clause of the Due Process Clause of the Fifth Amendment.²⁵⁰ The Court began its analysis by noting the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes."²⁵¹ The Court stated that this plenary power is drawn both explicitly and implicitly from the Constitution itself.²⁵² Article I, section 8, clause 3 of the Constitution, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes and thus, to this extent, singles Indians out as a proper subject for separate legislation."²⁵³ Article II, section 2, clause 2 of the Constitution, gives the President the power, by and with the advice of the Senate, to make treaties.²⁵⁴ The opinion then suggests that both Congress and the Court recognized the "special relationship" between the federal government and Native American tribes.²⁵⁵

²⁴⁶ See *Morton*, 417 U.S. at 551-52; Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 543-44 (1996).

²⁴⁷ See Benjamin, *supra* note 246, at 543.

²⁴⁸ See *id.* at 544.

²⁴⁹ 417 U.S. 535.

²⁵⁰ See Benjamin, *supra* note 246, at 545.

²⁵¹ *Morton*, 417 U.S. at 551.

²⁵² See *id.* at 551-52.

²⁵³ *Id.* at 552.

²⁵⁴ See *id.*

²⁵⁵ See Benjamin, *supra* note 246, at 545.

The Court then concluded that the BIA preference did not constitute racial discrimination, and was not even a racial preference: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and thus "the preference is political rather than racial in nature."²⁵⁶ The Court expanded this point, stating

[T]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.²⁵⁷

The Court ruled that in light of this distinction, the Native American preference was subject to review under a rational basis test, rather than under heightened scrutiny.²⁵⁸ Therefore, in order to pass the *Mancari* test, any special treatment afforded Native Alaskans would have to be rationally related to the fulfillment of Congress's unique obligation to Native Alaskans.

The distinction between tribal and racial classifications is key to the decision.²⁵⁹ As long as the Court can characterize the benefits to Native American tribes as existing on a government-to-government basis, such treatment can avoid heightened scrutiny.²⁶⁰

After *Mancari*, there were several Supreme Court cases that raised equal protection challenges to government actions that give priority to members of Native American tribes.²⁶¹ In each of those cases, the Court applied *Mancari's* analysis and upheld the constitutionality of the provision.²⁶²

V. PROTECTION OF NONTRADITIONAL NATIVE AMERICAN ACTIVITIES

Similar situations have existed in the past where the federal government has taken measures to protect nontraditional Native American activities, which had been introduced to Native Americans in an

²⁵⁶ *Morton*, 417 U.S. at 553 n.24.

²⁵⁷ *Id.* at 554.

²⁵⁸ See Benjamin, *supra* note 246, at 546.

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 548.

²⁶¹ See *id.*

²⁶² See *id.*

effort to provide for and assimilate them into the economy of the continental United States while still allowing Native Americans to continue their traditional lifestyle.²⁶³

A. *Agricultural Activities and Water Rights*

For example, agriculture was not part of many traditional Native American cultures but was taught and encouraged among Native Americans by the federal government.²⁶⁴ In response to contact with non-Natives, and changes in available food supplies and population settlement patterns, Native Americans assimilated agriculture into their traditional culture.²⁶⁵ Native Americans continued to hunt and gather wild resources and applied their knowledge and perceptions of nature and community to their agricultural activities.²⁶⁶ When water resources in the Mid-West began to become scarce, litigation arose as to what water rights Native Americans and non-Natives owned.²⁶⁷

1. *Colville Confederated Tribes v. Walton*: Protecting Nontraditional Native American Activities

In *Colville Confederated Tribes*, the Ninth Circuit found that one purpose for creating the Colville Reservation was to provide a homeland for Native Americans to maintain an agrarian society while also continuing to engage in their traditional fishing activities.²⁶⁸ The court held that where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude that the federal government intended to reserve the necessary water to the Native Americans.²⁶⁹ The Ninth Circuit further held that although these purposes dictated the reservation of water to the Native Americans, it did not dictate the use of the reserved water.²⁷⁰ In other words, the reserved water could be used for activities other than agriculture and fishing.²⁷¹ The Ninth Circuit stated that this finding

²⁶³ See generally *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1980); *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979).

²⁶⁴ See *Adair*, 723 F.2d at 1409-10.

²⁶⁵ See *id.* at 1409.

²⁶⁶ See *Adair*, 478 F. Supp. at 339.

²⁶⁷ See generally *Adair*, 723 F.2d 1394; *Colville Confederated Tribes*, 647 F.2d 42; *Adair*, 478 F. Supp. 336.

²⁶⁸ See *Colville Confederated Tribes*, 647 F.2d at 47-48.

²⁶⁹ See *id.* at 47.

²⁷⁰ See *id.* at 48.

²⁷¹ See *id.* at 48-49.

was consistent with the general purpose for the creation of the reservation, which was to provide a homeland for the survival and growth of the Native American culture.²⁷²

The court further stated that their findings were reasonable “because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights” and it was assumed that the federal government intended to deal fairly with the Native Americans by reserving water without which their land would be useless.²⁷³ The court also held that the water had been reserved to meet future as well as present needs.²⁷⁴ Furthermore, the Ninth Circuit considered the need for the Native Americans to maintain themselves under “changed circumstances.”²⁷⁵

2. *United States v. Adair*: Ensuring Native American Self-Sufficiency

After its decision in *Colville*, the Ninth Circuit, in *United States v. Adair*, held that under the 1864 Treaty between the United States and the Klamath and Modoc Native Americans, the Native Americans secured hunting, fishing and agricultural rights which implied the right to as much water as necessary to fulfill those purposes.²⁷⁶ According to the Ninth Circuit, the Treaty was intended to provide an area for the exclusive occupation of the Native Americans so that they could continue to be self-sufficient.²⁷⁷ The Treaty provided two ways for the Native Americans to be self-sufficient.²⁷⁸ First, it ensured the Native Americans’ right to pursue their traditional culture of hunting and fishing, and second, it encouraged the Native Americans to develop agriculture.²⁷⁹ As encouragement, the Treaty obligated the federal government to pay \$80,000 during a period of fifteen years to “promote the well-being of the Indians” and make additional payments for personnel and materials needed to establish the Native Americans in an agricultural way of life.²⁸⁰ For example, the federal

²⁷² See *id.*

²⁷³ *Colville Confederated Tribes*, 647 F.2d at 46–47.

²⁷⁴ See *id.* at 47–48.

²⁷⁵ See *id.* at 47.

²⁷⁶ See *Adair*, 723 F.2d at 1410.

²⁷⁷ See *Adair*, 478 F. Supp. at 345.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 339.

government developed irrigation systems to promote livestock grazing.²⁸¹ Through these means, the federal government hoped to advance the Native Americans in "education," "civilization," and "secure their moral improvement."²⁸²

The Ninth Circuit held that the Native Americans were entitled to use water essential to their agricultural needs.²⁸³ Because water is a finite resource, the Ninth Circuit's holding that the Native Americans are entitled to take what is necessary to fulfill their purposes could result in insufficient water for non-Natives. Thus, the Ninth Circuit and the federal government protected a nontraditional activity that had been introduced to provide for and assimilate Native Americans into the economy of the continental United States while allowing the Native Americans to continue their traditional lifestyle.²⁸⁴

VI. ANALYSIS

Reindeer herding is a part of the Native Alaskan culture of the Seward Peninsula. The Reindeer Act establishes a federal fiduciary obligation to protect and maintain the economic and cultural welfare of the Seward Peninsula Native Alaskan reindeer herders.²⁸⁵ An exclusive Native Alaskan priority within the reindeer industry is the most appropriate and effective form of federal protection. Such protection does not run afoul of the U.S. Constitution because reindeer herding is unique to Native Alaskan culture; affects Native land, community, and culture; and is rationally related to the federal obligation to Native Alaskans. Finally, the fact that reindeer herding was introduced to Native Alaskan culture is of no consequence as the federal government has recognized that cultural survival demands flexibility in the face of significant change and has previously protected similar nontraditional activities of Native Americans within the continental United States.²⁸⁶

²⁸¹ See *id.* at 339-40.

²⁸² *Adair*, 478 F. Supp at 339-40.

²⁸³ See *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1984).

²⁸⁴ See *id.* at 1409-10.

²⁸⁵ Reindeer Industry Act, 25 U.S.C. §§ 500-500n (1994).

²⁸⁶ See *Adair*, 723 F.2d at 1409-10; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1980); *Adair*, 478 F. Supp. at 339; Sacks, *supra* note 229, at 311-12.

A. *Reindeer Herding and Native Alaskan Subsistence Culture*

The Ninth Circuit's reasoning in *Williams v. Babbitt* is premised on its finding that the Reindeer Act does not pertain to unique Native Alaskan concerns.²⁸⁷ This finding was based on the fact that reindeer are not indigenous to North America and therefore could not be a part of traditional Native Alaskan culture.²⁸⁸ This view of Native Alaskan culture, however, analyzes the culture from a point prior to the arrival of reindeer. At what point, 200 years ago or 1000 years ago, is unclear. Although tradition and custom imply a certain degree of permanence or at least only gradual evolution, it is unrealistic to require cultural values to remain forever fixed.²⁸⁹ Change is common in all societies and is often the key to a culture's survival.²⁹⁰ However, it is important that subsistence uses not become commercially exploited.²⁹¹ Tradition and custom do not prohibit the evolution of subsistence cultural values, but they do limit the commercialization of them.²⁹²

Reindeer herding is an important activity in the Seward Peninsula culture, knitting together extended families in a system of collective and cooperative economic and social relationships.²⁹³ In addition to providing for Native Alaskan subsistence, the reindeer herder and his employees are also a primary socioeconomic unit.²⁹⁴ The Native Alaskan reindeer herders of the Seward Peninsula, however, do not operate the reindeer industry on a strictly commercial or profit basis.²⁹⁵ The needs of the community, culture, and subsistence values are all considered in herd management decisions.²⁹⁶ The reindeer herds are not managed to achieve maximum profit but instead are managed to ensure nutritional needs are satisfied and traditional subsistence activities can take place.²⁹⁷ Consequently, the Native Alaskan reindeer herds of the Seward Peninsula are not managed in the most efficient nor profitable manner.²⁹⁸ Therefore, although reindeer herding has a

²⁸⁷ 115 F.3d 657, 664 (9th Cir. 1997).

²⁸⁸ See *id.* at 659.

²⁸⁹ See *CASE*, *supra* note 2, at 276.

²⁹⁰ See *id.*

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *Subsistence and Self-Determination*, *supra* note 21, at 1027.

²⁹⁴ See *STERN ET AL.*, *supra* note 1, at 119-21.

²⁹⁵ See *id.* at 164-65.

²⁹⁶ See *id.* at 125-26.

²⁹⁷ See *id.* at 164-65.

²⁹⁸ See *id.*

commercial significance, it has become a part of the overall cultural and social custom of the Seward Peninsula Native Alaskans.²⁹⁹

The Reindeer Act does pertain to unique Native Alaskan concerns because the reindeer industry, in its part-subsistence and part-commercial operation, allows Native Alaskans to remain self-sufficient in their Native land and continue to practice traditional subsistence activities.³⁰⁰ Reindeer herding allows Native Alaskans to continue living on the Seward Peninsula in small villages, with enough food and money to satisfy their basic needs, and access and opportunity to hunt caribou and sea mammals.³⁰¹ Reindeer herding is part of Native Alaskan culture, as was intended by the federal government by introducing reindeer to the Seward Peninsula.³⁰² To ignore the government's involvement in establishing and maintaining a de facto Native Alaskan monopoly in the reindeer industry for the past sixty years is unjust.

Furthermore, the Reindeer Act is found under Title 25 of the United States Code. Title 25 pertains to Indian Law, and the inclusion of the Reindeer Act under this Title further indicates that the Reindeer Act pertains to unique Native American concerns. The reindeer herding industry is a successful adaptation and modification of Native Alaskan subsistence cultural and social practices in the face of significant change.³⁰³ Thus, the reindeer industry and the Reindeer Act do address unique Native Alaskan concerns. They have allowed the Native Alaskans of the Seward Peninsula to remain self-sufficient, thereby protecting their unique culture.

B. *Federal Government Trust Responsibility to Protect Native Alaskan Reindeer Herding Culture and Economy*

The Reindeer Act is a unique statutory program and is important for several reasons.³⁰⁴ First, its stated purpose is to provide for Native Alaskan subsistence and to help the Native Alaskan "survive in his native way, in his native land."³⁰⁵ Thus, the Reindeer Act is a display

²⁹⁹ See STERN ET AL., *supra* note 1, at 9, 10, 119–21.

³⁰⁰ See *id.* at 9.

³⁰¹ See *id.* at 9, 123.

³⁰² Reindeer Industry Act, 25 U.S.C. § 500 (1994).

³⁰³ See *Subsistence and Self-Determination*, *supra* note 21, at 1032; STERN ET AL., *supra* note 1, at 16–17.

³⁰⁴ See CASE, *supra* note 2, at 287.

³⁰⁵ *Id.*

of the federal government's concern for the protection of Native Alaskan culture.³⁰⁶ Second, the Reindeer Act is evidence of the federal government's acceptance of its responsibility for Native Alaskan cultural and economic welfare.³⁰⁷ The Reindeer Act documents the federal government's recognition that its relationship with Native Alaskans is the same as exists between the federal government and other Native Americans.³⁰⁸

The extended House of Representatives debate regarding the Reindeer Act demonstrates that Congress understood the Reindeer Act's cultural implications and the federal responsibility to promote the cultural and economic welfare of Native Alaskans.³⁰⁹ According to Representative Green of Florida, floor manager of the bill, "[the Reindeer Act's] motives are the best. It is for the purpose of protecting the native Eskimo of Alaska in his own rights . . ."³¹⁰

Congress also recognized that the Reindeer Act was an acknowledgment of the federal government's trust responsibility to Native Alaskans and that this responsibility was the same owed to other Native Americans.

The natives of Alaska, including the Eskimo, are held to have practically the same status as the Indians of the United States. The Federal Government has recognized this responsibility. It is likewise the responsibility of the Federal Government to protect and look after the social and future economic welfare of these natives.³¹¹

Alaska's Representative Dimond drafted the Reindeer Act legislation.³¹² His remarks in the House debates confirmed Congress's commitment to establish the reindeer as a self-supporting Native Alaskan subsistence enterprise: "I am not coming here to ask you to take care of [the Eskimos] today or tomorrow. I am asking you to assist them in setting up a system which will enable them to take care of themselves and their children over the next hundred years."³¹³

This part-subsistence and part-commercial industry was intended to allow Native Alaskans to remain in their Native land and continue

³⁰⁶ See *id.*

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See CASE, *supra* note 2, at 286.

³¹⁰ 81 CONG. REC. 9480-81 (1937).

³¹¹ *Id.* at 9485.

³¹² See CASE, *supra* note 2, at 209.

³¹³ 81 CONG. REC. 9486 (1937).

to practice their traditional subsistence activities such as fishing and hunting.³¹⁴ The industry was to supplement the natural food supply of the Native Alaskans and provide them with cash resources to buy necessities not readily available on the isolated Seward Peninsula such as oil, lumber, medicine, etc.³¹⁵ The goal of the Reindeer Act was to ensure Native Alaskan self-sufficiency.³¹⁶

The Reindeer Act serves as the required statutory trigger establishing and defining the federal government's trust obligation to Native Alaskans.³¹⁷ The clearly expressed primary purpose of the Reindeer Act is to "establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business."³¹⁸ The purpose is not, as indicated in the *Williams* decision, to "preserv[e] the native character of the reindeer industry."³¹⁹ The Reindeer Act explicitly establishes a trust obligation of the DOI to establish and manage a self-sustaining reindeer industry under Native Alaskan control.³²⁰ The Reindeer Act established a new means of subsistence for Native Alaskans, which the federal government has a fiduciary duty to maintain and protect.³²¹

C. *Ineffective Constitutional Challenges*

Furthermore, a reindeer priority limited solely to Native Alaskans would not be precluded by the federal equal protection clause, because it is premised on the special government-to-government relationship between the Native Alaskans and the federal government.³²²

In the *Williams* decision, the Ninth Circuit interpreted *Mancari* to shield only those statutes that affect unique Indian interests from heightened constitutional scrutiny.³²³ Thus, a statute giving special treatment to Native Alaskans that affects unique Native interests only has to be rationally related to the federal government's obligation to Native Alaskans.³²⁴ The Ninth Circuit, however, stated that the

³¹⁴ See STERN ET AL., *supra* note 1, at 26.

³¹⁵ See *id.* at 24; CASE, *supra* note 2, at 208.

³¹⁶ Reindeer Industry Act, 25 U.S.C. § 500 (1994).

³¹⁷ See Bryner, *supra* note 16, at 307-08.

³¹⁸ 25 U.S.C. § 500.

³¹⁹ *Williams v. Babbitt*, 115 F.3d 657, 659 (9th Cir. 1997).

³²⁰ See 25 U.S.C. § 500.

³²¹ See *id.*

³²² See Kancewick & Smith, *supra* note 19, at 676.

³²³ See *Williams*, 115 F.3d at 664.

³²⁴ See *id.*

reindeer industry "in no way relates to native land, tribal or communal status, or culture" and therefore, *Mancari* did not apply.³²⁵ As discussed earlier, however, the reindeer industry and the Reindeer Act do affect unique Native Alaskan concerns.

Reindeer herding is a unique Native Alaskan concern because the federal government imported reindeer specifically to provide for and assimilate Native Alaskans into the American economy and population settlement patterns.³²⁶ The United States' expansion into the Alaskan territory made the Native Alaskan traditional subsistence way of life impossible.³²⁷ Without the reindeer industry, the Native Alaskans of the Seward Peninsula would not be able to continue to live in isolated, small villages. They would have to move inland, find work, and their culture would be lost. The federal government established, encouraged, and protected the Native Alaskan reliance on reindeer.³²⁸

Moreover, history has shown that the Native Alaskans and their part-subsistence and part-commercial operation of the reindeer industry are unable to compete with non-Native herders whose primary concern is profits.³²⁹ The Native Alaskan reindeer industry is not operated in the most cost effective or profitable manner, because the goal is subsistence and not profit.³³⁰ As a result, extraordinary measures have been taken to exclude non-Natives from the industry.³³¹ The federal government has maintained a Native Alaskan monopoly in the reindeer industry for the past sixty years.³³² Accordingly, an exclusive Native Alaskan priority in the reindeer industry is needed to ensure the economic and cultural well-being of the Native Alaskan reindeer herders of the Seward Peninsula.

Thus, the federal government made the reindeer industry a unique Native Alaskan concern and has maintained it as an exclusively Native Alaskan concern for the past sixty years.³³³ Reindeer herding has been incorporated into Native Alaskan culture and the continuation of that culture depends upon it. Therefore, the Ninth Circuit should

³²⁵ *Id.*

³²⁶ See *CASE*, *supra* note 2, at 208; *Wadson*, *supra* note 2.

³²⁷ See *STERN ET AL.*, *supra* note 1, at 23.

³²⁸ See *generally* Reindeer Industry Act, 25 U.S.C. §§ 500-500n (1994).

³²⁹ See *CASE*, *supra* note 2, at 209; *Wadson*, *supra* note 2.

³³⁰ See *STERN ET AL.*, *supra* note 1, at 164-65.

³³¹ See 25 U.S.C. §§ 500-500n.

³³² See *id.*; *Williams v. Babbitt*, 115 F.3d 657, 661 (9th Cir. 1997).

³³³ See 25 U.S.C. §§ 500-500n; *Williams*, 115 F.3d at 661.

have applied the *Mancari* rational relation test in *Williams*. As an exclusively Native Alaskan priority in the reindeer industry is rationally related to the fulfillment of the federal government's trust obligation to protect Native Alaskan subsistence, such a priority would not present constitutional concerns.

D. *Protection of Reindeer Herding Culture as "Nontraditional"*

In addition, Native American self-sufficiency has long been a part of federal Native American policy.³³⁴ Through several statutory programs, such as the Reindeer Act, the federal government has supported Native American economic development and cultural preservation since the turn of the century.³³⁵ The federal government has recognized that subsistence is central to Native Alaskan culture and is key to Native Alaskans self-sufficiency.³³⁶ The federal government has also recognized that, as a result of changed circumstances, subsistence has also changed over time in order to meet Native Alaskan needs.³³⁷

ANILCA defines subsistence in terms of the customary and traditional uses of wildlife by rural Alaskans.³³⁸ Specifically, subsistence uses are defined as "the customary and traditional uses by rural Alaskan residents of wild, renewable resources for the purposes of direct personal or family consumption; the making and selling of handicraft; sharing, exchange and barter; and customary trade."³³⁹ Thus, Congress has incorporated Native Alaskan customs and traditions directly into the U.S. Code by defining subsistence uses to include "customary and traditional uses."³⁴⁰

Furthermore, under ANILCA, "customary trade" is not required to be only for personal or family consumption.³⁴¹ Customary trade is defined as "the limited noncommercial exchange for money of fish and wildlife or their parts in minimal quantities."³⁴² This allows some forms of trade to be classified as a "subsistence use" even though they might

³³⁴ See CASE, *supra* note 2, at 207.

³³⁵ See *id.* at 208.

³³⁶ See 25 U.S.C. § 500; CASE, *supra* note 2, at 208–09, 287.

³³⁷ See Sacks, *supra* note 229, at 311–12.

³³⁸ See Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3111 (1994 & Supp. III 1997); Bryner, *supra* note 16, at 309.

³³⁹ 16 U.S.C. § 3111.

³⁴⁰ See Kancewick & Smith, *supra* note 19, at 661.

³⁴¹ See CASE, *supra* note 2, at 301.

³⁴² 16 U.S.C. § 3111(4).

involve money and commerce.³⁴³ It is clear from ANILCA's legislative history, however, that customary trade cannot result in the "establishment of significant commercial enterprises."³⁴⁴ This suggests that the form of such trade must pre-exist ANILCA (i.e., be customary or long established).³⁴⁵

ANILCA recognizes that traditional subsistence customs have been altered by contact with other cultures.³⁴⁶ ANILCA's legislative history explains that traditional uses are "not restricted to methods passed down from generation to generation and [are] not intended to foreclose the use of new, unidentified means . . ."³⁴⁷ Thus, ANILCA acknowledges the modern evolution of traditional Native Alaskan culture.³⁴⁸

In *Colville Confederated Tribes* and *Adair*, the Ninth Circuit and the federal government protected nontraditional agricultural activities which had been introduced as a means of providing for and assimilating Native Americans into the economy of the continental United States while allowing Native Americans to continue their traditional lifestyle.³⁴⁹ Such protection was given despite the potential for total exclusion of non-Natives, as it was very possible there would be insufficient water for non-Native uses once Native Americans had withdrawn the water required for their uses.³⁵⁰ Such circumstances are similar to the current reindeer herding situation.

The Ninth Circuit and the federal government have recognized the federal trust obligation to protect Native Alaskan culture and the necessity of cultural change.³⁵¹ They have also acknowledged the impact outside cultures have had on Native Alaskan culture.³⁵² The Ninth Circuit and the federal government have protected nontraditional Native American activities in the past.³⁵³ The federal govern-

³⁴³ See CASE, *supra* note 2, at 301.

³⁴⁴ *Id.* (quoting S. REP. No. 94, at 233-34 (1980)).

³⁴⁵ See CASE, *supra* note 2, at 301.

³⁴⁶ See Sacks, *supra* note 229, at 311-12.

³⁴⁷ *Id.* at 312.

³⁴⁸ See *id.* at 311-12.

³⁴⁹ See *United States v. Adair*, 723 F.2d 1394, 1409-10 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1980); *United States v. Adair*, 478 F. Supp. 336, 339 (D. Or. 1979).

³⁵⁰ See *Colville Confederated Tribes*, 647 F.2d at 52.

³⁵¹ See *United States v. Berrigan*, 2 Alaska 442, 442 (D. Alaska 1905); Sacks, *supra* note 229, at 311-12.

³⁵² See Sacks, *supra* note 229, at 311-12.

³⁵³ See *Adair*, 723 F.2d at 1409-10; *Colville Confederated Tribes*, 647 F.2d at 47-48; *Adair*, 478 F. Supp. at 339.

ment owes the same consideration to the Native Alaskan reindeer herders of the Seward Peninsula.

CONCLUSION

As a result of the *Williams* decision, Native Alaskan reindeer herders are now facing increased competition from non-Natives. The reindeer industry also faces competition from the migratory caribou herds that pass through the Seward Peninsula taking reindeer with them, competing for forage, and spreading disease. Furthermore, Native Alaskan reindeer herders face competition from the recently established feed-lot reindeer operations that operate strictly on profit considerations. Consequently, the reindeer industry, as it has been operated for the past sixty years under the protection of the Reindeer Act, and the Native Alaskan culture that depends upon it are in danger. The federal government has a fiduciary responsibility to maintain and protect a reindeer industry under Native Alaskan control that provides the subsistence necessary to allow the Native Alaskan culture of the Seward Peninsula to continue. In addition, according to the Reindeer Act, where the federal government's fiduciary responsibility is defined, the reindeer industry is to be operated "in the native way." The recent feed-lot reindeer operations do not meet this standard.

An exclusive Native Alaskan priority within the reindeer industry would be the most appropriate and effective form of federal protection. The Reindeer Act should be amended to explicitly exclude non-Natives from importing or selling reindeer. As discussed, such an exclusive Native Alaskan priority would not run afoul of the U.S. Constitution as it would not be considered a racial classification. Native herders are at a competitive disadvantage due to their subsistence concerns. Furthermore, non-Natives are not extensively involved in the reindeer industry. Thus, such protection of Native herders would have limited impact on non-Natives. The federal government could compensate those non-Native herders who have recently entered the reindeer industry.

Short of an exclusive Native priority, the federal government should take other actions to protect and maintain the Seward Peninsula Native reindeer industry. The federal government could begin to discourage the feed-lot reindeer operations regulatorily through strict environmental controls, limits on the number of reindeer that may be imported and slaughtered, import taxes, sales taxes, etc. Now

is the time to take such action as these operations are new and their success is undetermined. Unfortunately, with regard to the migratory caribou herds, there is probably little that can be done. Natural population cycles will most likely result in a decline in the number of caribou. Hunting caribou is a traditional Native Alaskan custom and with the return of the caribou to the Seward Peninsula, Native Alaskans have been able to engage in that activity on a subsistence level again. The federal government's fiduciary responsibility to protect Native Alaskan culture would place the priority on maintaining the caribou population as opposed to maintaining the reindeer population. In addition, because the reindeer are herded in a free range system, the enormous distances, and the different kinds of wildlife and their seasonal migration patterns make it impossible to prevent caribou herds from interacting with the reindeer herds.

The reindeer industry of the Seward Peninsula and the Native Alaskan culture that depends upon it are in jeopardy. The federal government must recognize its fiduciary duty to ensure that the Native Alaskans of the Seward Peninsula can continue to live in their "native way" and in their "native land." A reindeer industry that provides subsistence as well as limited commercial benefit is crucial to the perpetuation of the Native Alaskan culture of the Seward Peninsula.