Subsistence

Legal

Questions,

including Sectional

Analysis (File 3)

Subsistence
Current 2

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JAN 21 1986

January 13, 1986

Senator Arliss Sturgulewski
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: No Need For Action On Subsistence Bills

Dear Senator Sturgulewski:

You are no doubt under pressure to amend the state subsistence law passed in 1978. This pressure stems in significant part from those who represent rural interests in the State of Alaska and who believe that the subsistence law must be amended in order to protect rural residents.

As lawyers with a long history of representing rural Alaskans, we strongly disagree with this position. After extensive legal analysis, we conclude that the State's law is not broken and, therefore, needs no fixing. What is needed is an effective administrative implementation of existing law. We suggest that the Boards of Fish and Game have totally and completely failed to implement the state subsistence priority, and that this administrative inaction is the cause of the existing problem with respect to the subsistence preference.

We have enclosed a copy of a friend of the court brief which we submitted in a case now pending before the Alaska Supreme Court. The case is named Eluska. It will help decide what the existing Alaska Statutes say about the subsistence priority. It will soon be decided. On December 5, 1985, the Alaska Supreme Court entered an order granting the Department of Law an expedited decision. By granting the motion, the court indicated that it will probably decide Eluska within the next few months.

The brief sets forth our legal opinion as to the serious errors and omissions made by the State Boards of Fish and Game when they attempted to implement the subsistence priority. As set out by the brief, the implementation has been remarkably glacial and grudging. We believe the Boards of Fish and Game have been violating both state law and federal law regarding the subsistence priorities since the laws were enacted. Consistently refusing to give a real priority to real subsistence users, the Boards have attempted to impose arbitrary, unreasonable, inappropriate, and often downright silly and irrelevant restrictions upon true subsistence users. To cover up this administrative malfeasance, the Boards are now trying to have the Department of Law obscure simple issues in high-sounding lawyers' jargon.

To us, the facts are plain. The Boards of Fish and Game have refused to implement the law that you passed in 1978. Now, as the courts force them to implement it, they are disingenuously claiming that you must now amend that law.

Our basic position is that you should do nothing, and that the Boards of Fish and Game must be made to finally implement the subsistence priority passed in 1978.

In this regard, we should like to comment on a recent letter sent by Assistant Secretary of the Interior Bill Horn to Governor Sheffield. In this letter, dated September 23, 1985, Mr. Horn asserts that the recent Alaska Supreme Court decision in Madison places the State in a position of not complying with Title VIII of the Alaska National Interest Lands Conservation Act (the 1980 federal subsistence law). We believe that Mr. Horn's letter is totally wrong. The Madison decision does not place the State in a position of non-compliance with federal law, for it merely adds an additional distinction which is not prohibited by federal statute.

The Conservation Act establishes a program of "cooperative federalism." Under this program, the State of Alaska can manage subsistence uses of fish and wildlife pursuant to "laws of general applicability" so long as they afford subsistence users the preference given to them by the Congress of the United States. While the preference required by Congress is limited to "rural Alaska residents," nothing in the federal law purports to prohibit the State from giving a preference to subsistence users who might not properly be classified as "rural residents" so long as rural subsistence users are fully protected. Indeed, section 815(3) of the Conservation Act makes abundantly clear that once rural subsistence users are protected Congress intended to vest the State with broad discretion in allocating uses among other users. This permits the State to extend the subsistence preference to "urban" subsistence users so long as "rural" subsistence users have been given the priority to which they are entitled.

The simple notion that the State can accord "urban" subsistence users a preference has previously been endorsed by Mr. Horn himself. Former Secretary of the Interior James G. Watt, by letter of February 25, 1982, informed the State of Alaska that it could protect "urban" subsistence users so long as the State extended top priority to "rural" subsistence users. A few weeks later, Mr. Bill Horn, then Deputy Undersecretary, appeared before the Joint Boards of Fish and Game and carried the same message. At that hearing, he unequivocally declared that the Boards of Fish and Game could extend the subsistence priority to "urban" subsistence users so long as they accorded first priority to "rural" subsistence users.

The Boards of Fish and Game declined the invitation given to them by both the Secretary of the Interior and his Undersecretary. Expressly deciding that they would not abide by your decision to accord a subsistence priority to all true subsistence users, "rural" or not, the Boards simply amended the statute through the administrative process by declaring that "urban" subsistence users would not be given a preference. As the Alaska Supreme Court found, the Boards of Fish and Game violated the clear intent of the act you passed in 1978 when it took this action. We believe the Boards should be taken to task for their wrongful ways. They should not be allowed to amend the law to suit their fancy.

We therefore urge that you take no action on a subsistence bill. The clients we represent on this issue are for the most part rural subsistence users, most of whom are Native. As the law firms which have represented more individuals and groups

on more subsistence issues than any other firm or firms in the state,[1] we do not believe that the interests of our clients are compromised by the present law. We believe that our clients' interests are significantly and continually compromised by the refusal of the Boards of Fish and Game to accord them the subsistence priority to which they are accorded under both state and federal law. Amending the statute along the lines suggested by Governor Sheffield would merely exacerbate the problem and obscure the true difficulties that rural Alaskans face in trying to force the Boards of Fish and Game to give them a true subsistence priority. We urge you to study the enclosed brief and reach your own independent conclusion as to whether the state subsistence law needs amending, totally and completely confident that your independent review will lead to the conclusion that the current law need not be amended and that those who would pressure you into taking precipitous action are mistaken.

Thank you for your consideration.

Sincerely,

Robert K. Hickerson
Executive Director
Alaska Legal Services Corporation

Donald S. Cooper
Chief Counsel
Alaska Legal Services Corporation

Lawrence A. Aschenbrenner
Directing Attorney
Native American Rights Fund

Robert T. Anderson
Staff Attorney
Native American Rights Fund

cc: Assistant Secretary of the Interior William P. Horn
Governor Bill Sheffield
Alaska Congressional Delegation
Chairman, United States Senate Energy Committee
Chairman, United States House Interior Committee

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[1] These cases include, inter alia: Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984); Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985); Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984); Bobby v. Alaska, D. Alaska Civil No. A84-544.

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR

In the Matter of the Petition of the Alaska Federation of Natives Proposing the Adoption of a Regulation Notifying The Public That the State of Alaska Has Not Enacted Laws of General Applicability Which Satisfy the Requirements of Section 805(d) of the Alaska National Interest Lands Conservation Act.	)

PETITION

COMES NOW the Alaska Federation of Natives and pursuant to 5 U.S.C. 553(e) and 43 C.F.R. 14.1 et seq. requests the United States Department of the Interior to adopt and publish the following regulation in the Federal Register:

NOTICE

> Notice is hereby given that the Secretary of the Interior has determined that the State of Alaska has not enacted and implemented laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804 and 805 of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487 (1980). Until such time as the State enacts laws of general applicability which satisfy the requirements of section 805(d), the taking of fish stocks and wildlife populations which are the subject of subsistence uses as that term is defined in section 803 shall be regulated by the Alaska Board of Fisheries and Alaska Board of Game pursuant to sections 803 and 804 of ANILCA.

A. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PERSON WITHIN THE MEANING OF 5 U.S.C. 553(e).

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives

residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural communities and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish stocks and wildlife populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent communities and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes, including but not limited to Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses.

AFN is an interested party within the meaning of 5 U.S.C. 553(e).

B. THE NOTICE WHICH THIS PETITION REQUESTS THE DEPARTMENT OF THE INTERIOR TO ADOPT AND PUBLISH IS A "RULE" AS DEFINED IN THE ADMINISTRATIVE PROCEDURE ACT.

The purpose of this petition is to request the Department of the Interior to publish a statement from the Department of particular applicability to, and intended to have a future effect upon, the regulation of the taking of fish stocks and wildlife populations in Alaska and the implementation and interpretation of Title VIII of ANILCA. Consequently, the requested notice is a "rule" as defined by 5 U.S.C. 551(4).

C. THE STATE OF ALASKA HAS NOT ENACTED AND IMPLEMENTED LAWS OF GENERAL APPLICABILITY WHICH ARE CONSISTENT WITH, AND WHICH PROVIDE FOR THE DEFINITION, PREFERENCE, AND PARTICIPATION SPECIFIED IN, SECTIONS 803, 804 AND 805 OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT. CONSEQUENTLY, SECS. 803 AND 804 OF ANILCA GOVERN THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF THE TAKING OF FISH STOCKS AND WILDLIFE POPULATIONS WHICH ARE THE SUBJECT OF SUBSISTENCE USES.

In 1980 the Congress enacted Title VIII of the Alaska National Interest Lands Conservation Act. The purpose of Title VIII inter alia is to ensure that the taking of fish stocks and wildlife populations in Alaska are regulated by the State of Alaska in a manner which ensures the continuation and protection of the taking of such stocks and populations by residents of rural communities and areas for personal and family consumption.

The operative provisions of Title VIII through which the Congress intended to achieve this important national goal are Secs. 803, 804, and 805. In particular, the Congress intended Secs. 803 and 804 to supercede A.S. 16.05 and control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803 of ANILCA.

However, as an act of comity, Sec. 805(d) provides that

if the Alaska Legislature enacts laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, Secs. 803, 804 and 805, then unless and until any one of such laws is repealed, such state statutes shall supercede Secs. 803, 804 and 805 insofar as such sections govern the regulatory activities of the Alaska Board of Fisheries and Alaska Board of Game.

In 1978 the Alaska Legislature enacted ch. 151 SLA 1978. Subsequent to the enactment of ANILCA, the State of Alaska represented to the Department of the Interior that ch. 151 satisfied the requirements of section 805(d), and, consequently, that ch. 151 rather than Secs. 803 and 804 controlled the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

This conclusion was not apparent on the face of the statute. As a result, on February 25, 1982, Secretary of the Interior James Watt wrote Governor Hammond indicating that the Department could not certify that the State of Alaska had satisfied the requirements of Sec. 805(d) because the purview of the state statutory definition of the term "subsistence uses" was not limited on its face to "rural Alaska residents," and, consequently, was not consistent with, and did not provide for the definition of the term "subsistence uses" set forth in Sec. 803. As Secretary Watt explained, the ch. 151 definition of the term "subsistence uses" failed "to distinguish rural residents engaged in subsistence uses from other users who make 'customary and traditional uses' of fish and game resources."

In response, the Alaska Board of Fisheries and Alaska Board of Game adopted an interpretative regulation which limited the purview of the ch. 151 definition to residents of rural Alaska. Only this class of hunters and fishermen would be provided the priority for subsistence uses established by A.S. 16.05.251(b) and 16.05.255(b). As a result, on April 14, 1982, Secretary Watt informed Governor Hammond that the State of Alaska had complied with the requirements of Sec. 805(d) of ANILCA, and that henceforth ch. 151 SLA 1978, rather than Secs. 803 and 804 of ANILCA, would control the Alaska Board of Fisheries and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses. The interpretative regulation which brought the State of Alaska into compliance with Sec. 805(d) was codified as 5 A.A.C. 99.010.

Regrettably, on February 22, 1985, the Alaska Supreme Court issued its opinion in Madison v. Alaska Department of Fish and Game. The Court held that the Tenth Alaska Legislature did not intend to limit the purview of the term "subsistence uses" in ch. 151 to residents of rural Alaska and, consequently, the adoption of a regulation limiting the purview of the ch. 151 definition in that manner was beyond the scope of the statute. Hence, contrary to Secretary Watt's determination on April 14, 1982, the State of Alaska has never been in compliance with the requirements of Sec. 805(d) of ANILCA, and, consequently, Secs. 803 and 804 still control the authority of the Alaska Board of Fisheries and Alaska Board of Game to adopt regulations governing the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

Because of the confusion which the Madison opinion has

engendered, the purpose of this petition is to request the Secretary of the Interior to publish a notice in the Federal Register which clarifies the status of the State of Alaska's compliance with Sec. 805(d) of ANILCA for the benefit of the public, the boards and interested federal agencies.

DATED: July 19, 1985

JANIE LEASK
President
Alaska Federation of Natives

By: _____
Donald C. Mitchell
Attorney for Petitioner

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR

In the Matter of the Petition of the Alaska Federation of Natives Proposing the Adoption of a Regulation Governing the Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations.	)

PETITION

COMES NOW the Alaska Federation of Natives and pursuant to 5 U.S.C. 553(e) and 43 C.F.R. 14.1 et seq. requests the United States Department of the Interior to adopt the following regulation:

> 43 C.F.R. ___. REGULATION OF THE TAKING OF FISH AND GAME FOR SUBSISTENCE USES IN ALASKA. (a) The identification of subsistence uses and the regulation of the taking of fish stocks and wildlife populations in Alaska which are the subject of such uses shall be identified pursuant to Sec. 803 and regulated pursuant to Sec. 804 of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (1980).
>
> (b) With respect to the State of Alaska's regulation of the taking of fish stocks and game populations which are the subject of subsistence uses, if the State enacts and implements laws of general applicability which are consistent with, and which provide for, the definition of "subsistence uses" set forth in Sec. 803, the authorization and priority for such uses set forth in Sec. 804, and the system of local advisory committees and regional advisory councils set forth in Sec. 805, then unless and until any one of the aforementioned laws is repealed, such State laws shall govern regulation of the taking of fish stocks and wildlife populations by the State of Alaska and such State laws shall supercede Secs. 803, 804 and 805 of the Alaska National Interest Lands Conservation Act insofar as such sections govern the State of Alaska's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses.
>
> (c)(1) Pursuant to Sec. 806 of the Alaska National Interest Lands Conservation Act, the Secretary of the Interior shall monitor the State of Alaska's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses.
>
> (2) If the Secretary determines either pursuant to the discharge of his monitoring responsibility set forth in paragraph (1) or as the result of oral or written notice from any interested party that the State of Alaska has failed or declined to regulate the taking of a fish stock or wildlife population pursuant to the regulatory standard set forth in subsection (a), then in addition

to such other action as may be authorized or required by law, the Secretary shall adopt regulations governing the taking of such stock or population pursuant to subsection (a), and such regulations shall supercede the State of Alaska's regulation of the taking of such stock or population.

(d) Consistent with sound management principles and the conservation of healthy fish stocks and wildlife populations, regulations adopted by the State of Alaska or the Secretary of the Interior pursuant to this section shall cause the least adverse impact possible on persons engaged in subsistence uses of such stocks and populations.

(e) For the purposes of this section, the terms -

(1) "subsistence uses" means the customary and traditional uses of a fish stock or wildlife population by rural Alaska residents for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of stocks or populations taken for personal or family consumption; and for customary trade.

(2) "rural" means a community or area in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area.

(3) "customary and traditional" means (i) a long-term, consistent pattern of use of a fish stock or wildlife population, excluding interruption by circumstances beyond the control of the persons taking such stock or population such as regulatory prohibition;

(ii) a use pattern which recurs in specific seasons of each year;

(iii) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local circumstances;

(iv) the consistent harvest and use of such stock or population near, or at a location reasonably accessible to, the residence of the persons taking such stock or population;

(v) the handling, preparing, preserving and storing of such stock or population in a manner which has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances;

(vi) a use pattern which includes the handing down of knowledge of fishing or hunting skills and values from generation to generation;

(vii) a use pattern in which the products derived from such stock or population are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises), barter, sharing, and gift-giving; and

(viii) a use pattern which includes reliance upon a wide diversity of fish stocks and wildlife populations of an area for personal and family consumption and which

provides substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take or consume such stock or population for their sustenance.

(4) "fish stock" means a species, subspecies, geographical grouping or other category of fish capable of management as a unit which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States.

(5) "wildlife population" means a group of animals of the same species or smaller taxa whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (3) of this subsection.

A. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PERSON WITHIN THE MEANING OF 5 U.S.C. 553(e).

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural communities and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish

stocks and wildlife populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent communities and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes, including but not limited to Title VIII of the Alaska National Interest Lands Conservation Act, and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses.

AFN is an interested party within the meaning of 5 U.S.C. 553(e).

B. FOR THE PAST EIGHTY-THREE YEARS THE CONGRESS HAS CONSISTENTLY RECOGNIZED THE NATIONAL INTEREST IN, AND THE FEDERAL RESPONSIBILITY FOR, ENSURING THAT THE TAKING OF FISH STOCKS AND WILDLIFE POPULATIONS RESIDENT WITHIN ALASKA IS REGULATED IN A MANNER WHICH PROTECTS THE TAKING OF SUCH STOCKS AND POPULATIONS FOR SUBSISTENCE USES BY ALASKA NATIVES AND OTHER PERSONS RESIDENT IN RURAL COMMUNITIES AND AREAS, AND IN 1980 THE CONGRESS ASSERTED ITS JURISDICTION TO ESTABLISH THE REGULATORY STANDARD WHICH PRESENTLY GOVERNS THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF SUCH TAKINGS.

Since 1980 there has been considerable confusion as to the responsibilities which the Congress assigned to, and the relationship which the Congress intended between, the Alaska Board of Fisheries and Alaska Board of Game and the Secretary of the Interior with respect to the regulation of fish stocks and wildlife populations which are the subject of subsistence uses. This confusion was recently compounded by the decision

of the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game. The purpose of the proposed regulation set forth above is to clarify the boards' and the Secretary's respective responsibilities for the benefit of the public, the boards, and affected federal agencies.

For the past eighty-three years the United States Congress has consistently recognized its responsibility, and has consistently asserted its jurisdiction, to ensure that the taking of fish stocks and wildlife populations is regulated in a manner consistent which the continuation and protection of the taking of such stocks and populations by Alaska Natives and other persons resident in rural communities and areas.

For example, the first game law applicable to Alaska was enacted by the Congress in 1902, 32 Stat. 327 (1902). Although the Act established statutory seasons and other forms of regulation of the taking of game birds and animals, the statute specifically exempted the taking of such birds and animals by Indians and Eskimos for food from regulation. The 1902 subsistence exemption was re-enacted by the Congress in the 1908 Alaska Game Act, 35 Stat. 102 (1908) and the 1925 Alaska Game Act, 43 Stat. 743 (1925).

In 1958, when the Congress enacted the Alaska Statehood Act, 72 Stat. 339 (1958), it refused to transfer regulatory authority over the taking of fish stocks and wildlife populations to the State of Alaska until such time as the new state demonstrated that it had adopted a regulatory system which inter alia ensured that the taking of such stocks and populations by Alaska Natives for subsistence uses would be adequately protected. See Sec. 6(e), Pub. L. No. 85-508. This provision was added to the Alaska Statehood Act on the floor of the House of Representatives by an amendment offered by Representatives Pelly and Westland.

By way of explanation as to why their amendment was needed, Pelly and Westland introduced a letter from Acting Territorial Governor Hugh Wade to the Alaska Senate expressing his concern that the fish and game statute which the Territorial Legislature had enacted in anticipation of statehood "overlooked or disregarded" the hunting and fishing rights "of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation [i.e. the 1925 Alaska Game Act, as amended]". 104 Cong. Rec. 9488-9489, 9750 (1958).

Between the transfer of authority to regulate the taking of fish stocks and wildlife populations to the new State of Alaska in 1960 and the enactment of ANCSA in 1971 it had become obvious that the Alaska Board of Fish and Game was not institutionally inclined to adopt hunting and fishing regulations which adequately safeguarded the taking of fish stocks and wildlife populations for subsistence uses as mandated by the Congress in 1958.

As a result, the United States Senate included a provision in its version of ANCSA which would have reasserted federal jurisdiction over the taking of wildlife populations in Alaska to ensure that this important national goal was achieved. See Sec. 21, S. 35, 92d Cong., 1st Sess. (1971). The provision was deleted from the final version of ANCSA after the Conference Committee received assurances from the State of Alaska that such a reassertion of federal jurisdiction was unnecessary because the Board of Fish and Game was prepared to adequately discharge its responsibility to protect subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas. However, in order to make unequivocally clear that both the Department of the Interior and the State of Alaska have a nondiscretionary responsiblity to ensure that subsistence

hunting and fishing by Alaska Natives is adequately protected, the Committee included the following admonition in its report to the Congress on the work of the conference:

> The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives. House Rept. No. 92-746, 92d Cong., 1st Sess. 37 (1971)(Emphasis added).

By 1977 when the Congress began consideration of legislation which was enacted in 1980 as the Alaska National Interest Lands Conservation Act (ANILCA), it had become obvious that contrary to representations made by the State of Alaska in 1971, the Alaska Board of Fisheries and Alaska Board of Game had not adopted hunting and fishing regulations which adequately protected subsistence uses. See for example Hearings on H.R. 39 before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs 95th Cong., 1st Sess., Part XI, 398-479 (statement of Donald C. Mitchell), Part XII, 52-61, 461-497 (statement of Byron Mallot).

The suggested solution to the problem was for the United States Congress to reassert its jurisdiction over the regulation of the taking of fish stocks and wildlife populations in Alaska to ensure that in the future such regulation would be conducted pursuant to federal regulatory standards which ensure that the taking of such stocks and populations by Alaska Natives and other residents of rural communities and areas would be adequately protected.

Significantly, this approach was suggested and supported by Jay S. Hammond, then Governor of Alaska, who candidly admitted to the Congress that there was "some justification" for "the perception that state regulation has either favored urban hunters too much, or not favored rural hunters enough when the difficult allocation decisions were made," and then concluded with the

request that:

> "I hope this Congress establishes the priority of subsistence use where there is a conflict on national interest lands. I believe this is a legitimate subject for [federal] legislation, and hope that is principle, which as been State policy for some time, is enacted into Federal law." Id. Part XII, 12 (statement of Hon. Jay S. Hammond).

The Congress responded to Governor Hammond's request by including Title VIII in ANILCA. Secs. 803 and 804 establish a federal standard which governs the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations. As Senator Ted Stevens, a major participant in the drafting of the version of ANILCA which was enacted into law, explained to the United States Senate, the Senate Committee on Energy and Natural Resources version of Title VIII required the Secretary of the Interior to initiate a civil action "to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804." 126 Cong. Rec. S 15131 (December 1, 1980 daily ed.)(Emphasis added).

Senator Stevens went on to explain that though the State of Alaska did not object to the Congress compelling its regulatory agencies to adopt hunting and fishing regulations pursuant to the federal regulatory standard set forth in Sec. 804, it did object to the Secretary of Interior being assigned responsibility to initiate a civil action if the Alaska Board of Fisheries or Alaska Board of Game failed to to so. For that reason Senator Stevens persuaded the Congress to amend the judicial enforcement section of Title VIII to eliminate the Secretary of the Interior's responsibility to prosecute a civil action against a board for failure to adopt regulations which are consistent with Sec. 804 and to establish a private cause of action in its stead.

As a result, if the Alaska Board of Fisheries or Alaska Board of Game adopts a regulation inconsistent with the federal regulatory standard set forth in Sec. 804, Sec. 807 authorizes local residents "aggrieved by a failure of the State...to provide for the priority for subsistence uses set forth in section 804... [to] file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority." The exclusive relief afforded by Sec. 807 to remedy the Alaska Board of Fisheries' or Alaska Board of Game's adoption of an unlawful regulation is an order of the United States District Court requiring the offending Board to adopt and submit regulations to the Court "which satisfy the requirements of Sec. 804."

Senator Stevens's understanding that Sec. 804 was intended by the Congress to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations is supported by the report of the committee which reported the version of ANILCA which was enacted into law.

As the Senate Committee on Energy and Natural Resources explained:

> This section [i.e. Sec. 804] requires <u>both</u> the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands... If a particular fish or wildlife population (e.g. salmon, moose, or caribou) in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section [i.e. Sec. 804] need not be imposed by <u>the State rulemaking authority</u>. However, if the continued viability of a particular population or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, <u>the State rulemaking authority</u>, in conjunction with the recommendations of the regional council representing the affected area, is required <u>by this section</u> to establish <u>regulations</u> which restrict the taking of such population to Alaska residents engaged in subsistence uses. Senate Rept. No. 96-413,

96th Cong., 1st Sess. 269-270 (1979) (Emphasis added).

The language and legislative history of Secs. 804 and 807 of ANILCA make clear that the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

However, in addition to its concern that subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas be adequately protected by the Alaska Board of Fisheries and Alaska Board of Game, the Congress was also sensitive to the political tension which has historically surrounded state and federal authority to regulate the taking of the same fish stocks and wildlife populations within the boundaries of the fifty states. No person and no state, including the State of Alaska, any longer challenges the Congress' constitutional authority to supercede state regulation of resident fish stocks and wildlife populations. See Kleppe v. New Mexico, 426 U.S. 529 (1976). However, during Congress' consideration of ANILCA, many members of Congress, including Senator Stevens, were of the opinion that, although constitutional, the assertion of such federal authority over the Alaska Board of Fisheries and Alaska Board of Game was politically unwise unless necessary to protect the national interest.

This policy was consistent with many actions of the Congress prior to enactment of ANILCA which have purposely limited the Department of the Interior's authority to regulate the taking of fish stocks and wildlife populations in contravention of state regulation. The Federal Land Policy and Management Act of 1976 is a recent example of congressional policy in this area. See Sec. 302(b), Pub. L. No. 94-579 (1976).

To the extent the Department of the Interior has been delegated regulatory authority to supercede state regulation, the Department has been similarly circumspect with respect to using it. The statute which delegates the U.S. Fish and Wildlife Service (FWS) authority to manage fish stocks and wildlife populations within units of the National Wildlife Refuge System, for example, requires FWS regulations governing the taking of stocks and populations within refuges to be consistent with the hunting and fishing regulations of the state in which a refuge is located only "to the extent practicable to do so". If consistency is not practicable, FWS may supercede state regulation.

However, because of the political sensitivity involved, FWS has voluntarily limited the exercise of its own jurisdiction. 50 C.F.R. 32.3(d) precludes FWS from adopting regulations governing the taking of a wildlife population within a refuge which are more liberal than the state regulations which, but for FWS' superceding regulations, would control the taking of such population. It is important to note, however, that this self-imposed regulatory restraint is an act of political comity - not a constitutional or statutory requirement.

This long tradition of congressional and administrative sensitivity to the tension between federal responsibility toward and state interest in the regulation of the taking of the same fish stocks and wildlife populations is reflected in Title VIII of ANILCA. Although the Congress intended the regulatory standard set forth in Sec. 804 to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803, if the Alaska Legislature enacts a state statute which establishes the same regulatory standard, then "unless and until [such statute

might be] repealed" the Congress intended the state statute, rather than Secs. 803 and 804, to govern the boards' adoption of fishing and hunting regulations. See Sec. 805(d).

If the Alaska Legislature enacted a statute of this nature and a board refused to adopt regulations consistent with its regulatory mandate, then although an aggrieved party is still authorized to file a civil action pursuant to Sec. 807, the claim for relief would be based upon violation of the state statute rather than Sec. 804.[1]

This act of comity is similar to the approach the Congress followed when it established the Alaska Land Bank Program in Sec. 907 of ANILCA. Village and regional corporations authorized by ANCSA but established pursuant to and regulated by State law are authorized to place lands in the land bank. During the time lands are deposited in the bank, Sec. 907(c)(2) supercedes the laws of the State of Alaska and exempts such lands from state taxation, adverse possession and judicial execution. However, as a matter of comity, if the Alaska Legislature enacts state statutes which provide banked land any of the protections from involuntary loss set forth in Sec. 907(c)(2), then "such [state] laws, unless and until repealed, shall supercede the relevant subparagraph of subsection (c)(2) and shall govern the grant of the benefit so provided".

For the reasons set forth above, the language and legislative history of Secs. 804 and 807 of ANILCA make clear that in the

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[1]Sec. 807(a) provides in pertinent part that:

> Local residents and other persons and organizations aggrieved by a failure of the State... to provide for the priority for subsistence uses set forth in section 804 (or with respect tto the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d))...

absense of a state statute which establishes the same regulatory standard as that set forth in Secs. 803 and 804, the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

E. THE PURVIEW OF THE REGULATORY AUTHORITY SET FORTH IN SEC. 804 OF ANILCA ENCOMPASSES THE TAKING OF FISH STOCKS WHICH AT ANY TIME OR DURING ANY SEASON OF THE YEAR MAY BE FOUND IN WATERS OF THE UNITED STATES AND WILDLIFE POPULATIONS WHOSE MEMBERS IN WHOLE OR IN PART USE OR MAY BE FOUND AT ANY TIME OR DURING ANY SEASON OF THE YEAR UPON LAND THE TITLE TO WHICH IS IN THE UNITED STATES OR UPON OR IN WATERS SUBJECT TO THE REGULATORY JURISDICTION OF THE UNITED STATES.

Paragraph (4) of proposed subsection (e) defines the term "fish stock" to encompass all fish stocks which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States. Paragraph (5) defines the term "wildlife population" to encompass all wildlife populations whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (4). These definitions are consistent with both the intent of Congress embodied in Title VIII of ANILCA and with fundamental principles of fish and wildlife management.

During the four years of congressional consideration of ANILCA, the policies embodied in Title VIII were the subject of prolonged, emotional, and intense debate. However, although all parties with an interest in Title VIII often disagreed about

various provisions and policies, one issue upon which all responsible parties did agree was that professional and scientific fish and wildlife management requires fish stocks and wildlife populations to be subject to one regulatory standard throughout their range. This is a fundamental tenet of the fish and wildlife management profession. Bifurcation of the regulatory standard would not only be confusing, it would be dangerous to the longterm conservation of the fish stocks and wildlife populations being regulated.

On August 20, 1977, Governor Hammond used strong language to reinforce this point in testimony before the House Committee on Interior and Insular Affairs:

> "The subsistence way of life should be preserved in Alaska for as long as possible. I think that this goal can be accomplished if we all realize that what we really are concerned about are these two basics:
>
> First, the resource itself - the fish and wildlife - must be maintained if subsistence is to persist as a way of life. This requires two things: First, protective management of the resource-sustaining habitat, and professional, coordinated, scientific management of the wildlife or fish species itself.
>
> ...
>
> [C]rucial to protection of the resource is coordinated, scientific wildlife management that manages animal populations <u>regardless of where they may roam, spawn, migrate or be taken</u>. As you know, fish and wildlife have little regard for bureaucratic boundaries and, so far as I am concerned, this is argument enough in itself <u>against segmenting the management</u> of a single species or population according to land ownership or user groups. Split management of a single living resource may make some marginal sense in the context of political science; but it makes absolutely no sense whatsoever in the context of biological science." <u>Id</u>. Part XII, 414, 416-417 (statement of Hon. Jay S. Hammond).(Emphasis added).

For the reasons described by Governor Hammond, the adoption of a construction of the purview of section 804 of ANILCA which would authorize the Alaska Board of Fisheries to apply one regulatory standard to a king salmon run when it is inside the boundaries of the Yukon Delta National Wildlife Refuge and a different standard farther up the Yukon River or to authorize the Alaska

Board of Game to apply one regulatory standard to hunting the harvestable surplus of the Nelchina caribou herd on public land and another for hunting the same herd on State and private land would place the health and longterm stability of fish stocks and wildlife populations of national and international significance at considerable risk.

The approach embodied in subsection (e)(4) and (5) both minimizes the risk of this result and is consistent with the intent of Congress embodied in Sec. 804.

With respect to fisheries, Sec. 804 applies to the taking of fish stocks on "public lands". Sec. 102 of ANILCA defines "public lands" as "federal land" title to which is in the United States, and "land" to include "waters, and interests therein". Consequently, with respect to fisheries, section 804 applies to fish stocks moving in waters in which the United States government has an interest. A regulatory interest is an "interest" as defined in Sec. 102.[2] That this result was intended by the Congress is supported by the legislative history introduced by Senator Stevens to explain the intent of Congress in adopting a substitute for the original Senate version of Sec. 807:

> "[T]he Committee section 807 establishes a complex 'judicial enforcement' scheme whereby the Secretary of the Interior is required to represent local advisory committees and regional advisory councils in civil actions to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804."[3] (Emphasis added).

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[2] See, e.g. 46 U.S.C. 740 (admiralty and maritime jurisdiction of the United States extends to "navigable water"), 33 U.S.C. 1344 (Secretary of the Army has jurisdiction to prohibit dredging of or discharge of fill material into the waters of the United States, including the territorial seas).

[3] 126 Cong. Rec. S15131 (daily ed. December 1, 1980)(remarks of Senator Ted Stevens).

With respect to wildlife, Sec. 802(1) of ANILCA establishes a clear and unequivocal congressional policy that "subsistence uses" of wildlife populations are to be regulated by the State of Alaska and the federal government in a manner consistent with "sound management management principles, and the conservation of healthy populations of...wildlife." With respect to the regulation of the taking of wildlife populations which use, and which are harvested for subsistence uses on, "public lands," the regulation of the taking of a population during a period of time when a population might be outside "public lands" pursuant to a regulatory standard different from the standard applied when the population is on "public lands" would violate the congressional policy set forth in Sec. 802(1) and would be a near guarantee for regulatory chaos.

It should be also be noted that Title VIII in general, and Sec. 804 in particular, were enacted by the Congress to benefit a class of hunters and fishermen composed primarily, albeit not exclusively, of Alaska Natives who reside in isolated rural villages and who provide sustenance for their families through hunting and fishing. For that reason in The People of the Village of Gambell v. Clark, ___ F.2d ___ (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit noted that with respect to the proper interpretation of the term "public lands" in Title VIII:

> "The most compelling reason for resolving the ambiguous language of Title VIII in favor of... [the interpretation urged by Alaska Natives residing in the village of Gambell] is that Title VIII was adopted to benefit the Natives. Under a familar rule of statutory construction doubtful language should be construed to further that purpose."

The Court then applied that principle of statutory construction to give the term "public lands" the widest possible purview in order to effectuate "Congress's intention to protect subsistence

uses by rural residents of Alaska".

The regulation proposed in the instant petition is intended to benefit the same class of Native hunters and fishermen. Subsection (e)(4) and (5) embodies an interpretation of Sec. 804 which is consistent with the fulfillment of this important national goal.

F. CONCLUSION.

Title VIII of ANILCA was intended by the Congress to advance an important national interest - the continuation and protection of the taking of fish stocks and wildlife populations for personal and family consumption by Alaska Natives and other persons who reside in rural communities and areas. The class of hunters and fishermen defined in Sec. 803 and the regulatory system established by Sec. 804 were carefully crafted by the Congress to fulfill this goal and were intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as defined in Sec. 803.

Until such time as the Alaska Legislature enacts a state statute which conforms to the requirements set forth in Sec. 805(d), Secs. 803 and 804 are intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses as that term is defined in Sec. 803.

Consequently, for all of the reasons set forth above, the Alaska Federation of Natives respectfully requests that its Petition Proposing the Adoption of a Regulation Governing the Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations by granted and its proposed regulation

adopted.

DATED: July 19, 1985

Janie Leask
President
Alaska Federation of Natives

BEFORE THE ALASKA BOARD OF FISHERIES AND ALASKA BOARD OF GAME

In the Matter of the Petition)
of the Alaska Federation of Natives)
Proposing the Adoption of a Regulation)
Governing the Identification and)
Regulation of Subsistence Uses of)
Fish Stocks and Game Populations.)
)

PETITION

COMES NOW the Alaska Federation of Natives and pursuant to A.S. 44.62.220 and Joint Board Resolution No. 85-16JB respectfully requests the Alaska Board of Fisheries and Alaska Board of Game to repeal 5 A.A.C. 99.010 and in lieu thereof adopt the following joint regulation:

> 5 A.A.C. 99.010. JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES. (a) The Board of Fisheries and Board of Game shall identify and regulate the taking of fish stocks and game populations according to the following procedures:
>
> (1) each board will assess the biological status of fish stocks and game populations and identify the harvestable surplus which may be taken from each stock and population consistent with the utilization, development and conservation of such stocks and populations on the sustained yield principle.
>
> (2) with respect to each fish stock or game population for which a harvestable surplus has been identified, each board will identify "subsistence uses" of such stock or population as such term is defined in Sec. 803, Pub. L. 96-487 (16 U.S.C. 3113), to wit the customary and traditional uses of such stock or population by rural Alaska residents for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of stocks or populations taken for personal or family consumption; and for customary trade.
>
> (3)(A) after identifying subsistence uses of a fish stock or game population pursuant to paragraph (2), the board will determine the amount of the harvestable surplus of such stock or population required to fully provide a reasonable opportunity to engage in such uses and, pursuant to Sec. 804, Pub. L. 96-487

(16 U.S.C. 3114), will adopt regulations which authorize the taking of such stock or population for subsistence uses.

(B) Pursuant to Sec. 802, Pub. L. 96-487 (16 U.S.C. 3112) and the maintenance of fish stocks and game populations on the sustained yield principle, regulations adopted pursuant to this paragraph will cause the least adverse impact possible on persons engaged in subistence uses of such stocks and populations.

(4) If the harvestable surplus of a fish stock or game population is not large enough to safely sustain a harvest consistent with the sustained yield principle by all persons engaged in subsistence uses of such stock or population, the board will adopt regulations which allocate the opportunity to take such stock or population for subsistence uses among such persons on the basis of the following criteria:

(A) customary and direct dependence upon the stock or population as the mainstay of livelihood;

(B) local residency; and

(C) the availability of alternative food resources.

(5) If the harvestable surplus of a fish stock or game population is larger than the amount of the surplus needed to fully provide a reasonable opportunity to engage in subsistence uses of such stock or population, the board will, in its discretion, adopt regulations pursuant to A.S. 16.05 which authorize the taking of such stock or population for nonsubsistence uses consistent with the sustained yield principle.

(b) for the purposes of subsection (a), the terms -

(1) "rural" means a community or area in which the taking of fish stocks and game populations for personal and family consumption is a significant characteristic of the economy of the community or area.

(2) "customary and traditional" means (i) a long-term, consistent pattern of use of a fish stock or game population, excluding interruption by circumstances beyond the control of the persons taking such stock or population such as regulatory prohibition;

(ii) a use pattern which recurs in specific seasons of each year;

(iii) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local circumstances;

(iv) the consistent harvest and use of such

stock or population near, or at a location reasonably accessible to, the residence of the persons taking such stock or population;

(v) the handling, preparing, preserving and storing of such stock or population in a manner which has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances;

(vi) a use pattern which includes the handing down of knowledge of fishing or hunting skills and values from generation to generation;

(vii) a use pattern in which the products derived from such stock or population are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises), barter, sharing, and gift-giving; and

(viii) a use pattern which includes reliance upon a wide diversity of fish stocks and game populations of an area for personal and family consumption and which provides substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take and consume such stock or population for their sustenance.

(3) "fish stock" means a species, subspecies, geographical grouping or other category of fish capable of management as a unit which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States.

(4) "game population" means a group of game animals of the same species or smaller taxa whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (3) of this subsection.

(c) The taking of fish stocks and game populations which are not subject to regulation pursuant to subsection (a) of this section shall be regulated by the boards pursuant to A.S. 16.05.

A. THE UNITED STATES CONGRESS HAS DELEGATED THE ALASKA BOARD OF FISHERIES AND ALASKA BOARD OF GAME AUTHORITY TO ADOPT THE PROPOSED REGULATION.

The Alaska Board of Fisheries and Alaska Board of Game is empowered to adopt the regulation set forth above pursuant to authority delegated to such boards by the United States Congress in Secs. 803 and 804 of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (1980).

B. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PARTY WITHIN THE MEANING OF A.S. 44.62.220.

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural villages and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish stocks and game populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent villages and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and game populations

for personal consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses. AFN is an interested party within the meaning of A.S. 44.62.220.

C. FOR THE PAST EIGHTY-THREE YEARS THE CONGRESS HAS CONSISTENTLY RECOGNIZED THE NATIONAL INTEREST IN, AND THE FEDERAL RESPONSIBILITY FOR, ENSURING THAT THE TAKING OF FISH STOCKS AND GAME POPULATIONS RESIDENT WITHIN ALASKA IS REGULATED IN A MANNER WHICH PROTECTS THE TAKING OF SUCH STOCKS AND POPULATIONS FOR SUBSISTENCE PURPOSES BY ALASKA NATIVES AND OTHER PERSONS RESIDENT IN RURAL VILLAGES AND AREAS, AND IN 1980 THE CONGRESS ASSERTED ITS JURISDICTION TO ESTABLISH THE REGULATORY STANDARD WHICH PRESENTLY GOVERNS THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF SUCH TAKINGS.

For the past eighty-three years the United States Congress has consistently recognized its responsibility, and has consistently asserted its jurisdiction, to ensure that the taking of fish stocks and game populations is regulated in a manner consistent which the continuation and protection of the taking of such stocks and populations by Alaska Natives and other persons resident in rural communities and areas.

For example, the first game law applicable to Alaska was enacted by the Congress in 1902, 32 Stat. 327 (1902). Although the Act established statutory seasons and other forms of regulation of the taking of game birds and animals, the statute specifically exempted the taking of such birds and animals by Indians and Eskimos for food from regulation. The 1902 subsistence exemption was re-enacted by the Congress in the 1908 Alaska Game Act, 35 Stat. 102 (1908) and the 1925 Alaska Game Act, 43 Stat. 743 (1925).

In 1958, when the Congress enacted the Alaska Statehood Act, 72 Stat. 339 (1958), it refused to transfer regulatory

authority over the taking of fish stocks and game populations to the State of Alaska until such time as the new state demonstrated that it had adopted a regulatory system which inter alia ensured that the taking of fish stocks and game populations by Alaska Natives for subsistence uses would be adequately protected. See Sec. 6(e), Pub. L. No. 85-508. This provision was added to the Alaska Statehood Act on the floor of the House of Representatives by an amendment offered by Representatives Pelly and Westland. By way of explanation as to why their amendment was needed, Pelly and Westland introduced a letter from Acting Territorial Governor Hugh Wade to the Alaska Senate expressing his concern that the fish and game statute which the Territorial Legislature had enacted in anticipation of statehood "overlooked or disregarded" the hunting and fishing rights "of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation [i.e. the 1925 Alaska Game Act, as amended]". 104 Cong. Rec. 9488-9489, 9750 (1958).

Between the transfer of authority to regulate the taking of fish stocks and game populations to the new State of Alaska in 1960 and the enactment of ANCSA in 1971 it had become obvious that the Alaska Board of Fish and Game was not institutionally inclined to adopt hunting and fishing regulations which adequately safeguarded the taking of fish stocks and game populations for subsistence uses as mandated by the Congress in 1958.

As a result, the United States Senate included a provision in its version of ANCSA which would have reasserted federal jurisdiction over the taking of fish stocks and game populations in Alaska to ensure that this important national goal was achieved. See Sec. 21, S. 35, 92d Cong., 1st Sess. (1971). The provision was deleted from the final version of ANCSA after the Conference

Committee received assurances from the State of Alaska that such a reassertion of federal jurisdiction was unnecessary because the Board of Fish and Game was prepared to adequately discharge its responsibility to protect subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas. However, in order to make unequivocally clear that both the Department of the Interior and the State of Alaska have a nondiscretionary responsiiblity to ensure that subsistence hunting and fishing by Alaska Natives is adequately protected, the Committee included the following admonition in its report to the Congress on the work of the conference:

> The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take <u>any action necessary</u> to protect the subsistence needs of the Natives. House Rept. No. 92-746, 92d Cong., 1st Sess. 37 (1971)(Emphasis added).

By 1977 when the Congress began consideration of legislation which was enacted in 1980 as the Alaska National Interest Lands Conservation Act (ANILCA), it had become obvious that contrary to representations made by the State of Alaska in 1971, the Alaska Board of Fisheries and Alaska Board of Game had not adopted hunting and fishing regulations which adequately protected subsistence uses. <u>See for example Hearings on H.R. 39 before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs</u> 95th Cong., 1st Sess., Part XI, 398-479 (statement of Donald C. Mitchell), Part XII, 52-61, 461-497 (statement of Byron Mallot).

The suggested solution to the problem was for the United States Congress to reassert its jurisdiction over the regulation of the taking of fish stocks and game populations in Alaska to ensure that in the future such regulation would be conducted pursuant to federal regulatory standards which ensure that the taking of such stocks and populations by Alaska Natives and

other residents of rural communities and areas will be adequately protected.

Significantly, this approach was suggested and supported by Jay S. Hammond, then Governor of Alaska, who candidly admitted to the Congress that there was "some justification" for "the perception that state regulation has either favored urban hunters too much, or not favored rural hunters enough when the difficult allocation decisions were made," and then concluded with the request that:

> "I hope this Congress establishes the priority of subsistence use where there is a conflict on national interest lands. I believe this is a legitimate subject for [federal] legislation, and hope that is principle, which as been State policy for some time, is enacted into Federal law." Id. Part XII, 12 (statement of Hon. Jay S. Hammond).

The Congress responded to Governor Hammond's request by including Title VIII in ANILCA. Secs. 803 and 804 establish a federal standard which governs the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations. As Senator Ted Stevens, a major participant in the drafting of the version of ANILCA which was enacted into law, explained to the United States Senate, the Senate Committee on Energy and Natural Resources version of title VIII required the Secretary of the Interior to initiate a civil action "to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804." 126 Cong. Rec. S 15131 (December 1, 1980 daily ed.)(Emphasis added).

Senator Stevens went on to explain that though the State of Alaska did not object to the Congress compelling its regulatory agencies to adopt hunting and fishing regulations pursuant to the federal regulatory standard set forth in section 804, it

did object to the Secretary of Interior being assigned responsibility to initiate a civil action if the Alaska Board of Fisheries or Alaska Board of Game failed to to so. For that reason Senator Stevens persuaded the Congress to amend the judicial enforcement section of title VIII to eliminate the Secretary of the Interior's enforcement responsibility and establish a private cause of action in its stead.

As a result, if the Alaska Board of Fisheries or Alaska Board of Game adopts a regulation inconsistent with the federal regulatory standard set forth in Sec. 804, Sec. 807 authorizes local residents "aggrieved by a failure of the State...to provide for the priority for subsistence uses set forth in section 804... [to] file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority." The exclusive relief afforded by Sec. 807 to remedy the Alaska Board of Fisheries' or Alaska Board of Game's adoption of an unlawful regulation is an order of the United States District Court requiring the offending board to adopt and submit regulations to the Court "which satisfy the requirements of Sec. 804." The language and legislative history of Secs. 804 and 807 of ANILCA make clear that the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses," as that term is defined in section 803 of ANILCA.

However, in addition to its concern that subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas be adequately protected by the Alaska Board of Fisheries and Alaska Board of Game, the Congress was also sensitive to the political tension which has historically

surrounded state and federal authority to regulate the taking of the same fish stocks and game populations within the boundaries of the fifty states. No person and no state, including the State of Alaska, any longer challenges the Congress' constitutional authority to supercede state regulation of resident fish stocks and game populations. See Kleppe v. New Mexico, 426 U.S. 529 (1976). However, during Congress' consideration of ANILCA, many members of Congress, including Senator Stevens, were of the opinion that, although constitutional, the assertion of such federal authority over the Alaska Board of Fisheries and Alaska Board of Game was politically unwise unless necessary to protect the national interest.

This policy was consistent with many actions of the Congress prior to enactment of ANILCA which purposely limited the Department of the Interior's authority to regulate the taking of fish stocks and game populations in contravention of state regulation. The Federal Land Policy and Management Act of 1976 is a recent example of congressional policy in this area. See Sec. 302(b), Pub. L. No. 94-579 (1976).

To the extent the Department of the Interior has been delegated regulatory authority to supercede state regulation, the Department has been similarly circumspect with respect to using it. The statute which delegates the U.S. Fish and Wildlife Service (FWS) authority to manage fish stocks and game populations within units of the National Wildlife Refuge System, for example, requires FWS regulations governing the taking of stocks and populations within refuges to be consistent with the hunting and fishing regulations of the state in which a refuge is located only "to the extent practicable to do so". If consistency is not practicable, FWS may supercede state regulation.

However, because of the political sensitivity involved,

FWS has voluntarily limited the exercise of its own jurisdiction. 50 C.F.R. 32.3(d) precludes FWS from adopting regulations governing the taking of a game population within a wildlife refuge which are more liberal than the state regulations which, but for FWS' superceding regulations, would control the taking of such population. It is important to note, however, that this self-imposed regulatory restraint is an act of political comity - not a constitutional or statutory requirement.

This long tradition of congressional sensitivity to the tension between federal responsibility toward and state interest in the regulation of the taking of the same fish stocks and game populations was reflected in title VIII of ANILCA. Although the Congress intended the regulatory standard set forth in Sec. 804 to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803, if the Alaska Legislature enacted a state statute which established the same regulatory standard, then "unless and until [such statute might be] repealed" the Congress intended the state statute, rather than Secs. 803 and 804, to govern the boards' adoption of fishing and hunting regulations. See Sec. 805(d).

If the Alaska Legislature enacted a statute of this nature and a board refused to adopt regulations consistent with its regulatory mandate, then although an aggrieved party is still authorized to file a civil action pursuant to Sec. 807, the claim for relief would be based upon violation of the state

statute rather than Sec. 804.[1]

This act of comity is similar to the approach the Congress followed when it established the Alaska Land Bank Program in Sec. 907 of ANILCA. Village and regional corporations authorized by ANCSA but established pursuant to and regulated by State law are authorized to place lands in the land bank. During the time lands are deposited in the bank, Sec. 907(c)(2) supercedes the laws of the State of Alaska and exempts such lands from state taxation, adverse possession and judicial execution. However, as a matter of comity, if the Alaska Legislature enacts state statutes which provide banked land any of the protections from involuntary loss set forth in Sec. 907(c)(2), then "such [state] laws, unless and until repealed, shall supercede the relevant subparagraph of subsection (c)(2) and shall govern the grant of the benefit so provided".

For the reasons set forth above, the language and legislative history of Secs. 804 and 807 of ANILCA make clear that in the absense of a state statute which establishes the same regulatory standard as that set forth in Secs. 803 and 804, the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

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[1]Sec. 807(a) provides in pertinent part that:

> Local residents and other persons and organizations aggrieved by a failure of the State... to provide for the priority for subsistence uses set forth in section 804 (or with respect tto the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d))...

D. THE STATE OF ALASKA HAS NOT ENACTED A STATUTE WHICH ESTABLISHES THE SAME REGULATORY STANDARD AS THAT SET FORTH IN SECS. 803 AND 804 OF ANILCA. CONSEQUENTLY, SECS. 803 AND 804 CONTROL THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF FISH STOCKS AND GAME POPULATIONS WHICH ARE THE SUBJECT OF "SUBSISTENCE USES" AS THAT TERM IS DEFINED IN SECTION 803.

In 1978 the Alaska Legislature enacted ch. 151 SLA 1978. Subsequent to the enactment of ANILCA, the State of Alaska represented to the Secretary of the Interior that ch. 151 established the same regulatory standard as that set forth in Secs. 803 and 804 of ANILCA, that ch. 151 satisfied the requirements of section 805(d), and, consequently, that ch. 151 rather than Secs. 803 and 804 should be determined by the Secretary to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803. This conclusion was not apparent on the face of the statute.

On February 25, 1982, Secretary of the Interior James Watt wrote Governor Hammond indicating that the Department of the Interior could not at that time certify that the State of Alaska had satisfied the requirements of Sec. 805(d) of ANILCA because the purview of the state statutory definition of the term "subsistence uses" was not limited on its face to "rural Alaska residents". As Secretary Watt explained, the State had failed "to distinguish rural residents engaged in subsistence uses from other users who make 'customary and traditional uses' of fish and game resources."

In response, the Alaska Board of Fisheries and Alaska Board of Game adopted an interpretative regulation which limited the purview of the state statutory definition to residents of rural Alaska. Only this class of hunters and fishermen would be provided the prioirty for subsistence uses established by A.S. 16.05.251(b)

and 16.05.255(b). As a result, on April 14, 1982, Secretary Watt informed Governor Hammond that the State of Alaska had complied with the requirements of Sec. 805(d) of ANILCA, and that henceforth the ch. 151 SLA 1978, rather than Secs. 803 and 804 of ANILCA, would control the Alaska Board of Fisheries and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of subsistence uses. The interpretative regulation which brought the State of Alaska into compliance with Sec. 805(d) was codified as 5 A.A.C. 99.010.

Regrettably, on February 22, 1985, the Alaska Supreme Court issued its opinion in Madison v. Alaska Department of Fish and Game. The Court held that the Tenth Alaska Legislature did not intend to limit the purview of the term "subsistence uses" in ch. 151 to residents of rural Alaska and, consequently, the adoption of a regulation limiting the purview of the statutory definition in that manner was beyond the scope of the statute. Hence, contrary to Secretary Watt's determination on April 14, 1982, the State of Alaska has never been in compliance with the requirements of Sec. 805(d) of ANILCA, and, consequently, Secs. 803 and 804 still control the authority of the Alaska Board of Fisheries and Alaska Board of Game to adopt regulations governing the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

The purpose of this petition is to request the boards to adopt a regulation which clarifies their regulatory authority in this regard.

E. THE PURVIEW OF THE REGULATORY AUTHORITY SET FORTH IN SEC. 804 OF ANILCA ENCOMPASSES THE TAKING OF FISH STOCKS WHICH AT ANY TIME OR DURING ANY SEASON OF THE YEAR MAY BE FOUND IN WATERS OF THE UNITED STATES AND GAME POPULATIONS WHOSE MEMBERS IN WHOLE OR IN PART USE OR MAY BE FOUND AT ANY TIME OR DURING ANY SEASON OF THE YEAR UPON LAND THE TITLE TO WHICH IS IN THE UNITED STATES OR UPON OR IN WATERS SUBJECT TO THE REGULATORY JURISDICTION OF THE UNITED STATES.

Paragraph (3) of proposed subsection (b) defines the term "fish stock" to encompass all fish stocks which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States. Paragraph (4) defines the term "game population" to encompass all game populations whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States, or upon or in waters described in paragraph (3). These definitions are consistent with both the intent of Congress embodied in title VIII of ANILCA and with fundamental principles of fish and game management.

During the four years of congressional consideration of ANILCA, the policies embodied in title VIII were the subject of prolonged, emotional, and intense debate. However, although all parties with an interest in title VIII often disagreed about various provisions and policies, one issue upon which all responsible parties did agree was that professional and scientific fish and game management requires fish stocks and game populations to be subject to one regulatory standard throughout their range. This is a fundamental tenet of fish and wildlife management profession. Bifurcation of the regulatory standard would not only be confusing, it would be dangerous to the longterm conservation

of the fish stocks and game populations being regulated.

On August 20, 1977, Governor Hammond used strong language to reinforce this point in testimony before the House Committee on Interior and Insular Affairs:

> "The subsistence way of life should be preserved in Alaska for as long as possible. I think that this goal can be accomplished if we all realize that what we really are concerned about are these two basics:
>
> First, the resource itself - the fish and wildlife - must be maintained if subsistence is to persist as a way of life. This requires two things: First, protective management of the resource-sustaining habitat, and professional, coordinated, scientific management of the wildlife or fish species itself.
>
> ...
>
> [C]rucial to protection of the resource is coordinated, scientific wildlife management that manages animal populations regardless of where they may roam, spawn, migrate or be taken. As you know, fish and wildlife have little regard for bureaucratic boundaries and, so far as I am concerned, this is argument enough in itself against segmenting the management of a single species or population according to land ownership or user groups. Split management of a single living resource may make some marginal sense in the context of political science; but it makes absolutely no sense whatsoever in the context of biological science." Id. Part XII, 414, 416-417 (statement of Hon. Jay S. Hammond).(Emphasis added).

For the reasons described by Governor Hammond, the adoption of a construction of the purview of section 804 of ANILCA which would authorize the Alaska Board of Fisheries to apply one regulatory standard to a king salmon run when it is inside the boundaries of the Yukon Delta National Wildlife Refuge and a different standard farther up the Yukon River or to authorize the Alaska Board of Game to apply one regulatory standard to hunting the harvestable surplus of the Nelchina caribou herd on public land and another for hunting the same herd on State and private land would place the health and longterm stability of fish stocks and game populations of national and international significance at considerable risk.

The approach embodied in subsection (b)(3) and (4) both

minimizes the risk of this result and is consistent with the intent of Congress embodied in Sec. 804.

With respect to fisheries, Sec. 804 applies to the taking of fish stocks on "public lands". Sec. 102 of ANILCA defines "public lands" as "federal land" title to which is in the United States, and "land" to include "waters, and interests therein". Consequently, with respect to fisheries, section 804 applies to fish stocks moving in waters in which the United States government has an "interest" - including a regulatory interest.[2] That this result was intended by the Congress is supported by the legislative history introduced by Senator Stevens to explain the intent of Congress in adopting a substitute for the original Senate version of section 807:

> "[T]he Committee section 807 establishes a complex 'judicial enforcement' scheme whereby the Secretary of the Interior is required to represent local advisory committees and regional advisory councils in civil actions to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804."[3] (Emphasis added).

With respect to game, Sec. 802(1) of ANILCA establishes a clear and unequivocal congressional policy that "subsistence uses" of game populations are to be regulated by the State of Alaska and the federal government in a manner consistent with "sound management management principles, and the conservation of healthy populations of...wildlife." With respect to the regulation of the taking of game populations which use, and

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[2] See, e.g. 46 U.S.C. 740 (admiralty and maritime jurisdiction of the United States extends to "navigable water"), 33 U.S.C. 1344 (Secretary of the Army has jurisdiction to prohibit dredging of or discharge of fill material into the waters of the United States, including the territorial seas).

[3] 126 Cong. Rec. S15131 (daily ed. December 1, 1980)(remarks of Senator Ted Stevens).

which are harvested for subsistence uses on, "public lands," the regulation of the taking of a population during a period of time when a population might be outside "public lands" pursuant to a regulatory standard different from the standard applied when the population is on "public lands" would violate the congressional policy set forth in Sec. 802(1) and would be a near guarantee for regulatory chaos.

It should be also be noted that Title VIII in general, and Sec. 804 in particular, were enacted by the Congress to benefit a class of hunters and fishermen composed primarily, albeit not exclusively, of Alaska Natives who reside in isolated rural villages and who provide sustenance for their families through hunting and fishing. For that reason in The People of the Village of Gambell v. Clark, ___ F.2d ___ (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit noted that with respect to the proper interpretation of the term "public lands" in Title VIII:

> "The most compelling reason for resolving the ambiguous language of Title VIII in favor of... [the interpretation urged by Alaska Natives residing in the village of Gambell] is that Title VIII was adopted to benefit the Natives. Under a familar rule of statutory construction doubtful language should be construed to further that purpose."

The Court then applied that principle of statutory construction to give the term "public lands" the widest possible purview in order to effectuate "Congress's intention to protect subsistence uses by rural residents of Alaska".

The regulation proposed in the instant petition is intended to benefit the same class of Native hunters and fishermen. Subsection (b)(3) and (4) embody an interpretation of Sec. 804 which is consistent with the fulfillment of this important national goal.

F. CONCLUSION.

Title VIII of ANILCA was intended by the Congress to advance an important national interest - the continuation and protection of the taking of fish stocks and game populations for personal and family consumption by Alaska Natives and other persons who reside in rural communities. The class of hunters and fishermen defined in Sec. 803 and the regulatory system established by Sec. 804 were carefully crafted by the Congress to fulfill this goal and were intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as defined in Sec. 803.

As the Senate Committee on Energy and Natural Resources, the committee which reported the version of title VIII which was enacted into law, explained:

> This section [i.e. Sec. 804] requires <u>both</u> the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands... If a particular fish or wildlife population (e.g. salmon, moose, or caribou) in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section [i.e. Sec. 804] need not be imposed by <u>the State rulemaking authority</u>. However, if the continued viability of a particular population or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, <u>the State rulemaking authority</u>, in conjunction with the recommendations of the regional council representing the affected area, is required <u>by this section</u> to establish <u>regulations</u> which restrict the taking of such population to Alaska residents engaged in subsistence uses. Senate Rept. No. 96-413, 96th Cong., 1st Sess. 269-270 (1979) (Emphasis added).The

Alaska Legislature has not enacted a state statute which conforms to the requirements set forth in Sec. 805(d), and, consequently, the applicability of Secs. 803 and 804 to the boards' regulatory activities has not been superceded by state law.

The boards' recent attempts to adopt hunting and fishing

regulations which reflect the definition of "subsistence uses" set forth in ch. 151 SLA 1978 rather than Sec. 803 of ANILCA has disadvantaged the class of hunters and fishermen Title VIII was enacted to protect by placing them in the same regulatory class as urban hunters and fishermen. For example, as a result of the fishing regulations recently adopted by the Alaska Board of Fisheries, rural residents of the village of Tyonek and along the Copper River are no longer protected by regulation from being overwhelmed by competition from large numbers of urban sportsmen harvesting the same fish stocks.

The regulations recently adopted by the Alaska Board of Game also treat urban sportsmen as unfairly as they do rural hunters and fishermen engaged in "subsistence uses" as that term is defined in Sec. 803. The application of the mainstay of livelihood, local residency, and availability of alternative resources criteria to allocate access to sport hunting opportunities among urban sportsmen makes little sense. Although both Sec. 804 and ch. 151 SLA 1978 include the same three criteria, Sec. 804 limits application of the criteria to allocating access to the harvestable surplus of a fish stock or game population among hunters or fishermen within the class of persons engaged in "subsistence uses" of the stock or population as defined by Sec. 803. Application of the criteria to <u>all</u> hunters and fishermen, both urban and rural, is a needlessly divisive and prohibitively expensive administrative nightmare.

Consequently, for all of the reasons set forth above, the Alaska Federation of Natives respectfully requests that its Petition Proposing the Adoption of a Regulation Governing the

Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations by granted and its proposed regulation adopted.

DATED: July 18, 1985

Janie Leask
President
Alaska Federation of Natives

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC. and ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC.,

Plaintiffs,

vs.

ROBERT JANTZEN, Director, United States Fish and Wildlife Service, and DON COLLINSWORTH, Commissioner, Alaska Department of Fish and Game,

Defendants.

and

THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and STATE REPRESENTATIVE TONY VASKA,

Intervenors/Defendants.

MEMORANDUM AND ORDER

J84-013 CIV

I. Background

THIS CAUSE comes before the court on the parties' cross motions for summary judgment. It concerns issues of game

management and Native subsistence hunting in the Yukon-Kuskokwim delta. Four species of migrating birds, the cackling Canada goose, the emperor goose, the white-fronted goose, and the black brant, have suffered major declines in population over the last 20 years. All parties agree that unless these declines are reversed, the species' populations may fall to dangerously low levels. As of 1983, the estimated populations are as follows: cackling Canada goose - 30,000; white-fronted goose - 113,000; black brant - 110,000; and emperor goose - 71,000. Approximate estimates for 1984 are: cackling Canada goose - 30,000; white-fronted goose - 100,000; black brant - 133,000; and emperor goose - 71,000. These numbers are necessarily approximate, given that geese do not fill out census forms.

The Yukon-Kuskokwim delta is a major summer nesting ground for these species. The species traditionally have been hunted by Natives in the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet. The evidence before this court indicates that this harvesting - along with hunting by sportsmen, loss of habitat, and natural predation - has been a major cause of the population decline.

Such spring hunting is potentially illegal under the terms of the migratory bird treaty between the United States and Canada

and the Migratory Bird Treaty Act of 1918 (MBTA), which implements that treaty's provisions in the United States. See United States-Great Britian Convention for the Protection of Migratory Birds, August 16, 1916, 39 Stat. 1702, T.S. 628 (Canada Treaty); Migratory Bird Treaty Act of 1918, Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)). Both state and federal law enforcement officials have assumed spring taking of geese by Natives to be illegal, but in recent years virtually no effort has been made to enforce compliance. As was found by this court in denying plaintiffs' motion for preliminary injunction, traditional methods of enforcing game laws have not been effective in the vast reaches of rural Alaska for both political and geographical reasons.

In January, 1984, the Association of Village Council Presidents (AVCP), Alaska Department of Fish and Game (ADF&G), U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game, and two California sportsmens' groups tentatively agreed to a cooperative plan to reduce hunting of some species. This plan, called the Hooper Bay Agreement, called for no hunting or harvest of cackling Canadian geese and reduced hunting and harvest of white-fronted geese and black brants. Emperor geese were not included in the agreement for the reason that they do nct migrate to California.

The Hooper Bay Agreement was replaced in 1985 by the Yukon-Kuskokwim Goose Management Plan. See Ex. A, Docket 96. In

addition to continuing the hunting restrictions of the previous agreement, the plan also restricts sport and subsistence hunting of the emperor goose. Native leaders have worked closely with villages in the delta region to publicize it and encourage compliance.

Pursuant to the plan, the parties adopted monitoring, verification and enforcement procedures. Ex. B, Docket 96. Under these procedures, any suspected violations of it are to be reported to the USFWS, APVC, and the ADF&G. These procedures further provide that the USFWS and ADF&G shall cite individual hunters for violations of the plan upon (1) a local village request; (2) recurring non-compliance or blatant violation; or (3) use of charter or private aircraft to assist in hunting. Other instances of non-compliance are responded to more informally. A cooperative team of AVCP, ADF&G and USFWS employees visits villages in response to reported violations to ensure compliance through education and information.

Initial reports indicate that the cooperative plan has been successful. See, e.g., USFWS Report attached to Docket 119. There has been particularly strong support for the program from the Native community. Apparently, this had led to a major decline in the subsistence harvest of each of the species in question. The plan has also substantially reduced egg gathering activities. Of equal importance, because of the involvement of

the Native community in the plan, increased enforcement, including the issuance of citations, has occurred.

Plaintiffs seek to have the court set aside the Goose Management Pla as well as what is known as the "Watson Policy" as violative of the MBTA and improperly promulgated. The "Watson Policy" refers to a policy memorandum written by the Alaska Area Director of USFWS in 1975. In this memorandum, he stated "that where there is a demonstrable need for the taking of migratory bird resources for subsistence purposes, the U.S. Fish and Wildlife Service will not recommend prosecution in Federal court for a violation of the Migratory Bird Treaty Act during the statutory closed period." Memorandum of Gordon Watson to All Stations, Alaska Area, December 5, 1975, Plaintiffs' Exhibit A.

After plaintiffs filed this suit against the state and federal defendants, the Alaska Federation of Natives and the Association of Village Council Presidents moved for, and were granted, intervenor status. In their cross-claim, among other arguments, they allege that Congress had repealed the MBTA's prohibition on spring subsistence hunting in the Alaska Game Law of 1925, Ch. 75, 43 Stat. 739 (1925), and the Fish and Wildlife Improvement Act of 1978 53(h)(2), Pub. L. No. 95-616, 92 Stat. 3110, 3112 (1978) (codified at 16 U.S.C. § 712 (1982). The court will address these claims first.

II. Intervenors' Cross-Claim

A. The Canadian Treaty and the MBTA

Prior to the passage of the MBTA, Congress had established a "subsistence" exception to the Alaska game laws. See Alaska Game Law of 1902, ch. 1037, 31 Stat. 327 (1902); Alaska Game Law of 1908, ch. 162, 35 Stat. 102 (1908). These laws allowed Natives to hunt game animals and birds at any time for food or clothing, and allowed miners and explorers to kill such game at any time when in need of food. See H.R. Rep. No. 951, 57th Cong., 1st Sess. 2 (1902).

The passage of the MBTA in 1918 apparently outlawed spring subsistence hunting of most migratory birds by Natives for the reason it created a closed season on migratory game birds between March 10 and September 1 of each year. The Act also left an extremely short to non-existent fall hunting season for the Natives, as the geese leave the delta in or before September.

Intervenors initially allege that Congress did not intend the MBTA to apply to Alaska, or to repeal by implication the Alaska Game laws and their subsistence exceptions. The court disagrees, and finds that Congress intended the MBTA to apply to subsistence hunting in Alaska. First, the purpose of the MBTA was to implement the Canadian Treaty, a treaty clearly intended to include Alaska Natives within its scope. Article II, sec. 3 of the Treaty states:

> The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

Although the Treaty's framers created a subsistence exception for migratory nongame birds, they created no similar exception for migratory game birds. This demonstrates the framers' intent that no subsistence exception exist for migratory game birds, and that the Treaty apply to Alaska.

The purpose of this exception was explained in a letter from the Secretary of Agriculture to the Secretary of State, dated March 10, 1916:

> The word other is inserted before "migratory non-game birds" to differentiate this group from migratory insectivorous birds in Paragraph 2 and the proviso is added "except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres, and puffins and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale." This proviso affects primarily the Territories of Alaska and the coastal Provinces and Territories of Canada, where the natives have been accustomed since time immemorial to utilize certain sea birds for food and clothing. The clause follows essentially certain provisions already contained in the laws of Alaska and some of the Provinces of Canada and is inserted merely to prevent any hardship on the natives in these remote parts of the continent.

Federal Memorandum in Opposition to Intervenors' Motion for Summary Judgment, Ex. A.

Other factors further evidence that the MBTA applies to Alaska. First, by its own language, the MBTA applies to both "States " and "Territories." See, e.g., MBTA § 7, 40 Stat. at 756. Second, an attempt by Mr. Sulzer, the delegate from Alaska to the House of Representatives, to amend the MBTA to create a subsistence exemption was voted down. See 55 Cong. Rec. 7457 (June 6, 1918) (comments of Rep. Sulzer). Last, regulations

issued contemporaneous with the MBTA included Alaska within their scope. See Proclamation of July 31, 1918, 40 Stat. 1812; Proclamation of October 25, 1918, 40 Stat. 1863.

B. The Alaska Game Law of 1925

Intervenors further contend that the Alaska Game Law of 1925, ch. 75, 43 Stat. 739 (1925), created a "subsistence" exception to the MBTA. The Alaska Game Law of 1925 superseded the 1900 Game Law, and by its own terms, comprehensively regulates all hunting of game, including migratory birds, in Alaska. See Alaska Game Law of 1925, §§ 2, 8 and 10, 43 Stat. at 740, 743.

Section 8 of the Act prohibits all taking of game, including migratory birds, unless permitted by the Act or regulations made pursuant to it.[1] Section 10 of the Act authorizes the Secretary to issue comprehensive regulations to implement the Act, but then places certain restrictions on the scope and content of

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1 Section 8, in relevant part, reads as follows:

> Sec. 8. TAKING OF ANIMALS AND BIRDS RESTRICTED.--That, unless and except as permitted by this Act or by regulations made pursuant to this Act, it shall be unlawful for any person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land fur-bearing animal, wild bird, or any arts thereof, or any nest of egg of any such bird . . . : Provided, that nothing in this Act shall be construed to prevent the collection or exportation of animals, birds, parts thereof, or nests or eggs of birds for scientific purposes, or of live animals, birds, or eggs of birds, for propagation or exhibition purposes, under a permit issued by the Secretary of Agriculture and under such regulations as he may prescribe. . . . (Emphasis added).

those regulations. Two of those restrictions are relevant to the issue before the court. First, the Act states that no regulation shall "prohibit any Indian or Eskimo, prospector or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available." Second, the Act requires that "nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations."[2] The court finds that these two sections cannot

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[2] The relevant language of the statute reads as follows:

> Sec. 10. Regulations.--That the Secretary of Agriculture, upon consultation with or recommendation of the [Alaska Game] commission, is hereby authorized and directed from time to time to determine when, to what extent, if at all, and by what means . . . game birds, nongame birds,and nests or eggs of birds may be taken, possessed, transported, caught, or sold, and to adopt suitable regulations permitting and governing the same in accordance with such determinations. . . .
>
> . . .
>
> but no such regulation . . . except as herein provided, shall prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, but the shipment or sale of any animals or birds or parts thereof so taken shall not be permitted, except that the hides of animal so taken may be sold within the Territory, but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

Alaska Game Act of 1925, § 10, 43 Stat. at 743-44.

be reconciled. The issue thus is whether the "emergency taking" clause must be read as an exception to the MBTA, i.e., the MBTA applies except for emergency taking, or whether the MBTA excludes migratory birds from an emergency taking exception.[3] To solve this problem, the court must divine the Congressional intent behind the 1925 Act. Fortunately for the court, the structure of the Act contains a number of indications of that intent.

First, the court finds that Congress intended the 1925 Act to comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. Section 8, for example, makes all taking of birds illegal, "except as permitted by this Act or by regulations made pursuant to this Act." The plain meaning of this language is that Congress no longer intended the MBTA to be a statutory authority for migratory bird regulations.

Section 10 of the Act further evidences Congressional intent that all future regulation of migratory birds in Alaska be pursuant to it and not to the MBTA. Section 10 gives the Secretary comprehensive authority to regulate taking of migratory birds. See footnote 2 supra. The final proviso of the section further supports this view. It states:

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Initially, the court finds that the "emergency exception" in the 1925 Act to be a positive grant of authority to natives, prospectors, and travelers to harvest game when in need. To read it otherwise would rob the section of any meaning or effect.

nor shall any regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

If Congress had intended migratory bird regulations to be promulgated under the MBTA, it would not have been necessary for Congress to order the Secretary not to issue regulations in conflict with it. Rather, the proviso indicates that Congress expected the Secretary to issue new regulations on migratory birds under the 1925 Act and not under the MBTA.

Section 16 of the 1925 Act further demonstrates that Congress intended it to supersede the MBTA as the basis of bird regulation.[4] Assuming that the MBTA superseded the 1908 Act the MBTA would have been the primary source of bird regulation in Alaska at the time of the 1925 Act. If Congress had intended the MBTA to continue to be in effect in Alaska as an independent basis for regulation after the passage of the 1925 Act, it would not have repealed its applicability to Alaska in section 16. See discussion below.

4

> Sec. 16. Existing Legislation Continued in Force Temporarily. -- That the provisions of existing laws relating to the protection of game and fur-bearing animals, birds, and nests and eggs of birds in the Territory shall remain in full force and effect until expiration of ninety days from the date of publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

Alaska Game Act of 1925 § 16, 43 Stat. at 747 (emphasis added).

While Congress intended all regulation of bird hunting in Alaska to be pursuant to the 1925 Act, nevertheless the terms of the MBTA were incorporated into it by reference, and any regulation under the 1925 Act was to be consistent with the MBTA. The question thus arises whether the 1925 Act repealed the MBTA as it applied to Alaska in any manner. Such a repeal could be either express or implied. 1A Singer, Sutherland Statutory Construction (Sands Fourth Edition 1985 Revision) § 23.07.

First, the court finds that section 16 of the 1925 Act expressly repealed the MBTA insofar as it applied to Alaska. This section voids all previous enactments relating to the protection of birds in Alaska. Given that Congress was aware of the MBTA when this section was enacted (see the section 10 proviso), the language's plain meaning is that Congress intended to include the MBTA within the term "existing legislation."[5] Additionally, such a result--that all previous acts are void irregardless of consistency--accords with the conclusion reached above that Congress intended the 1925 Act to be the comprehensive source of regulation for all bird hunting in Alaska. Nevertheless, since the 1925 Act incorporates the terms of the MBTA by reference, the MBTA still applied to Alaska to the extent it was not inconsis-

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5 This clause is not a "general repealing clause." See 1A Singer at § 23.08; Hess v. Reynolds, 113 U.S. 73, 79 (1885); Henderson's Tobacco, 78 U.S. (11 Wall.) 652 (1870). Section 16 does not merely void prior legislation to the extent it was inconsistent. Rather, all previous enactments are voided, irregardless of consistency.

tent with the other terms of the 1925 Act. However, this application was through its incorporation into the vehicle of the 1925 Act.

Second, the court finds that the 1925 Act repealed the MBTA's applicability to Alaska by implication at least so far as it is contrary to the 1925 Act's subsistence exemption. As stated by the Supreme Court,

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy."

United States v. Borden Co., 308 U.S. 188, 198-96 (1939) (citations omitted). Thus, where a particular local law conflicts with an earlier general law of nationwide application, the special or local law will supersede the general enactment to the extent they are inconsistent. 1A Singer at § 23.16.

To determine whether there is an inconsistency between the 1925 Act and the MBTA, the court must first determine the relationship between the conflicting clauses in section 10 in the 1925 Act. The court finds both cannot simultaneously be given their full scope. If the penultimate emergency need[6] clause is

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6 As noted below, the emergency exception was expanded to a broader subsistence exception in 1940.

given its plain meaning, then the word "birds" within the exception would apply to both migratory and non-migratory birds and contravene the MBTA. If, however, the MBTA clause is given precedence, then the emergency need exception only applies to non-migratory birds, not all birds as its language suggests.

A number of factors show that Congress intended the emergency need exception to take precedence. While no one of these factors is conclusive, the weight of all the factors supports the conclusion. First, the plain language of the emergency need exception compels this result. Congress shows it knew how to distinguish between different types of birds elsewhere in the 1925 Act. Its failure to do so here is evidence that it intended the exception to include all birds.

Second, the emergency need proviso states that "[no regulation] . . . shall prohibit any Indian or Eskimo to take . . . birds during the close reason when he is in absolute need of food . . . ." This direct grant of authority under the statute allows Natives to undertake subsistence hunting, even absent implementing regulations.[7] The MBTA clause only applies to regulations issued pursuant to the 1925 Act. Consequently, it must be presumed that the MBTA was not meant to apply to taking

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7 This position is further supported by the subsection of the emergency need proviso that allows the Secretary "by regulation" to limit such taking in event of species decline. The implication is that, absent such regulation, emergency need taking is allowed.

for subsistence/emergency needs, which was permitted without regulation.

Third, the court places great weight on the contemporaneous interpretation given to the 1925 Act by the Department of Agriculture, the agency charged with issuing regulations. In May 1925, four months after the Act's passage, the Department issued regulations that interpreted the Act as creating an "emergency" exception to the MBTA. See U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, issued May 1925 (Federal Defendants' exhibit "E". Intervenor's Exhibit "3"). Regulations 12 and 13 created seasons and set bag limits for migratory birds. Regulation 8, however, provided an absolute exception to those limits, providing:

> REGULATION 8.--TAKING OF GAME BY PROSPECTORS, TRAVELERS, AND CERTAIN INDIANS WHEN IN NEED OF FOOD
>
> An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

This interpretation prevailed for 19 years, until 1944 (See below.)

Fourth, the court relies on the principles of statutory interpretation that ambiguities in statutes intended to benefit Natives must be resolved in favor of the Natives, and that the

emergency clause, being the more specific, locally-oriented clause, is presumed to control over the MBTA, the more general statute. See, e.g., Morton v. Mancari, 417 U.S. 540, 550-51 (1974). Last, reading the "emergency" exemption as controlling is logical as well. It would be reasonable to assume that, given an "absolute" need for food, Congress would intend that all type of game be available for taking to avoid starvation.

Based on the above factors, the court finds that Congress intended the "emergency need" provision to create an exception to the MBTA rather than the other way around. Consequently, the 1925 Act, at least to the extent of that provision, is repugnant to the MBTA and impliedly repeals the MBTA to the extent of that inconsistency.

C. The 1940 "Subsistence" Amendment and the 1943 Game Act

In 1940, Congress expanded the "emergency" provision in the 1925 Act to create a broader subsistence exception. The 1925 Act had created a narrow subsistence exception, under which a Native could take game and birds out of season "when in absolute need of food and other food is not available." Federal agencies apparently interpreted this standard narrowly to prosecute Natives for hunting game out of season.[8] In order to reconfirm that the "need" exception was intended to apply to subsistence hunting, Congress amended section 10 of the 1925 Act to allow

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8 The major area of dispute was deer hunting in southeast Alaska.

Natives to take birds and animals out of season "when . . . in need of food and other sufficient food is not available." Act of October 10, 1940, ch. 845, 54 Stat. 1103-04; H. Rep. No. 2746, 76th Cong. 3d Sess. (1940). Thus, to the extent that the 1925 Game Act survived statehood, it survived in this broader form.[9]

D. The 1944 Regulation

In 1944, the USFWS amended the subsistence regulation to exclude migratory birds from its scope. As rewritten, the regulation read:

> An Indian or Eskimo, or an explorer, prospector, or traveler, may take animals, birds (except migratory birds), or game fishes in any part of the territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish, or part thereof so taken; and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing, for his own use and that of his immediate family.

9 Fed. Reg. 5270 (May 15, 1944) (emphasis added). When an administrative agency changes its interpretation of a statute after a long period of time, the court must give far more credence to the original interpretation than the later reinterpre-

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9 The 1925 Act was reenacted, with amendments not relevant here, in 1943. Act of July 1, 1943, ch. 183, 57 Stat. 301. This reenactment is important in one sense, however. At the time of reenactment, Congress had before it the long-standing regulation allowing subsistence hunting of migratory birds. Congress' failure to clarify the statute's language demonstrates its acceptance of that regulatory interpretation and must be seen as a ratification of the regulation.

tation. See Watt v. Alaska, 451 U.S. 259, 272-73 (1981). The court finds that the reinterpretation here was contrary to law, and the prior interpretation correct. Accordingly, it is the 1925 Act and not the 1944 regulation that controls.

E. Alaska Statehood Act

The federal defendants argue that even if the 1925 Act repealed the MBTA by implication, the 1925 Act was in turn "superseded" or "rendered obsolete" by the Alaska Statehood Act, thus reviving the MBTA. See Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act states:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska Game Law of July 1, 1943, [the 1925 Alaska Game Law, as amended], and under the provisions of the Alaska commercial fisheries laws of June 26,1906 [citation omitted] and June 6, 1924 [citation omitted] as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; Provided, that the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State legislatures has made adequate provision for the administration, management, and conservation of said resources in the broad national interest * * *.

Federal defendants admit there was never an express repeal of the 1925 Act. See generally Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141 (1959) (act repealing laws made obsolete by

Statehood Act). However, if a statute was not expressly repealed, any repeal (at least under the facts of this case) must have occurred through repeal by implication.

1. Express Repeal

Although not mentioned by the parties, there in fact was an express repeal of the 1925 Act. See Fish and Game Code of Alaska, Ch. 94, 1959 Session Laws of Alaska, Art IV, § 1. For the reasons stated below, this repeal did not affect that portion of the 1925 Act that regulated migratory birds.

This repeal by the Alaska State Legislature presumably was under the authority granted it by section 8(d) of the Alaska Statehood Act. This section allowed the state to modify or repeal Territorial laws, that is "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the union." See generally Metlakatla Indian Community v. Egan, 362 P.2d 901, 922 (Alaska 1961), vacated on other grounds, 369 U.S. 45 (1962) (discussing effect of § 8(d)).

This statute did not effectively repeal the 1925 Act's subsistence exception to the MBTA for two reasons. First, that portion of the 1925 Act that regulated migratory birds was not a law "the validity of which is dependent solely upon the authority of Congress to provide for the government of Alaska. . . ." Rather, that regulation's validity was equally based on the

authority of Congress to implement treaties. See Missouri v. Holland, 252 U.S. 416 (1920). The fact that Congress incorporated the terms of the MBTA, which was based on Congress' treaty power, into the 1925 Act by reference clearly demonstrates Congress' intent to rely on its authority. Additionally, Congress in the 1925 Act chose, for humanitarian reasons, not to enforce the 1916 Canadian treaty against Natives in need of food. Although this exception was contrary to the terms of the treaty, Congress nevertheless was acting under its authority to implement the treaty when it decided to implement it only partially.

Second, even after statehood, the authority to manage migratory birds remained an area of federal regulation, and such authority was not passed to Alaska. See Federal opposition brief, Docket 70, at 38. The reason for this appears in a letter written by the Department of the Interior that appears in a Senate Report on Alaska statehood:

> [The Statehood Act] would transfer to the State of Alaska the same jurisdiction and control over the fisheries and wildlife therein as are possessed and exercised by the existing States within their territorial limits and adjacent waters. Authority over matters affecting migratory birds would not be transferred, since this is a subject which is governed by Federal law throughout the Union. . . . [This situation] involve[s] the discharge of international commitments, undertaken by the United States through treaty or convention.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Accordingly, given that regulation of taking of migratory birds is an area of federal primacy, the Statehood Act's § 8(d) did not give the

state the authority to repeal federal policy in the area.

2. Repeal by Implication

The Statehood Act also did not impliedly repeal the 1925 Act's regulation of migratory birds. As noted above, in order for there to be repeal by implication, there must be actual inconsistency or repugnance between statutes. If implied repeal is to be present here, such inconsistency must be found in section 6(e) of the Statehood Act, which transferred the administration and management of fish and wildlife resources to Alaska. However, authority over regulation of migratory bird takes was not transferred to Alaska (see above). It therefore cannot be shown that there was the transfer of any authority to the state that would be inconsistent with continued federal management of migratory birds under the 1925 Act.

F. The Fish and Wildlife Improvement Act of 1978

The court declines to address whether the Secretary has authority to issue regulations pursuant to the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3112 (1978) (codified at 16 U.S.C.§ 712(1) (1982)). There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision.

G. Conclusion

In conclusion, the court finds that the MBTA's direct

regulation of migratory birds in Alaska was repealed by the 1925 Act. However, since the 1925 Act incorporates the terms of the MBTA by reference, the net result is that the MBTA's terms, except for subsistence situations, continue to apply. Such regulation is pursuant to authority granted the Secretary by the 1925 Act. The court further finds that the Statehood Act did not transfer authority over migratory birds to Alaska, and that therefore the 1925 Act's provisions on migratory birds continue in effect. In the absence of regulation to the contrary, subsistence hunting of migratory birds for nutritional (as opposed to cultural or other) needs remains legal.

III. Plaintiffs' Claims

A. The Hooper Bay Agreement

Plaintiffs allege that the Hooper Bay Agreement was adopted in violation of a number of statutes and that its adoption was arbitrary and capricious. Because the Hooper Bay Agreement has been superseded by the 1985 Yukon-Kuskokwim Delta Goose Management Plan, these claims must be dismissed as moot.

B. The Watson Non-Enforcement Policy

The Watson policy of December 5, 1975, purported to define circumstances in which the U.S. Fish and Wildlife Service would forebear to enforce the MBTA against subsistence users. Plaintiffs challenge this declaration of policy on a variety of procedural and substantive grounds. Because this court holds

that the MBTA does not apply to the subsistence takings addressed by the policy, the forebearance promised by the Watson Non-Enforcement Policy is irrelevant. To invalidate the policy would not affect enforcement--there can be none--or remedy the injuries of which plaintiffs complain. Accordingly, the claims relating to the validity of this policy are moot.[10]

C. The 1985 Yukon-Kuskokwim Delta Goose Management Plan

1. APA

Plaintiffs apparently contend that the current Goose Management Plan (GMP) constitutes a regulation adopted without compliance with the Administrative Procedure Act. Portions of the GMP are not self executing; the proposed restrictions on sport hunting, for example, were not intended to become effective without separate promulgation of appropriate regulations. Plaintiffs, however, challenge the agreement only insofar as it allegedly restricts agency discretion with respect to enforcement of the MBTA against subsistence users and delegates enforcement responsibility to the Association of Village Council Presidents (AVCP).

This claim is mooted by this court's holding regarding the reach of the MBTA. In essence, the subsistence-enforcement

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10 Alternatively, the lack of redressability of plaintiffs' alleged injury may be viewed as vitiating standing. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). What is clear is that no case or controversy exists with respect to the Watson policy.

aspect of the GMP has become a mere statement of intent by the AVCP to enforce the plan voluntarily. The Fish and Wildlife Service cannot enforce the MBTA against bona fide subsistence users in the Delta, and its promises to refrain from doing so under certain conditions are irrelevant. Thus, the GMP is no longer a "promise" to withhold enforcement of the MBTA.

2. NEPA

For the same reason, plaintiffs' National Environmental Policy Act (NEPA) claim regarding the GMP is also moot. Given the irrelevance of the federal promises not to enforce, the subsistence aspect of the GMP is not the major federal action required to trigger NEPA. 43 U.S.C. § 4332(c). Moreover, it would be futile to order an EIS for a government declaration regarding application and enforcement of an act it has no power to enforce.

It is conceivable that the GMP as a whole could trigger the EIS requirement, even though much of it is not self-executing and subsequent implementing regulations might be promulgated only after issuance of their own EIS's. When the moot MBTA-enforcement aspect of the plan is removed, what remains is a plan in which state and federal governmental parties propose interrelated actions to reduce sport hunting take, and which the AVCP states on behalf of its constituents a plan to reduce subsistence take on a voluntary basis. Even if NEPA applies to the GMP as a whole, however, it must be remembered that plaintiffs' allegec

injury grows solely out of subsistence hunting and egging. The Fish and Wildlife Service's acceptance of voluntary concessions regarding that legal take has caused plaintiffs no injury in fact; in other words, the alleged injury from subsistence take is not "fairly traceable" to the action occurring here, i.e., voluntary reduction in subsistence take. Cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261 (1977). Moreover, invalidation of the GMP would not redress plaintiffs' injury. See Simon, supra. Plaintiffs are therefore without standing to raise NEPA issues growing out of the GMP.[11]

3. Yukon Delta National Wildlife Refuge/ANILCA Claims

Section 303(7)(B) of the Alaska National Interest Land Conservation Act (ANILCA) sets forth the purposes for which the Yukon Delta National Wildlife Refuge shall be managed. 94 Stat. 2392. Sub-parts (ii) and (iii) of the above section create the following purposes for the refuge:

> (ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;
>
> (iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local rural residents;

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11 Even if plaintiffs had standing to raise the NEPA issues and prevailed on those issues, it is likely that the "exceptional circumstances" doctrine would preclude issuance of an injunction pending completion of the EIS. See American Motorcyclist Ass'n v. Watt, 714 F.2d 963, 966-97 (9th Cir. 1983).

There is no evidence that Congress intended to prevent any taking of migratory birds in the refuge. Such an intent would conflict with Congressional intent in passing section 3(h)(2) of the FWIA. See 16 U.S.C. § 712(1) and associated legislative history. In any event, the Canadian government has agreed to amend the 1916 treaty to allow some subsistence hunting of migratory birds. Thus, allowing subsistence hunting does not conflict with the purpose of any treaty obligation. On the other hand, if this section is read as prohibiting all subsistence hunting of migratory birds, section (iii) becomes devoid of meaning, as practically all birds within the refuge are migratory and thus would not be subject to subsistence take.

IV. State's Motion to Dismiss Counts IV and VII and Part of Count I

Plaintiffs have not opposed the state's motion to dismiss their state law claims. The motion is deemed well taken and granted. Local Rule 5(B)(4).

Accordingly, IT IS ORDERED:

(1) THAT the intervenors' cross-motion for summary judgment on their cross claims is granted in part and denied in part as set forth above.

(2) THAT the state's motion to dismiss Counts IV, VII and part of Count I of plaintiff's complaint is granted;

(3) THAT the various parties' motions to dismiss/grant summary judgment on plaintiffs' claims are granted;

(4) THAT plaintiffs' motion for partial summary judgment is denied;

(5) THAT plaintiffs' motion to vacate stay is denied as moot;

(6) THAT the federal defendants' cross-motion for summary judgment against intervenors is denied in part and granted in part, as set forth above.

DATED at Anchorage, Alaska, this 24th day of January, 1985.

United States District Judge

Outdoor C
Dept of Justice/Anc Go between
AFN
Nat'l Rifle Assn
Go between Waterfowl

cc: Gregory F. Cook 6-9719
Bruce Landon
Larri Irene Spengler 3600
Donald C. Mitchell 276-1681
Wayne Anthony Ross
James R. Hanson - Columbus Oh. W. Life Legisl Fund of Am. lobbyist not a lot of exp.
Clarke Young 6-5755
Kenneth O. Jarvi 276-4271
Olof Hellen 276-2713
Jim Kilbourne --
J. Carol Williams - Appelate Div. - Dept of Justice WDC

Jack

DAVID SILOOKA,

Respondent.

Dist. Ct. Case No. 3KO-83-465 Cr.
Ct. App. Case No. A-210
Supreme Ct. Case No. S-99

ON PETITION FOR HEARING FROM THE COURT OF APPEALS

BRIEF AMICI CURIAE OF
PLAINTIFFS IN BOBBY v. ALASKA AND
THE NATIVE AMERICAN RIGHTS FUND

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Filed this 24th day of October, 1985
in the Supreme Court of the State of Alaska

Deputy Clerk

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STATUTES PRINCIPALLY RELIED UPON

Alaska National Interest Lands Conservation Act

Public Law 96-487
96th Congress
December 2, 1980
(94 Stat. 2371)

TITLE VIII — SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111. SEC. 801. 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;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(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 over Native affairs and 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; and

43 USC 1601 note.

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

POLICY

SEC. 802 It is hereby declared to be the policy of Congress that —

16 USC 3112.

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante, p. 2377.

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

DEFINITIONS

16 USC 3113.

SEC. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term —

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses —

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

PREFERENCE FOR SUBSISTENCE USES

SEC. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

16 USC 3114.

Priority criteria.

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

SEC. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish —

16 USC 3115.

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistance uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Regional advisory council, authority.

Each regional advisory council shall be composed of residents of the region and shall have the following authority:

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decisionmaking process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses;

Annual report to Secretary.

(D) the preparation of an annual report to the Secretary which shall contain —

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

Implementation.

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

Reimbursement. to States.

(e)(1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

Report to Congress.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

FEDERAL MONITORING

Report to congressional committees. 16 USC 3116.

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

SEC. 807. (a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

(c) This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.

Sec. 16.05.094. Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall

(1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;

(2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;

(3) make information gathered available to the public, appropriate agencies, and other organized bodies;

(4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;

(5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;

(6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;

(7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game. (§ 3 ch 151 SLA 1978)

Sec. 16.05.255. Regulations of the Board of Game.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

Sec. 16.05.940. Definitions.

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

INTEREST OF AMICI CURIAE

Bobby v. Alaska, Civil Action No. A84-544 (D. Alaska), is a federal court class action pending against the state filed in November 1984 on behalf of the people of Lime Village pursuant to ANILCA §807, alleging that the state, through the imposition of arbitrary closed seasons and individual bag limits, had denied the people the subsistence preference mandated by ANILCA §804. One Lime Village subsistence hunter had his snowmachine confiscated by the state for taking moose in accordance with custom and tradition but not provided for in the state's regulatory scheme (civil forfeiture action still pending), and another Lime subsistence hunter was charged criminally (since dismissed) for the same moose taking. At the insistence of the state that the plaintiffs exhaust the same purported administrative remedies that the state holds out in the instant case as an adequate alternative to judicial vindication of subsistence rights, the lawyers for the Bobby plaintiffs devoted five months to the state's complex and time-consuming administrative process. The Bobby plaintiffs found the proffered remedy to be exhausting but wholly inadequate.

The Board of Game, at its March regulatory meeting in Anchorage, found that the people of Lime Village, who by custom and tradition harvest moose and caribou on a year-round basis, "are probably the most geographically isolated and subsistence dependent people in the state." Findings on Lime Village Management Area, Alaska Board of Game #85-36-GB (4 April 1985); see also Priscilla Kari, Land Use and Economy of Lime Village

(ADF&G Technical Paper No. 80, June 1983). Nevertheless, the Board, while liberalizing some of the sport-hunting restrictions, refused to abandon the precepts of arbitrary calendar-based closed seasons and individual bag limits -- precepts which discriminate against Lime Village's customary and traditional uses of wildlife resources and the communal subsistence-based socioeconomic and sociocultural system of the village. The Board's refusal was not based on the sustained-yield principle, inasmuch as the Board continued to allow non-local and nonresident sport and trophy hunting on the Lime hunting grounds. Rather, the state blames this Court for the Board's refusal:

> On February 22, 1985, the Alaska Supreme Court decided Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985). The case held that the Boards of Fisheries and Game do not have statutory authority to identify subsistence uses as the customary and traditional uses of fish and game in Alaska by rural Alaska residents, nor do the boards have the authority to identify subsistence users on a community or area basis. Therefore, when the Board of Game met, it could not consider establishing seasons and bag limits specific to Lime Village, as it could have done before Madison.

Response to the Defendant's Supplemental Motion for Partial Summary Judgment at 2, filed 20 September 1985 by the state in State v. One Red Yamaha Snowmachine and Wasilie Bobby, No. 4MC-84-1 Civ. (Dist. Ct., Fourth Judicial Dist. at McGrath).

In June the Board of Game again convened, this time in "emergency" session in Juneau, the alleged emergency having arisen as a result of the decision of the court of appeals in the case at bar, 698 P.2d 174 (Alaska App. 1985). The state had announced, in

effect, that the Eluska decision had legalized "poaching," and that, since Madison had assertedly declared "all Alaskans" to be subsistence users, it was no longer possible to distinguish true subsistence hunters from poachers.[1] Amicus curiae Bobby plaintiffs and others again petitioned the Board, at its emergency meeting, for specific relief and for the adoption of subsistence regulations which they believed would constitute compliance with state law, as construed in Madison, as well as federal law -- plaintiffs being of the view that the state's interpretations of Madison and Eluska were fundamentally flawed. See Appendices A, B and C, attached hereto. Again plaintiffs were denied relief. The Board adopted emergency regulations, but these consist entirely of mere name changes, except for the creation of a limited-entry-type "tier II" application and permit system for those hunts previously governed by registration or random-drawing permits.[2]

In the case before the Court the state openly solicits "this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings." State's Br. at 31. Such guidance is sorely needed, and the state is also in need of guidance as to its paramount federal legal obligations. Amicus Bobby plaintiffs have a vital interest in the

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[1] Memo from the state's Chief Prosecutor to the Commissioners of Public Safety and Fish & Game (22 May 1985). See also State's Brief of Appellant at 5 n.2.

[2] These emergency regulations were formally promulgated by the Commissioner of Fish & Game on 5 July 1985, and transmitted to the public on 11 July. They have since been published in a more comprehensible format as Alaska Game Regulations No. 26 [hereafter "Game Regs."]. The new regulations are described in notes 44 & 95, infra.

correct outcome of this case. Moreover, having sifted through the maze of "confusing, unorganized and often unintelligible"[3/] fish and game statutes and regulations, and having participated intimately in the administrative process with which the state seeks to encumber the fundamental subsistence rights of hunters in remote villages, amicus believes that the views presented here will assist the Court in the proper resolution of this controversy.

The Native American Rights Fund (NARF) is a national non-profit legal foundation established in 1970 to represent Native Americans across the country on cases of major importance. It has office in Washington, D.C.; Boulder, Colorado and Anchorage, Alaska. NARF has played a major role in much of the successful natural resource litigation involving Native Americans in the "lower 48" such as United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) (Great Lakes fisheries) and United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (the "Boldt decision").

NARF opened its Alaska office in October 1984 to respond to an increasing number of requests for assistance from village councils and individuals on matters involving Native governmental rights and subsistence. Its two Anchorage attorneys have spent the past year researching the law in these areas and giving legal advice to approximately thirty Native villages and organizations. The court of appeals' decision in Eluska is critical to the

[3/] Alaska Judicial Council, Twelfth Report to the Legislature and Supreme Court: 1983-84 at Appendix N-1.5 ("Fish & Game Sentences: 1980-81").

subsistence lifeway of our Native clients. Our participation is not on behalf of a specific client. We support the decision of the court below in the general interest of our clients and wish to inform this Court of well-established analogous principles in Native American law which provide additional support for the decisions of the lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Introduction

"The subsistence way of life" -- regardless of whether or not its precise components can be agreed upon -- has a special meaning to Alaskans. Most residents of the state know and readily acknowledge that they either do or do not lead such a rugged lifeway. To be sure, there is murkiness at the confluence of the subsistence, sport, trophy and commercial classifications, and those who find themselves situated there deserve fair and sensitive treatment. And there are no doubt those who opportunistically classify themselves according to their individual perceptions, on any given day, of self-interest. This is easy enough to understand in a regulatory system that portrays yesterday's Grand Slam trophy hunter as today's subsistence hunter/fisher/gatherer. Still, most Alaskans know it when they see it, and most know that it is primarily a "rural" enterprise. They know also that leading a subsistence lifeway is not merely a weekend or recreational activity, but rather that true subsistence users have integrated the activities associated with hunting and

fishing -- learning the necessary skills, preparing the equipment, hunting, fishing, preparing what is caught or taken, sharing the take with others -- to the extent that these attributes are so much a part of their lives that they use them to define themselves. Their dependence on hunting and fishing is cultural and social as well as economic. Moreover, all Alaskans are aware that the state and national legislatures have mandated a wildlife-use preference for those engaged in subsistence lifeways and lifestyles, albeit that some of them believe (without reason, in our view) that such a preference is unconstitutional.

This case, however, is not about the constitutionality of the "subsistence priority." Rather, like Madison v. Alaska Dept. of Fish & Game, 696 P.2d 168 (Alaska 1985), it is about whether or not the state's game regulations satisfy the subsistence priority requirements of state and federal law. The court of appeals, relying solely on state law, has concluded that the state has a mandatory duty to issue regulations which implement the statutory priority for subsistence. State v. Eluska, 698 P.2d 174, 178 (Alaska App. 1985). The state does not now challenge this conclusion. Rather, its position is that its regulations do all that the law requires. The court of appeals disagreed. Relying on its own reading of state law and on this Court's decision in Madison, it held that, as a general matter, the state has failed to give subsistence proper consideration before enforcing regulations which restrict it.

According to AS 16.05.251(b), as interpreted in Madison, all non-subsistence uses of fish and game must be curtailed before

restrictions are imposed on subsistence uses. Madison at 174. It is not enough, therefore, for the regulations to give local subsistence hunters and fishers a limited seasonal "opportunity" to hunt and fish. Nor is it enough to design slightly longer seasons and slightly more liberal individual bag limits for subsistence hunters and fishermen. Rather, the subsistence priority requires what the word "priority" implies. Subsistence comes first. Regulations which impose substantial restrictions on subsistence hunters and fishers are justifiable only on one or both of two grounds -- protection of fish and wildlife or preservation of subsistence itself -- and justifiable only if sport and commercial hunters and fishers who might compete with subsistence users have been told to do their hunting and fishing elsewhere. Because the state game regulations do not come close to putting this approach to fish and game management into practice, the court of appeals correctly called the entire regulatory system into question.

We are filing this brief to provide additional support for the court of appeals' basic conclusions and, as part of our arguments, to emphasize the central problem the Boards of Fisheries and Game have failed to address. For seven years, the state subsistence law has required the Boards to identify customary and traditional subsistence uses of fish and game and give those uses priority. A similar federal mandate has been in place for almost five years. Not only has the state failed to do what the law requires, its reaction to the decisions in Madison and Eluska has been to relabel its sport regulations as

"subsistence" regulations, as if a change in name alone will satisfy the law and the courts.

Believing that the state's position is wrong in all material respects[4], and that the Court ought to examine the questions presented for review from the perspective of the history that produced the subsistence preference, we present the following arguments as friends of the court and of subsistence users. In doing so we have acknowledged the broadest definition of subsistence users to include rural and non-rural and Native and non-Native peoples wherever the legislative histories or subsistence studies support such breadth. However, the history and case law primarily relied upon in this historical/legal analysis demonstrate that at the heart of the subsistence preference is the overriding federal commitment (with some state support) to protect Alaska Native communities, including their subsistence lifeways. Certain sections of this brief will speak exclusively to this fundamental subsistence right of Native Alaskans, without which there would be no subsistence preference at all for anyone, rural or non-rural, Native or non-Native.

Summary of Argument

Before examining the substantive guarantees of the state and federal subsistence laws[5] and considering the propriety of the

[4] We do agree with the state that this case is not moot and that "this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings" (State's Br. at 30-31) is desperately needed.

[5] AS 16.05.094, -.255(b), -.257 and -.920(23); Title VIII of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (2 Dec. 1980), 94 Stat. 2422, 16 U.S.C. §§ 3111 et. seq. [hereinafter cited as "ANILCA" with the Public Law section numbers].

state's regulatory management system under those laws and in the light of the actual facts of Alaska's subsistence lifeways, we urge the Court to review the evolution of the subsistence-preference laws. We therefore briefly review the operation of English wildlife law, its influences on early American wildlife law, and the development of the latter into today's regulatory system, which is dominated by sport, commercial and wildlife-protector interests. We then trace the parallel legal preference consistently accorded (in word if not in deed) to the subsistence hunting and fishing rights of American Indians. We show that general wildlife law in Alaska has come to be similarly dominated by sport and wildlife-protector (as well as commercial) interests, but that Alaska Natives (and others) have consistently received a legal preference for subsistence hunting and fishing similar to that accorded to lower-48 Indians.

From this perspective, the state/federal subsistence laws (mandated by principles of federal supremacy) may be seen as securing a positive right with all of the attributes of a fundamental right, due to be respected and protected as such. The manner in which the subsistence preference was designed to operate is then examined in some detail, as is the accumulated body of knowledge about the function and inner-workings of the varied subsistence ways of life throughout the state, including that of respondent Eluska and his village. We show that that way of life is entitled to constitutional protection independently of the subsistence statutes. Against these conclusions we juxtapose the state's sporting management system and demonstrate that it is in

significant conflict with both the facts and the law.

From this, and from the relevant precedents of Indian law, we conclude that the basic approach of the court of appeals is correct, though in certain respects it should have gone further. We also expose the fatuity of the state's avoidance arguments (e.g., exhaustion of non-existent administrative remedies). We respectfully submit the information and arguments herein believing them to be useful to the Court in laying down guidelines for bringing the state into compliance with the subsistence-preference laws.

ARGUMENT

I.

HISTORICALLY IN AMERICA THE NATIVE SUBSISTENCE HUNTING AND FISHING RIGHT HAS BEEN ACCORDED THE STATUS OF A FUNDAMENTAL RIGHT AND EXEMPTED FROM THE EVOLVING PRECEPTS OF ANGLO-AMERICAN WILDLIFE LAW

In support of the restrictions it seeks to apply to respondent Eluska, the state invokes Biblical injunctions and claims that "[s]easons and sex restrictions have been law in the United States since colonial days." State's Br. at 13 n.10. It is well to review the history of Anglo-American wildlife jurisprudence, to trace its development and examine the purposes it serves, to contrast these sport-hunting rules with Indian and other subsistence ways of life and with applicable Indian law, and to see how these developments have played out on the Alaska scene, culminating in the landmark federal/state subsistence-preference experiment.

A. English and Early American Wildlife Management Systems

The English antecedents of American wildlife law consisted primarily of harsh, cruel and antidemocratic game laws which afforded an absolute preference for the sporting pleasure of the English aristocracy over the needs of the common man.[6/] Although some of these sporting rules -- e.g., seasons, bag limits and methods restrictions -- survived the American Revolution, early American wildlife management was dominated by the democratic principle of "free taking."[7/] This passion for "democracy," for equal hunting rights for all, had disastrous consequences, for it led, among other excesses, to commercial dealing in wildlife. Market hunting and the "free taking" ethos brought many game species to the brink of extinction by the end of the nineteenth century.[8/] This unrestrained slaughter had devastating consequences for Indian cultures which had depended for millenia on these subsistence resources as the mainstay of their physical and cultural survival; sometimes the slaughter was specifically motivated by the goal of driving the Indians from their land to make room for white settlement (and to force the conversion of

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[6/] See Thomas A. Lund, American Wildlife Law 3-17, 21-23, 100-03 (1980) [hereafter, American Wildlife Law]; E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975). The "qualification statutes" were the English system's principal means of bestowing sport hunting rights upon the wealthy and depriving the masses of both food and hunting weapons. These laws were enforced by the king's Forest Jurisdiction.

[7/] American Wildlife Law at 19-34.

[8/] Id. at 57-60.

Indians into farmers).[9/]

Thus, rejection of the English caste system for allocating wildlife uses led to the early American approach to wildlife as primarily an economic resource to be exploited, which in turn threatened the very existence of wildlife. Complete disaster was avoided only by the intervention and influence of sport interests, which secured the elimination of commercial hunting, other regulatory restrictions, funding for regulatory enforcement, wildlife restoration programs, habitat protection, and the like.[10/] Thus American wildlife law has come to be dominated by sport and (especially at the federal level) wildlife-protector interests;[11/] the survival of many species is indebted to those interests, as are the pleasures and desires of sport and commerce, and the subsistence needs of many peoples.

B. The Simultaneous Recognition of the Subsistence Rights of Native Americans and the Protection of Those Rights From Sport and Commercial Restrictions

European discoverers of the "new world" recognized from the outset that Native occupants of America had possessory rights to their lands which should not be unilaterally taken. This principle of discovery was acknowledged by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[9/] For example, "[i]t has been forcefully contended that, through considered inaction, the federal government encouraged the annihilation of the buffalo as a means to oust native tribes from areas destined for white occupation." Id. at 89, citing Peter Matthiessen, Wildlife in America 145-48 (1959). See also, e.g., Bruce Brown, Mountain in the Clouds: A Search for the Wild Salmon (1982).

[10/] American Wildlife Law at 61-73.

[11/] Id. 75-78, 81-99.

> [Discovery] could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

Id. at 544.[12/] This aboriginal right of use and occupancy included the right to hunt and fish free of outside interference, F. Cohen, Handbook of Federal Indian Law 443 (1982 ed.), and these aboriginal rights could only be extinguished by the federal government. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

The Indians "yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831). In the very first treaties with the Indians, the United States guaranteed the sanctity of their hunting grounds (e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) at 551-556), it being recognized that "[h]unting was...the principal occupation of the Indians, and their land was more used for that purpose than for any other." Id. at 553.

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until

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[12/] Which is not to say that the elitism and arrogance of the English were absent from United States policy, for one of the colonizing objects was "the civilization of the Indians and their conversion to Christianity -- objects to be accomplished by conciliatory conduct and good example; not by extermination." 31 U.S. (6 Pet.) at 546.

> they abandoned them, made a cession to the government, or an authorized sale to individuals.

Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

As can be seen from the cases cited hereafter, the subsistence hunting and fishing rights of Native Americans (and often their commercial rights as well[13]) were routinely reserved by the Indians in the eighteenth and nineteenth century treaties and agreements negotiated with the United States.[14] This fundamental subsistence right was "not much less necessary to the existence of the Indians than the atmosphere they breathed....[It] was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905).

Over the years, and continuing still, these rights have come into conflict with the non-Indian, non-subsistence oriented wildlife management systems of the states. As these conflicts have been presented to the courts, the pattern of judicial response has been to give vigorous positive protection to Native hunting and fishing rights. Indeed, Native hunting and fishing rights reserved by treaty, statute or agreement have been liberally construed to accomplish the important purpose of providing for the continued pursuit of a subsistence lifeway. See Menominee Tribe v. United States, 391 U.S. 404 (1968); Cohen,

13/ See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

14/ That these rights were expressly reserved is not, of course, to imply that such sovereign contracts were always honored. See, e.g., Ward v. Race Horse, 163 U.S. 504 (1896); New York ex rel. Kennedy v. Becker, 241 U.S. 557 (1915); United States v. Harris, 117 F. Supp. 915 (D. Alaska 1954).

supra at 446.

Recognition of the importance of subsistence rights is partially responsible for the rule that reservation Indians have jurisdiction, exclusive of that of the states, to regulate on-reservation hunting and fishing by both tribal members and non-members, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).[15/] Of greater significance for the present case, however, are those decisions enforcing off-reservation hunting and fishing rights which the Indians have reserved by treaty or statute. These treaty and statutory provisions frequently reserve such rights "in common with all other persons," yet it is routinely held that the states may not impose their sport and commercial restrictions on Indians engaged in protected hunting and fishing activities, at least unless the state can "demonstrate that its regulation is a reasonable and necessary conservation measure, ... and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 184, 207 (1975).[16/] In addition, such regulatory measures as state

[15/] See also Arnett v. 5 Gill Nets, 121 Cal. Rep. 906 (Cal. App. 1975) (state precluded from regulating on-reservation fishing). Moreover, the tribes have jurisdiction to enforce their tribal hunting and fishing regulations against tribal members engaged in off-reservation activities. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

[16/] Depending perhaps on the particular treaty or statutory language involved, some cases either hold or imply that state regulation of off-reservation reserved hunting and fishing activities is precluded altogether. See, e.g., Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665, 669 (10th Cir. 1980) ("state hunting and fishing regulations do not apply, directly or indirectly, to hunting and fishing by [tribal] members... on land held as Indian allotments and on land held in trust by the United States for the Tribes," i.e., in "Indian country" within a disestablished reservation); Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) (continued)

licensing requirements, which are "not indispensable to the effectiveness of a state conservation program," may not be applied to the Indians' reserved hunting and fishing rights, Tulee v. Washington, 315 U.S. 681 (1942),[17] nor may the state, by license granted to private land-holders, obstruct the Indians from fishing on their treaty-protected "usual and accustomed" fishing grounds. United States v. Winans, supra.

In Argument IV, infra, we show that the cases cited above

(footnote 16 continued) (within ancestral reservation, now part of a national forest and wildlife refuge) (but see Kimball II, 590 F.2d 768 (9th Cir. 1979)); People v. Jondreau, 185 N.W.2d 375 (Mich. 1971) (only the President may regulate Indian fishing at treaty-protected places); State v. Stasso, 563 P.2d 562, 565 (Mont. 1977) (Indians have "right to hunt game animals free from state regulation on lands ceded by the tribes to the federal government" which remain "open and unclaimed"); State v. Arthur, 261 P.2d 135, 143 (Idaho 1953) (holding that the Indians' reserved rights "to hunt upon open and unclaimed land still exist unimpaired and that they are entitled to hunt at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation"). Other cases, however, as in Antoine (quoted in the text), allow the state to regulate the off-reservation fishing and hunting activities of the Indians, at least where those rights were reserved "in common" with non-Indians, but only in a reasonable and nondiscriminatory manner upon a showing by the state of a conservation necessity that cannot be effectively addressed by less-intrusive measures. See New Mexico v. Mescalero Apache Tribe, supra, 462 U.S. at 342; Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 174, 175-77 (1977); Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983); United States v. Michigan, 653 F.2d 277 (6th Cir. 1981); Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979); Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976), and 302 F. Supp. 899 (D. Ore. 1969); United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), aff'd on subsequent review sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Holcomb v. Confederated Tribes, 382 F.2d 1013 (9th Cir. 1967); Peterson v. Christensen, 455 F. Supp. 1095 (E.D. Wis. 1978); State v. Braun, 309 N.W.2d 875 (Wis. 1981); State v. Peterson, 297 N.W.2d 52 (Wis. App. 1980); State v. Coffee, 556 P.2d 1185 (Idaho 1976); People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976); State v. Gurnoe, 192 N.W.2d 892 (Wis. 1972).

[17] See also State v. McConville, 139 P.2d 485 (Idaho 1943).

provide instructive precedent for the proper resolution of the instant case. We mention them here to highlight the Nation's longstanding recognition of the supreme importance of Native hunting and fishing rights, as well as the recognition that "[t]he tribes could not eat by seasons, nor could sporting bag limits suffice for family [or tribal] sustenance. For aboriginal Indian behavioral patterns to be perpetuated, neither seasons nor bag limits could be imposed. At the same time, laws had to be enacted to prevent the burgeoning population of non-Indians from taking the limited wildlife resource." American Wildlife Law, supra, at 90.[18] The customary and traditional subsistence uses of wildlife by Native peoples, as these cases reflect, have been accorded all of the attributes of fundamental rights in constitutional jurisprudence[19] -- rights which the states may regulate, if at

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[18] See also, e.g., State v. Arthur, 261 P.2d 135, 142 (Idaho 1953):

> While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion....

[19] Indeed, the reserved hunting and fishing right is so powerful that, in the absence of an express congressional abrogation, it overrides such exclusively conservation legislation as the Eagle Protection Act, the Migratory Bird Treaty and the Endangered Species Act. United States v. Dion, 752 F.2d 1261 (8th Cir. 1985) (en banc); United States v. White, 508 F.2d 453 (8th Cir. 1974); United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941); but cf. United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980). Where the Indians, by treaty, have secured protection for "their way of life which included hunting and fishing," congressional intent to abrogate such rights will not be lightly imputed, Menominee Tribe v. United States, 391 U.S. 404, 406 (1968), and states may adopt regulations to implement (continued)

all, only upon a demonstration of conservation necessity, and then only through the least intrusive nondiscriminatory means available. We now show that these rights have been accorded at least as much, if not more, respect in the development of Alaska wildlife and Native law.

C. Historic Protection of the Alaska Subsistence Ways of Life of Natives and Others

The evolution of wildlife law in Alaska has pretty much followed the pattern nationally and in the lower 48, which is not surprising inasmuch as Alaska's territorial game codes were written by Congress, which was heavily influenced by sport and conservation interests. But while the "free taking" ethos was just as prevalent here as elsewhere, resulting in significant market hunting and other excesses during the gold rushes, Alaska in large part was spared the threat of wildlife extinction until World War II, since which time we have seen the development of the present system. See Morgan Sherwood, Big Game in Alaska: A History of Wildlife and People (1981).[20]

(footnote 19 continued) federal rights notwithstanding contrary provisions of their constitutions. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra, 443 U.S. at 692-96.

[20] We cite this book for its historical perspective on the evolution of game management in Alaska, but we do not commend its apparent insensitivity to both the legal rights of Alaska Natives and their cultural plight in the face of the encroachments by the "free taking" civilization. For example, Sherwood suggests "that Native conservation systems either did not exist or broke down rapidly following the introduction of rifles and the commercial economy." Steve J. Langdon, Alaskan Native Subsistence: Current Regulatory Regimes and Issues 19 (October 1984, Paper for Roundtable Discussions of Subsistence, Alaska Native Review Commission). As Professor Langdon points out (id.):

> Evidence can be cited of wasteful Native harvesting. Two points (continued)

The subsistence hunting and fishing rights (along with certain commercial rights) of Alaska Natives were also protected in much the same way as they were in the rest of the United States, except that in Alaska these rights were protected unilaterally by statute rather than by negotiated treaty.[21/] At the time of Alaska's acquisition by the United States, the

(footnote 20 continued) should be made about those depredations. First and foremost they occurred in an al ered sociocultural environment in which the ability of Natives to control their resources was severely undermined. New users made demands on their resources and although most Alaskan Native groups objected to the appropriation of their resources, they were nearly powerless to stop it. When the initial conditions of population, technology, and economy changed, it became a new adaptational setting, and it is to be expected that new forms of behavior might appear. Second, the incidents which occurred were not widespread and were the product of a relatively small minority of individuals, perhaps even those who had become most detached from their Native cultures of birth as they attached themselves to the commercial exchange economy of the immigrants. It is untenable to propose either that general Native cultural patterns can be characterized on the basis of an isolated number of cases or that situations of wildlife mismanagement in an entirely altered socioeconomic and sociocultural setting can be used to make judgments about the characteristics of previous adaptations.

See also note 64, infra.

[21/] Article III of the 1867 Treaty of Purchase, 15 Stat. 539, left the land and land-related claims of Alaska Natives for future resolution by Congress, which did not attempt a settlement until the 1971 Alaska Native Claims Settlement Act ["ANCSA"], P.L. 92-203, 85 Stat. 689, 43 U.S.C. §§ 1601 et seq., and the 1980 passage of ANILCA.

subsistence rights of the Territory's Native peoples were protected by the "laws of an antecedent government [Russia]."[22/] The Second (1821) and Third (1844) Charters of the Russian American Company guaranteed Native hunting and fishing rights in the following terms:[23/]

> The natives not employed by the Company are permitted to enjoy fishing along the shores where they live, while free from the service to the Company, in order to procure food for themselves and their families. They shall not, however, visit the neighboring shores without permission of the colonial authorities. They are entitled also to catch the sea animals and the wild beasts on these islands and places where they are living, and everything acquired by them in this way is their full property. If, however, they would like to trade some of their furs, they are permitted to sell them only to the Company at fixed rates which shall be submitted by the Board of Directors to the government.

From the outset of American acquisition, Congress recognized the necessity and justice of according Natives special preference for the taking of subsistence wildlife resources. In an Act to Prevent the Extermination of Fur-bearing Animals in Alaska (1 July 1870), ch. 189, 16 Stat. 180, Congress imposed a 20-year bag limit of 75,000 per annum and 25,000 per annum, respectively, on the commercial taking of fur-seals on St. Paul and St. George islands, with open seasons only during June, July, September and October. Natives were exempted from these restrictions in the following language (§1):

22/ United States v. Berrigan, 2 Alaska Rep. 442, 446 (D. Alaska 1905).

23/ Russian Administration of Alaska and the Status of the Alaska Natives, S. Doc. No. 152, 81st Cong., 2d Sess. 45, 50-51 (6 April 1950).

> Provided, That the natives of said islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use, which killing shall be limited and controlled by such regulations as shall be prescribed by the Secretary of the Treasury.

Throughout the remainder of Alaska's territorial status, Congress regularly provided subsistence-taking preferences for Natives and others in the wildlife laws which Congress found it increasingly necessary to adopt. In Alaska's first game law, enacted 7 June 1902, 32 Stat. 327, Congress, inter alia, banned the taking of game animals for export and established seasons, individual bag limits and sex restrictions for the taking of game animals and birds. Congress expressly provided (§1), however, that "[n]othing in this Act shall...prevent the killing of any game animal or bird for food or clothing by native Indians or Eskimo or by miners, explorers, or travelers on a journey when in need of food; but the game animals or birds so killed shall not be shipped or sold." This exemption, classified as such, was re-enacted when the 1902 Act was amended by the Act of 11 March 1908, 35 Stat. 102.

The United States continued to be cognizant of the rights and special needs of Alaska Natives when it negotiated the Migratory Bird Treaty of 1916, 39 Stat. 1702, 1703:

> The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murries and puffins, and their eggs for food and their

> skin for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

In an enactment on 6 June 1924, 43 Stat. 464, to protect Alaska's fisheries, Congress exempted from methods and closed-season restrictions "the taking of fish for local food requirements or for use as dog feed." Id. at 466 (§§ 4 and 5).[24/] The Act was amended on 16 April 1934, 48 Stat. 594. With respect to restrictions on fish fences, traps, fishwheels, etc. (§3), as well as other methods and means restrictions (§4), the "Karluk, Ugashik, Yukon, and Kuskokwim Rivers" were specifically excepted. Congress explained (id. at 595):

> That the exception hereinabove contained with reference to the Kuskokwim and Yukon Rivers shall be solely for the purpose of enabling native Indians and bona fide permanent white inhabitants along the said rivers to take from said rivers for commercial purposes and for export from the Territory of Alaska king salmon in such manner and such quantities, and at such times as the Secretary of Commerce may, by suitable regulations, from time to time permit: Provided further, That no person shall be deemed to be a bona fide permanent inhabitant of the said rivers who has not resided thereon, or within fifty miles thereof for a period of over one year, and that the term 'native Indians' as used herein shall be taken to mean members of the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood.

By Act of 13 January 1925, 43 Stat. 739, Congress established the Alaska Game Commission and a law enforcement mechanism, and

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24/ The predecessor Act of 26 June 1906, 34 Stat. 478, did not contain the exemption in these words, although it did "except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto." Id. at 479 (§5). The early fisheries act of 2 March 1889, 25 Stat. 1009, prohibiting the obstruction of spawning streams, did not contain any exceptions.

directed the Secretary of Agriculture, in consultation with the Commission, to regulate the taking of game and other animals. With the exception of the prohibition against the use of "strychnine or other poison" (§9), the legislation provided that the Secretary's regulations may not restrict "any Indian or Eskimo, prospector, or traveler to take animals and birds during the close seasons when he is in absolute need of food and other food is not available...," unless "he shall determine that the supply of such species of animals or birds is in danger of extermination..." (§10).[25] This exemption was continued in the amending act of 25 June 1938, 52 Stat. 1169, 1171,[26] with an additional proviso added to §3 (the one-year residency requirement) that whenever the Secretary finds "that the economic welfare and interests of native Indians or Eskimos, or the fur resources of Alaska, are threatened by the influx of trappers without the Territory," he may impose a three-year residency requirement for a resident trapping license. Id. at 1170.

Meanwhile, Congress passed the Reindeer Industry Act of 1 September 1937, 50 Stat. 900, addressed explicitly to Native

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[25] Section 11(H) also provided the following exemption from the licensing requirement for fur dealers: "but no license shall be required of a native-born resident Indian, Eskimo, or half-breed who has now severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise, or of a hunter or trapper selling the skins of such animals which he has lawfully taken...." This exemption was amended by act of 14 February 1931, 46 Stat. 1111, 1113, to include "cooperative stores operated exclusively by and for native Indians, Eskimos, or half-breeds, or of stores operated by missions exclusively for native Indians, Eskimos, or half-breeds." This exemption, as amended, was retained in the amending act of 25 June 1938, 52 Stat. 1169, 1171-72, and that of 1 July 1943, 57 Stat. 301, 308.

[26] It was further retained by amending acts of 10 October 1940, 54 Stat. 1103, and 1 July 1943, 57 Stat. 301, 306, except that the word "absolute" was dropped in these later amendments.

"subsistence" (§1):

> That a necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this Act, 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. . . .

Four years later, on 18 August 1941, 55 Stat. 632, legislation was passed prohibiting the taking of walruses, with but two exceptions -- for "scientific or educational purposes" with approval of the Secretary of the Interior, and (id. at 633):

> That walruses may be taken at any time by natives for food and clothing for themselves and by miners or explorers or any other person when in need of food and other food is not available, and the skins, hides, tusks, or ivory of walruses so taken may be possessed, sold, bartered, or purchased in the Territory and said tusks or ivory, when carved or otherwise manufactured or processed in the Territory, may be exported therefrom.

There matters basically stood on the law books when the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (7 July 1958) was debated in Congress. Congressman Westland, arguing for federal retention of control over Alaska's fish and wildlife, complained of the Territorial Legislature's failure to protect "the rights and privileges of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation." 104 Cong. Rec. 9488-89 (1958); see also id. at 9747-50.[27/] In response to this concern, in part,

[27/] In 1957 the Territorial Legislature had created a special-interest seven-member Fish and Game Commission composed of three commercial fishermen from three specified regions of the state, one hunter, one trapper, one sport fisherman and one fish processor, the latter four at large. Ch. 63 SLA 1957.

§6(e) of the Statehood Act retained federal control over wildlife resources until "after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest." 72 Stat. 341. Congressional intent and his trust responsibility to Alaska Natives[28] notwithstanding, the Secretary failed to protect the "rights and privileges" of Alaska Natives with respect to wildlife,[29] and the state was eventually certified to assume administration and management of fish and game.[30]

Nevertheless, in wildlife matters over which the federal government continued to exercise jurisdiction, Congress continued to provide protection for Native hunting and fishing rights. In the 1966 legislation regulating the taking of fur seals in the North Pacific, an exemption was given from the law's prohibitions for "Indians, Aleuts, and Eskimos who dwell on the coasts of the North Pacific Ocean." 16 U.S.C. §1152. The subsistence issue then received considerable consideration in the deliberations leading up the passage of ANCSA in 1971, but in the end Congress

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[28] See, e.g., People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979).

[29] See Letter from Secretary Fred A. Seaton to Governor Hugh J. Wade (2 March, 1959) reprinted in Hearings on H.R. 39 et al. Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., part XI 411-412 (1978) [hereinafter "House Hearings"].

[30] On 17 April 1959 the state legislature enacted ch. 94 SLA 1959, which contained no provision for Native or other subsistence uses, but which was given compliance certification by the Secretary on 27 April 1959 (House Hearings, supra, part XI at 413), and the President thereafter transferred jurisdiction to the state by Executive Order No. 10857 (5 January 1960).

elected to protect Native subsistence rights through Conference Committee directive rather than positive law.[31]

That the congressional directive was intended to be taken seriously, however, was immediately made manifest. The year following ANCSA, 1972, Congress passed the Marine Mammal Protection Act, 16 U.S.C. §§1361 et seq. Adhering to its 100-year-old policy, Congress expressly exempted Alaska Natives from the Act's prohibitions against taking marine mammals, if such taking by Natives "is for subsistence purposes" or "for purposes of creating and selling authentic native articles of handicrafts and clothing," and is nonwasteful. 16 U.S.C. §1371(b). The next year, in the Trans-Alaska Oil Pipeline Act of 1973, Congress imposed strict damages liability upon the pipeline constructors for any harm to the subsistence resources of Natives or others. 43 U.S.C. §1653(a)(1). That same year Congress enacted the Endangered Species Act, and again an exemption from the Act's restrictions was given for subsistence uses by Alaska Natives resident in the state and "any non-native permanent resident of an Alaskan native village." 16 U.S.C. §1539(e)(1). This section of the Act further provides:

> Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

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[31] See David S. Case, Alaska Natives and American Laws 294-95 (1984); see also Argument IIA, infra.

Finally, in the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3110, 3112, Congress referred to the subsistence provisions in the migratory bird treaties with Canada, Japan, Mexico and the Soviet Union and vested the Secretary of the Interior with authority "to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs...." 16 U.S.C. §712(1).

Meanwhile, of course, Alaska's indigenous peoples were pressing Congress for the positive protection of their subsistence way of life from the restrictions of the state's wildlife management regime, which was dominated by and geared to the interests of sport and commerce. In a process involving extended negotiations, the state, through its legislative and executive branches, and the Congress took action to protect the profound value of the Alaska subsistence way of life. As seen above, this action was not taken in a vacuum, nor was it the product merely of some intuitive sense of justice and morality. Rather, the legislators labored in the context of a legal history establishing beyond doubt and without equivocation that the subsistence right is a fundamental human right. The culmination of that history and legislative effort is before the Court, to be given meaning or, as the state would have it, treated as a dead letter.

II.

THE STATE SUBSISTENCE LAW MUST BE CONSTRUED IN HARMONY WITH ITS FEDERAL COUNTERPART, BUT THE STATE IS NOT PRECLUDED FROM PROVIDING BROADER PROTECTION, SO LONG AS THE PROTECTION MANDATED BY FEDERAL LAW IS

PROVIDED, WHICH CAN READILY BE ACCOMPLISHED THROUGH IMPLEMENTATION OF THE "CUSTOMARY AND TRADITIONAL USE" GUIDELINE -- THE CENTERPIECE OF BOTH STATE AND FEDERAL LAW

The state and federal subsistence-preference laws are unique in the history of Anglo-American wildlife and Indian law. They are positive laws, which recognize and seek to protect fundamental rights. Rather than exempting subsistence hunting and fishing from the wildlife management system dominated by sport, commercial and wildlife-protector interests, as had been done historically in Alaska, these laws impose upon that system an affirmative duty to alter its management prerogatives so as to protect subsistence lifeways by giving subsistence uses an absolute preference over all other wildlife uses. The state's wildlife managers have had a hard time swallowing this law, as the instant case demonstrates, but it is the law nonetheless. The state's effort to gut the law must be rejected, and instead the Court should give full force to the legislatures' recognition of the profound value of a way of life that has no equal, and is not possible, outside of Alaska -- to the recognition that subsistence uses are "essential to Native physical, economic, traditional and cultural existence and to non-Native physical, economic, traditional, and social existence." ANILCA §801(1).

In this argument section we show that settled principles of federalism oblige the Court to construe the state law consistently with federal law. We also show, however, that the state is not precluded by federal standards from affording protection to the broader class of non-"rural" subsistence users identified in

Madison. Nevertheless, neither the state nor the Court is free to abandon the "customary and traditional use" guideline, which is the substantive bedrock of both the state and federal subsistence-preference mandates. The law requires the state to systematically identify such uses and provide them with positive protection through regulations designed to fit the facts of Alaska's subsistence lifeways. Only by enforcing this affirmative obligation upon the state is it possible to ensure that subsistence uses are accorded first priority, rather than the status they now enjoy as activities subordinate to the entrenched regulatory system designed to allocate among sport and commercial uses.

A. The Federal/State Subsistence Protection Program Is One Of Cooperative Federalism In Which the State Is Bound By, But Not Limited To, The Minimum Standards Set Forth In Federal Law

In considering the interplay between state and federal law one must begin with the federal government's continuing responsibility to protect Native ways of life. ANCSA did not extinguish this responsibility. Although that Act did not contain any specific provisions on subsistence, the reason it did not was that Congress believed that the state and the Secretary of the Interior would protect subsistence using their existing authority. As the conference committee which drafted ANCSA's final version explained: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." Conference Report No. 92-746, 92nd Cong., 1st Sess., reprinted in [1971] U.S. Code Cong. & Ad.

News 2247, 2250.[32] ANILCA's Title VIII, which contains the federal priority, grew out of this continuing responsibility: it was enacted "because the Secretary and the State failed to heed Congress's admonition" to protect subsistence. People of the Village of Gambell v. Clark, 746 F.2d 572, 580 (9th Cir. 1984).

The state's subsistence law is itself in part a reaction to congressional doubts about the state's commitment to defending subsistence. See Op. Atty. Gen. A66-120-82 (December 2, 1981) at 6. In 1977, Governor Hammond and at least five legislators heard Congressman Seiberling suggest that one way to ensure that subsistence would receive a priority "would be for the Federal Government to do what we did in the strip mining law, to lay down conditions governing management of game on Federal lands and then say if the State were willing to meet those conditions we would turn over that management to the State." House Hearings, supra note 29, part XII at 18.[33] During their deliberations on the bill which became the state subsistence law, legislators were given information about the progress and probable requirements of federal Alaska lands legislation. (Representative Cotten remarked on the House floor, for example, about some of H.R. 39's important features, e.g.: "[B]oy, they did use the word 'traditional.'" Partial transcript of House Debate on HB 960 (26 May 1978) at 10;

[32] The conference committee suggested that, among other things, the Secretary could protect subsistence by "closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened." Id.

[33] Six other legislators testified at another hearing at which state management under federal standards was discussed. House Hearings, part XI at 155-56.

see also id. at 8. (This transcript was prepared by the Department of Law on 1 September 1981, and was later submitted to the Secretary of the Interior as part of the state's certification package. It is hereafter referred to as Legislative History.)) This is not to say that in enacting Ch. 151 SLA 1978 the Legislature agreed that its law should be interpreted to be identical to whatever law Congress eventually approved.[34/] But it is also clear that some legislators knew that the bill they passed might eventually be tested for consistency with federal requirements.

For our purposes, the federal requirement important here is that the state must give subsistence a priority, and the terms of the federal conditions are set out in ANILCA's §804:

> Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:
>
> (1) customary and direct dependence upon the populations as the mainstay of livelihood;
>
> (2) local residency; and
>
> (3) the availability of alternative resources.

Important members of Congress expected that the state's management of fish and wildlife would be consistent with the

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[34/] In Madison, this Court has already rejected this way of interpreting the state statute. 696 P.2d at 176-77 n.13.

federal priority. Indeed, Senator Stevens referred to "the State's responsibilities under Section 804" [126 Cong. Rec. S15130 (December 1, 1980)], Congressman Udall described what "the subsistence priority requires the State of Alaska" to do [126 Cong. Rec. H10546 (November 12, 1980)], and the Senate Committee on Energy and Natural Resources explained that § 804 "requires both the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands...." S. Rep. No. 96-413, 96th Cong, 1st Sess. 269, reprinted in [1980] U.S. Code Cong. & Ad. News 5070, 5213. Parts of Title VIII do bind the State as well as the Secretary of the Interior. Section 804 says that "[e]xcept as provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority" -- without specifying who is to do the according. Section 807 gives people and organizations the right to sue the State if they have been "aggrieved by a failure of the State . . . to provide for the priority for subsistence uses set out in Section 804." And §805(d) provides that appropriate State laws "shall supersede" some of ANILCA's subsistence provisions, specifically including the subsistence priority, "insofar as [the ANILCA provisions] govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses."

Congress did agree to defer direct application of federal law to state fish and game management -- but only if the state fine-tuned its statutes and regulations to make them consistent

with federal objectives. According to § 805(d), the ANILCA priority would not directly govern state management if within one year of ANILCA's enactment the state satisfied the Secretary that it had "enact[ed] and implement[ed] laws of general applicability which are consistent with, and which provide for, the definition, preference, and participation specified in sections 803, 804, and 805." Appropriate state laws, "unless and until repealed," would "supersede" these ANILCA provisions. Their enactment and implementation would also stave off direct federal management of the public lands and lead to federal financial contributions towards the costs of allowing greater public participation in subsistence management. See §§ 805(d) and (e).

Thus, under ANILCA, the state had a choice. It could have asserted its refusal to comply with the federal conditions, thus provoking federal fish and game management of the public lands and risking federal cutoffs of funding for state fish and game management. Or the state could have decided to meet the federal conditions, retain its management authority, and continue to receive federal funds. Not surprisingly, it chose the latter course. Governor Hammond sent documents evidencing Alaska's compliance with Title VIII to Secretary Watt on December 2, 1981. (These included Op. Atty. Gen. A66-120-82, supra.) Changes in state regulations and policies were reported to the Secretary in a letter of December 23. Secretary Watt then expressed some doubt about certain features of the state program (see Appendix D hereto), and the Boards of Fisheries and Game responded by again revising their regulations. When, on May 14, 1982, the Secretary

finally certified that Alaska was in compliance with ANILCA, the state had clearly demonstrated its desire to meet federal conditions in order to retain the right to regulate fish and game.[35]

By doing this it ensured that its own laws would be interpreted in light of the federal standards with which it had pledged its willingness and ability to comply. A state which elects to accept federal benefits and avoid federal penalties by participating in what, in other contexts, is called "a program of co-operative federalism," must not ignore or undercut the federal standards which underlie the program -- unless it abandons the program altogether. Yet, while it participates in the program, it retains some discretion. If it decides to supplement the federal requirements, or pursue independent policies of its own, that is its right, unless the regulatory system it sets up is inconsistent with what federal law mandates. See ANILCA §815(3).

This kind of relationship between federal and state authority is not at all unusual. It is, for example, the way in which a number of important social welfare programs work.[36] And it is

[35] The voters agreed that state subsistence management should continue. By a vote of 111,770 to 79,679, they rejected an initiative which would have repealed the state subsistence law. State of Alaska Official Election Returns by Precinct, General Election, November 2, 1982 at 47 (Ballot Measure No. 7).

[36] See King v. Smith, 392 U.S. 309 (1968) (assuming that welfare recipients may sue state officials to get them to comply with federal law); Rosado v. Wyman, 397 U.S. 397 (1970) (making that assumption explicit); and New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) (states may pursue their own special welfare policies so long as these are not inconsistent with federal law). See also Thomas v. Johnston, 557 F.Supp. 879, 919 (W.D. Tex. 1983) ("While a state is free to decide whether to participate in the Medicaid program and receive Federal assistance, once the state opts into the Federal program it (continued)

central to the operation of the Surface Mining Control and Reclamation Act of 1977 -- the law Congressman Seiberling was remembering when in that same year he proposed state subsistence management under federal conditions.[37/] The Surface Mining Control and Reclamation Act established a "continuing partnership between the states and the federal government, with the Secretary [of the Interior] providing oversight, advice, and back-up authority, and the States bearing the major responsibility for implementation." In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 516 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981); see generally id. at 519-21. In this Act Congress "prescribe[d] federal minimum standards governing surface coal mining, which a state may either implement itself or else yield to a federally administered regulatory program." Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 289 (1981). States may submit management plans to the Secretary of the Interior, just as Alaska submitted its subsistence management plan to the Secretary. 30 U.S.C. § 1253. If the Secretary approves, the states are then responsible for regulating surface coal mining. See 30 U.S.C. §§ 1253(b) and 1254. State plans must include laws which regulate surface mining and reclamation "in accordance with the requirements of [the Act]," 30 U.S.C.

(footnote 36 continued) must comply with the strictures of Federal law"); Caldwell v. Blum, 621 F.2d 191 (2d Cir. 1980) (applying this principle); compare Norman v. St. Clair, 610 F.2d 1228, 1237 (5th Cir. 1980) (under Medicaid Act states have some discretion to choose how to make one spouse responsible for the other's medical care).

[37/] See text at note 33 supra.

§ 1253(a), but federal law does not prevent states from enforcing laws which are more protective than the federal minimum standards:

> No State law or regulation in effect on August 3, 1977, or which may become effective thereafter, shall be superseded by any provision in [the Act] or any regulations issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter.
>
> Any provision of any State law or regulation... which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of [the Act] or any regulation issued pursuant thereto will not be construed to be inconsistent with [the Act].

30 U.S.C. § 1255. Meanwhile, citizens have a private federal right of action, paralleling the right established by ANILCA's § 807, to compel "the appropriate State regulatory authority" "to perform any act or duty under [the Act] which is not discretionary...." 30 U.S.C. § 1270(a).[38]

The similarity to ANILCA is obvious, and a recognition that ANILCA establishes a program of co-operative federalism will help the Court interpret state law consistently with federal standards.

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[38] Hodel upheld this system against Tenth Amendment attacks, explaining that federal statutes which "[allow] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs," are generally constitutional. In a footnote Justice Marshall cited three federal cases sustaining statutes resembling the Surface Mining Control and Reclamation Act, including the Airborne Hunting Act, 16 U.S.C. Secs. 742j - 1; the Clean Air Act, 33 U.S.C. §§ 7401 et seq.; and the Clean Water Act, 33 U.S.C. Sec. 1251 et seq.. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 289 & n.30.

B. The Broader Protection Afforded By State Law, As Construed In Madison, Is Not Necessarily In Conflict With Federal Law, Unless The State Is Correct In Its Interpretation That "All Alaskans" Have Been Declared Subsistence Users.

In Madison the Court held, quite correctly in our view, that the 1978 state subsistence law's protections are "not strictly limited to rural communities." 696 P.2d at 176. Throughout its opinion the Court emphasized that "the legislature intended to protect subsistence, not limit it." E.g., id. At the same time, there can be no doubt that Congress did strictly limit the federal subsistence preference to "rural Alaska residents." ANILCA § 803. This was undoubtedly due in part to Congress' concern with fulfulling its obligations to Alaska Native villages where some three-fourths of the state's Native peoples reside,[39] and also in part due to the correct belief that the subsistence way of life is primarily something engaged in by "rural" people.[40]

[39] See, e.g., Federal Field Committee for Development Planning in Alaska, Alaska Natives and The Land (Oct. 1968).

[40] See, e.g. Yupiktak Bista, Does One Way of Life Have to Die So Another Can Live? (Dec. 1974). One committee report, for example, explained the "rural" limitation as follows (S. Rep. No. 96-413, supra, at 233):

> Although many residents of cities such as Ketchikan, Juneau, Anchorage, and Fairbanks harvest renewable resources from the public lands for personal or family consumption, by its very nature a "subsistence use" is something done only by Native and non-Native residents of "rural" Alaska. The Committee adopted an amendment to clarify this point by limiting application of the definition to areas of "rural" Alaska including communities such as Dillingham, Bethel, Nome, Kotzebue, Barrow, and other Native and non-Native villages scattered throughout the State. However, the Committee does not intend to imply that the rural nature of such (continued)

We are not persuaded, however, that by focusing exclusively on "rural" Alaska Congress intended to preclude the state, in its discretion, from affording a wildlife-use preference to identifiable subsistence users who might not properly be classified as rural residents, or who might live in areas whose "rural" character, through no fault of those living there, has been eroded by the encroachments of rapid economic development and population growth -- such as the Madison plaintiffs. We have found no legislative history indicating such an intent on the part of Congress, and we are bolstered in our view by the position taken by Secretary Watt during the certification process. By letter to Governor Hammond dated 25 February 1982 (Appendix D hereto), Secretary Watt responded to a subsistence "policy" of the Joint Boards which had been previously submitted to him as part of

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(footnote 40 continued) communities is a static condition; the direction of the economic development and rural character of such communities may change over time. It should be emphasized that this amendment is not intended to impose a "durational" rural residency requirement in the definition or impede the traditional movement of Alaska residents between the rural areas and the major population centers and vice versa. Nor does the amendment prohibit the taking of fish and wildlife on certain public lands by normal residents. Rather, nonsubsistence uses may continue in accordance with existing law but do not enjoy any preference on the public lands, and, consequently, may be restricted pursuant to Section 804 when necessary to protect subsistence resources or to ensure the satisfaction of the subsistence needs of rural residents.

the state's certification package, and he proposed a revised version of the policy, to be adopted in regulatory form. The effect of Watt's proposed revisions was to authorize the state to implement a "three-tier" system whereby (1) "rural and other subsistence uses" would have a preference over nonsubsistence uses, (2) if resources were not sufficient to satisfy all subsistence uses, then "rural subsistence uses" would have priority, and (3) if still further restrictions among rural users were necessary, they would be applied according to the three criteria currently known as the "tier II" criteria. According to Watt, if the boards had adopted that policy in regulatory form, the state's program "would comply with all applicable provisions of Title VIII."

For reasons known only to themselves, so far as we are informed,[41] the boards elected instead to adopt the strict rural limitation, which was then applied with a vengeance until the Madison court intervened. Had the boards adopted the regulation suggested by Secretary Watt, or should they now adopt such a

[41] The timing of these events, however (see Madison, 696 P.2d at 177), raises the strong suspicion that the boards (or the Board of Fisheries, at least) seized upon the "rural" limit as a means of stripping all Cook Inlet subsistence fishers, except those residing in the three undeniably rural villages of Tyonek, English Bay and Port Graham, of any preference over, or even equal rights with, the powerful sport and commercial lobbies. See Thomas D. Lonner, The Spider and the Fly: American Dominion and the Survival of Alaska Native Subsistence 12 (October 1984). The Madison court struck a solid blow against this unlawful purpose, but the only effect has been to cause the Board of Fisheries to open up to "all Alaskans" the subsistence fisheries of the three villages that had been protected, and with respect to which this Court (see 696 P.2d at 174) expressed not the slightest hint of disapproval. Compare 5 AAC 01.580 (vol. 2 AAC, pp. 5-21-22) with 5 AAC 01.580 (vol. 4 AAC, Appendix A, p. ER-4, Emergency Regulation adopted 6/1/85).

regulation or some similar approach,[42] the state would, in our judgment, be in substantial paper compliance with both Title VIII and state law. But the state has taken a different tack, and one that is at least as hostile to subsistence uses as the policy struck down in Madison.

If state law actually did classify "all Alaskans" as subsistence users, then the conflict with Title VIII would be manifest and the state would have to surrender its privilege of managing a substantial part, if not most, of Alaska's wildlife resources. Such an extension of the subsistence preference to all state residents would so trivialize and dilute the priority as to render it "like the earth before it was made, 'without form and void.'"[43] Moreover, by placing such a construction upon the Madison opinion the state in effect contends that the Court convicted the 1978 Legislature of committing a fraud, to wit: of pretending to engage in extended and intense debate about the difficult subject of subsistence, when what it was really doing was devising a means of restricting nonresidents.[44] We are

[42] In conjunction with the Board of Game's self-imposed "emergency" meeting in June, the plaintiffs in Bobby v. Alaska and others, before becoming aware of Secretary Watt's recommendation, unsuccessfully petitioned the Board to adopt a subsistence regulation (see Appendix B) designed to comply with both state and federal law.

[43] People v. Jondreau, 185 N.W.2d 375, 383 (Mich. 1971) (Black, J., concurring), citing Genesis ch. 1:2.

[44] If "all Alaskans" are subsistence users, and every consumptive Alaskan activity is "subsistence," then all Alaskans have a priority over non-Alaskans, and if limitations must be made all non-Alaskans will be forbidden to hunt or fish before any Alaskans are affected. Under the Board of Game's new approach, hunts previously limited to those holding random-drawing or registration permits have been designated as "tier II subsistence hunts," with non-Alaskans excluded and Alaskans (continued)

certain that the Legislature did no such thing and, having searched the Madison decision in vain, we are confident that the Court did not declare "all Alaskans" to be subsistence users.

Finally, the state's distorted view of Madison would read the "customary and traditional use" guideline right out of the law. That, too, the Court clearly did not say. Rather, the Court quite plainly said: "The words 'customary and traditional' serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans." 696 P.2d at 176. The "customary and traditional use" standard, to which we turn next, is the very heart of the law. It is the sole mechanism for identifying and preferring subsistence uses, and it is obvious that neither the state nor national legislatures entertained the notion that "rural" could serve as a proxy for "customary and traditional."[45/] Of course, we readily concede that, even in the rural setting, the development and application of appropriate "customary and traditional use" criteria is not an easy task. Furthermore, the Court's Madison holding that subsistence protection cannot be strictly limited to rural residents

(footnote 44 continued) required to qualify through a "tier II" point system. See Game Regs, supra note 2, at 12-13; Tier II Questionnaire, attached as Appendix E. Non-Alaskans had been able to participate in popular sport hunts; now, under the new policy, they may not be. The court of appeals presumed that the state would be able to avoid unconstitutional "discrimination against outsiders and newcomers," Eluska, 698 P.2d at 178 n.6, but there is no sign that it anticipated the state's regulatory reaction to its decision.

[45/] It is clear from ANILCA's legislative history that "customary and traditional" subsistence uses of fish and game are a subset of all consumptive uses, and not everything "rural" people do is subsistence. See Cong. Rec. H 10547 (November 12, 1980) (Congressman Udall). The Congressman's example was a local subsistence moose hunt. People living outside the areas where the moose were -- whether "urban" or "rural" people -- would not be classified as "subsistence hunters."

undoubtedly makes the state's task even more difficult. And that's the rub.

C. The Core Mechanism of the Subsistence Laws for Identifying and Protecting Subsistence Uses Is the "Customary and Traditional Use" Guideline, Designed To Ensure Coverage of All Legitimate Subsistence Uses

Although the state approaches the subsistence laws as though they were mere procedural enactments drafted to assist the state in making discretionary resource-allocation decisions, it cannot be gainsaid that the overriding goal of the laws, and hence the paramount duty of the state, is to protect the subsistence way of life, not to subject it to needless and discriminatory rules designed to regulate sport and commerce. Congress thus declared the national interest to be in the interdependent goals of "proper regulation, protection and conservation of fish and wildlife on the public lands and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska...." ANILCA § 801(5). Perhaps nowhere is the supreme importance of this goal better exemplified than in Congress' decision to make a subsistence exception to the theretofore inviolate policy of prohibiting hunting in all national parks.[46] The legislative history explained:[47]

[46] See American Wildlife Law, supra, at 94-95.

[47] 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); accord, e.g., id. at H10541 (12 Nov. 1980). It was further noted: "The National Park Service recognizes, and the Committee agrees, that subsistence uses by local rural residents have been, and are now, a natural part of the ecosystem serving as a primary consumer in the natural food chain." S. Rep. No. 96-413, supra, at 171. In the national parks of Alaska Congress wanted to insure "stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems, including recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem." Id. at 233.

> With respect to the situation of local residents in and near certain new national parks and monuments established by this Act, the Committee believes that the establishment of these units should protect the opportunity for local rural residents to continue to engage in a subsistence way of life. The Committee notes that the Alaska Native people have been living a subsistence way of life for thousands of years, and that the Alaska Native way of life in rural Alaska may be the last major remnant of the subsistence culture alive today in North America. In addition, there is also a significant non-Native population residing in rural Alaska which in recent times has developed a subsistence lifestyle that also is a cultural value.

Congress thus sought to protect subsistence lifeways by guaranteeing the basic right of self-determination:[48/]

> In addition to the cultural importance of the subsistence lifestyle, curtailment of subsistence uses would impose major hardships upon many residents of rural Alaska. It is a combination of these factors which has led to the conclusion that there is a need to continue the opportunity for subsistence uses of renewable resources, including wildlife, within certain National Parks and Monuments by local rural residents who have, or are a member of a family which has, an established or historical pattern of subsistence uses within such units. Local rural residents who maintain their primary, permanent residence within or near such units should have the opportunity to decide for themselves the course, pace, and extent, if any, of their own lifestyle and community evolution.

Both the state and federal subsistence laws were predicated upon an extensive record revealing that numerous rural Alaska

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[48/] 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); accord, e.g., id. at H10541, H10545, H10546 (12 Nov. 1980); H. Rep. No. 95-1045, 95th Cong., 2d Sess., part I at 182, 185 and 187 (1978).

Native villages and others were greatly dependent upon wild renewable resources for their economic, cultural and/or social existence--a dependence that commanded a positive legal preference over all other uses of such resources.[49] At the same time, the legislators recognized that the precise nature and inner-workings of subsistence lifeways, and the extent of subsistence users' economic, cultural and/or social dependence on wildlife and other renewable resources, were not well known. Consequently, the legislatures designed a statutory scheme that would ensure extensive research into these unknown factors, the results of which, it was clearly contemplated, would then be incorporated into protective regulations.[50] The vehicle for thus guaranteeing the protection of subsistence lifeways was the definition of subsistence uses as "customary and traditional uses." This definition was intended to have sufficient flexibility, depth and breadth to take account of and protect the diverse Alaska subsistence ways of life in all of their manifestations. It was

[49] Congress found, for example: "Alaska's more than 200 rural villages are unique in that they are the last communities in the United States in which a substantial number of residents are still dependent upon the harvest of renewable resources on the public lands for their sustenance." S. Rep. No. 96-413, supra, at 230-31.

[50] The state law therefore created the Subsistence Division of ADF&G and assigned it substantial research obligations. AS 16.05.094. ANILCA §812 imposes similar duties on the Secretary of the Interior. AS 16.05.094(5) and (6) expressly mandate the Subsistence Division to evaluate the impact of laws and regulations on subsistence hunting and fishing and to recommend "corrective action" to the Department and the fish and game boards. As Representative Gruening pointed out during debate, in opposition to Representative Cotten's unsuccessful amendment to delete "customary and traditional" from the bill, "I think that the meaning of customary and traditional applying it to use...is not that confusing. After all, this bill is to establish a framework in which these can be developed." Legislative History at 11-12.

designed in no small way to identify historical subsistence uses, restore the opportunity to continue those uses to the extent such opportunity had been eroded, and to perpetuate the esential resource base and the opportunity for such uses in the future.

The "customary and traditional use" guideline was intended by Congress, as it was by the state legislature,[51] to identify and protect long-established economic and cultural dependence on wild renewable resources:[52]

> However, the phrase "customary and traditional" is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation.

At the same time, the standard was not intended to preclude future adaptations in technology. In discussing the term "traditionally employed" in § 811(b), Congress explained that it is "not intended to foreclose the use of new, as yet unidentified means of surface transportation, so long as such means are subject to reasonable regulation necessary to prevent waste or damage to fish, wildlife or terrain."[53] This point was made elsewhere in

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[51] See Representative Anderson's discussion during the state debate, quoted in Madison, 696 P.2d at 175-76, and the Court's recognition that "[h]is major concern focused on the potential pressure put on resources by newcomers." Id. at 176.

[52] H. Rep. No. 96-97, 96th Cong., 1st Sess., part I at 279 (1979).

[53] S. Rep. No. 96-413, supra, at 275.

the legislative history as follows:[54]

> The Committee, after careful consideration, has adopted a definition of "subsistence uses" which affords significant flexibility to the Secretary and others responsible for implementing this title. In particular, the Committee recognizes that technology and techniques employed by those making subsistence uses of resources of the public lands may be subject to continuing change in the future as they have been in the past; the Committee does not intend that any such change, by itself, should be considered as inherently impermissible or as necessarily placing subsistence users completely outside the scope of this act. Similarly, the Committee recognizes that people may be dependent upon subsistence uses in a very realistic way even though they may, to some limited extent, be participants in the cash-oriented economy, and also that subsistence uses sometimes have an important cultural significance which should not be disregarded by those responsible for interpreting and implementing the policies of this act.

It was further stated:[55]

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[54] H. Rep. No. 95-1045, supra, part I at 186.

[55] 126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980). A similar point was made in the House debate in the state legislature. Representative Hayes expressed concern that defining subsistence in terms of "personal or family consumption" might not cover the situation in which it is "traditional and customary to share with the elderly and those that are sick and those that are without a hunter in the family" (Legislative History at 13); he questioned "[i]f a hunter takes game and shares it with someone other than himself or his family, does he fall outside this definition?" Id. at 14. He was assured that there was no problem, that the law fully covered the situation he described. Id. at 13, 14-15. During the ANILCA debate, Congressman Udall gave the following example of how the subsistence preference was intended to be implemented on a community or regional, rather than individual basis (126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980)):

> For example, if residents of the villages in a particular area normally harvest five hundred moose for subsistence uses, and fly in hunters from outside the local area normally harvest five hundred moose from the same herd, but the (continued)

It also should be noted that customary and traditional subsistence uses must be evaluated on a community or area basis, rather than an individual basis. If not, our commitment in this legislation to the protection of the Alaska Native subsistence way of life would be terminated in one generation as rural residents with established subsistence

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(footnote 55 continued) biologists determine that the herd can safely sustain a total harvest of only six hundred moose, the subsistence priority in section 804 requires that only one hundred moose be made available for harvest by persons other than residents of the local area engaged in subsistence uses. This result could be achieved by opening the moose season to the residents of the game management units in which the moose herd is located for hunting without a permit to obtain moose for subsistence uses, and then allocating access to the remaining one hundred moose to non-residents of the area by lottery.

If in the previous example the moose herd is only capable of sustaining a total harvest of four hundred moose, then not only must no hunting of the herd be permitted by persons not resident of the local area, but the State must also establish priorities for access to the herd by the rural residents of the local area as well, based upon the three criteria set forth in the subsistence preference; local residency, availability of alternative resources, and dependence upon the resource. Only at this stage of the regulatory process, when dependence upon the resource as the mainstay of livelihood for the first time becomes a permissible allocation criteria does the income of individual rural residents become a permissible factor in the allocation process. The availability of alternative resources criteria is intended to focus on alternative subsistence or other food resources, not money. For example, if caribou are reduced are some villages better able to withstand the hardship than others because they have more access to seals or moose?

> uses pass away and their descendents with no established customary and traditional uses take their place in the subsistence cycle.

Additionally, Congress emphasized that subsistence users should have access to their resources "regardless of where such [wildlife] populations may be located in the future":[56/]

> Traditional habitat and migration routes may be altered by transportation systems and development activities on the public lands. By focusing on access to the resource itself, rather than on the particular portion of the public lands upon which the resources may presently be located, this section [811(a)] provides the flexibility necessary to ensure the continuation of subsistence uses in the future, subject to reasonable regulation.

Furthermore, Congressman Udall emphasized that the state has a duty to restore subsistence-harvest opportunities that had been eroded by the state's inhospitable management regime:[57/]

> The State must first identify the customary and traditional subsistence uses of each population and stock by rural residents. It should be emphasized that this evaluation must be based upon subsistence use, not upon any form of economic or other need. It also should be emphasized that the level of subsistence uses by rural residents of particular wildlife populations and fish may have been repressed by State regulatory activities and, consequently, recent historical levels of harvest of a particular population or stock may not accurately reflect the normal level of the customary and traditional subsistence use of such population.

[56/] S. Rep. No. 96-413, supra, at 275; see also, e.g., 126 Cong. Rec. S11128-29 (daily ed. 18 Aug. 1980); id. at S11198-99 (19 Aug. 1980); id. at H10535 (12 Nov. 1980).

[57/] 126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980).

After giving some examples of how customary and traditional harvest levels had been repressed, he concluded (id.):

> Mr. Speaker, similar examples are too numerous to mention. The point I am making is that the subsistence priority requires the State of Alaska to determine the customary and traditional subsistence use of a particular wildlife population or fish which would have reasonably been made by rural residents if their subsistence uses had consistently been respected and adequately protected by State regulation.

Thus, it is seen that "customary and traditional uses" is a broad and flexible concept. It reaches deep into the past and looks forward to the future. It is designed to protect and continue renewable natural resource harvesting in rural communities in which such resource use has been an integral part of the economic and cultural fabric, and to restore harvesting opportunities that have been repressed by state management. It encompasses beliefs and customs handed down, by word of mouth or example, from generation to generation. It applies to people as a group, as well as to individuals. It is not circumscribed by geography; it focuses on the resource itself, rather than on where the resource is now located or has been located in the past. It embraces advances in resource harvesting technology and technique, and does not seek to confine subsistence users to present or past technologies. It recognizes the necessity of cash. It has great social and cultural significance which is due to be honored.

Obviously, the "customary and traditional use" standard was designed to be given such content as dictated by the known and knowable facts of Alaska's subsistence lifeways. It is not an

easy standard to administer, but as we now show, there can be no doubt that the state's wildlife managers have both the knowledge and competence to properly implement the "customary and traditional use" guideline.

III.

THE LIFEWAYS OF MEMBERS OF SUBSISTENCE-BASED SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS, ABOUT WHICH THE STATE HAS A SUBSTANTIAL BODY OF KNOWLEDGE, ARE ENTITLED TO CONSTITUTIONAL PROTECTION INDEPENDENTLY OF THE SUBSISTENCE LAWS

Here we provide a brief overview of the ever-increasing volume of research into the diverse subsistence lifeways of Alaskans. That research reveals that the most common such way of life is that engaged in by Alaska Native villages with "subsistence-based socioeconomic systems." Those "systems" represent a culturally distinct way of life in which subsistence activities constitute the central, integral component of the ultimate being of members of those communities. We suggest that this way of life is entitled to constitutional protection without benefit of the subsistence-preference laws.

> Finally, subsistence societies typically have a set of beliefs and values which link the human participants in the natural order to the natural resources, particularly the living ones, on which they depend. These belief systems tend not to dichotomize the living world into human and other, but rather to link together in an order ordained by some ultimate force the lives and spirits of humans and others. Among Alaskan Natives there are often more direct links in addition to respect, deference, and obligation shown to animals and their spirits, in that some animals are conceived to have been human at one point and transformed into their current form in the past. This is

> further affirmation of the essential unity between humans and animals in spiritual nature and supports the notion of their mutual dependence and obligation.
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> It is through capturing, processing, distributing, celebrating, and consuming naturally occurring fish and animal populations that subsistence societies define the nutritional, physical health, economic, social, cultural, and religious components of their way of life. Without harvests, there is no subsistence.[58]

A. The Nature of Alaska Subsistence Lifeways

Undoubtedly the most significant impact of the subsistence laws to date is that the legislative expectation of extensive research into the Alaska subsistence way of life is being fulfilled. An ever-expanding volume of subsistence research is being conducted and published by ADF&G's Subsistence Division, as well as by numerous other government agencies and private organizations.[59] While much is yet to be done, the process is firmly in place and ongoing. The body of research already published reflects considerable diversity among those Alaskans who are economically and socially dependent upon the harvest of wild renewable resources for local uses.

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[58] Steve J. Langdon, Alaskan Native Subsistence: Current Regulatory Regimes and Issues 3 (October 1984, Paper for Roundtable Discussions of Subsistence, Alaska Native Review Commission, Vol. XIX).

[59] The Subsistence Division has published over 125 volumes in its "Technical Paper Series." While some of the papers are concerned only with theoretical or policy matters, most of them involve in-depth reviews of the subsistence uses of a particular village or region. There is, in addition, a substantial amount of research available from other government agencies, as well as private organizations. See, e.g., U.S. Dept. of the Interior, Subsistence Management and Use: Implementation of Title VIII of ANILCA (March 1985), and the numerous references therein.

By far the most common type of such resource use is that engaged in by "subsistence-based socioeconomic systems" with certain common identifiable characteristics. These "systems" consist primarily of rural Native villages, or groups of villages, although a few non-Native communities may also share many of the same characteristics.[60] These subsistence systems are exceedingly complex, and their varied features are not readily apparent to the untrained or unfamiliar observer:[61]

> Many White persons imagine that subsistence is merely the act of an individual going hunting or fishing. Subsistence, in actual fact, is a complicated economic system, and it demands the organized labor of practically every man, woman, and child in a village. There are countless tasks, such as the maintenance of equipment (nets, snowshoes, boats, fishwheels, outboard motors, snowmobiles, etc.), preparing the outfit for major hunting and fishing expeditions, setting and checking traplines, dressing and packing hundreds of pounds of meat, cutting and drying thousands of pounds of fish, gathering berries and edible plants, tanning skins and hides, making things from them--clothing, footgear, containers, sleds, tents, kayaks--sharing harvests of meat and fish, and trading with other communities.

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[60] Deposition of Steven R. Behnke (18 Sept. 1985), in Bobby v. Alaska, Civil Action No. A84-544 (D. Alaska). By the very nature of Native communal subsistence systems, which have evolved over thousands of years, and which incorporate kinship-based distribution systems and oral traditions, the Native system is not likely to have a non-Native community counterpart, although the deposition just cited indicates that there may be a few non-Native communities which during the past 50 years or so have acquired some of the attributes of the Native systems. At the same time, non-Natives who marry or otherwise become integrated into Native villages are given equal status in the socioeconomic system. See, e.g., Thomas R. Berger, Village Journey: Report of The Alaska Native Review Commission, 151, 153 (1985).

[61] Thomas Berger, supra, at 56.

These systems operate at the community or regional level:[62]

> The fishing and hunting pattern is not an attribute of an individual, but of an entire community or regional group. The patterns of resource use have a relatively long and continuous time depth within the community, passed on from one generation to the next through instruction and learning. A person may adopt the fishing and hunting patterns by becoming socialized into the community. However, the behaviors of any individual are not a complete or sufficient representation of the socioeconomic system.

Although they predominate in the smaller rural villages, these subsistence-based socioeconomic systems are also present elsewhere on the Alaska landscape, such as in "regional centers" (e.g., Nome) where, despite the more pervasive presence of the market ecomony, the attributes of a subsistence-based socio-economic system still predominate. Wolfe & Ellanna, supra, at 273. Thus, as early recognized, in its most visible form "subsistence is a kinship-bound community economic system with an elaborate division of labor and special roles. By defining and confining activities to individuals only, regulatory systems may intrude seriously and unreasonably into these arrangements."[63]

Still, there are other uses that merit subsistence-preference protection. Even in Fairbanks, for example, where hunting and fishing activities "were scheduled around wage jobs and engaged in for the value of 'being outdoors' and 'recreation yielding a food

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[62] Robert J. Wolfe & Linda J. Ellanna, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities 250 (ADF&G Technical Paper No. 61, March 1983). See generally Steve Langdon & Rosita Worl, Distribution and Exchange of Subsistence Resources in Alaska (ADF&G Technical Paper No. 55, April 1981).

[63] Thomas D. Lonner, Subsistence as an Economic System in Alaska: Theoretical and Policy Implications 27 (ADF&G Technical Paper No. 67, 3 Nov. 1980).

return,'" there are also "a small number of the sampled fishermen [who] fished for salmon for more economic reasons, for food for families and dogteams, as part of a self-sufficient, 'interior way of life.'" Wolfe & Ellanna, supra, at 257. Hence, while subsistence "systems" of one sort or another comprise the bulk of true subsistence harvest activities:

> On the other hand, there are a number of persons who live on their own in the bush, who live in urban areas but whose ties are to rural economies, who live in urban areas but who have been customary and traditional users of wild resources for long periods, and so on. These persons must have their interests protected through factual research and documentation and permitting systems.

Lonner, supra note 63, at 27-28; accord, Madison, 696 P.2d at 170.

Finally, it should be acknowledged that no one has a more literally vital interest in wildlife conservation than those engaged in the subsistence way of life, who are themselves one with the ecosystem. These descendants of peoples who have lived off the land from time out of mind operate within a set of cultural, social, economic and environmental constraints that are likely far more effective for ecosystem conservation than any printed words of Anglo-Saxon sporting law.[64/]

64/ See, e.g., Steve J. Langdon, supra note 58, at 14-20; Richard K. Nelson, Make Prayers to the Raven 16-24 (1983); Harvey A. Feit, Waswanipi Realities and Adaptations: Resource Management and Cognitive Structure (1978 dissertation, McGill Univ. Anthropology Dept.); Harvey A. Feit, Decisionmaking and Management of Wildlife Resources: Contemporary and Historical Perspective on Waswanipi Cree Hunting (1983, International Congress of Anthropological and Ethnological Sciences); Harvey A. Feit, James Bay Cree Self-Governance and Management of Land and Wildlife Under the James Bay and Northern Quebec Agreement (1985, American Indian Workshop, Copenhagen); Peter J. Usher, Property Rights: The Basis of Wildlife Management (Draft) (Presented to the Third National Workshop on People, Resources, and the Environment North of 60°); Priscilla Kari, Land Use and Economy of Lime Village 127-29 (ADF&G Technical Paper No. 80, June 1983).

B. Alaska Native Subsistence-Based Socioeconomic and Sociocultural Systems Are Entitled to Constitutional Protection.

The fundamental right of Alaska Natives to engage in subsistence hunting and fishing is grounded in federal law and long-standing federal policy towards Native American peoples, including Alaska Natives. See Argument I B and C. The source of this fundamental right can also be found in the First[65], Ninth, and Fourteenth Amendments to the United States Constitution, insofar as the right is intimately involved with the associational, religious, and personal rights of Native Alaskans in the exercise of their traditional subsistence lifeways.

The State of Alaska has criminalized many of these subsistence activities by making conduct illegal which does not conform to its sport hunting regulations, seasons, and bag limits. Its unwarranted intrusion into the way Native people live is forbidden by the United States Constitution.

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[65] Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 587, 594 (N.D. Cal. 1983) ("We also reject the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs and practices. Governmental action that makes difficult or impedes religious observances may also be 'invalid even though the burden may be characterized as being only indirect.' (citation omitted)"), aff'd in relevant part, __ F2d __ (9th Cir. 1985), 12 Indian Law Rptr. 2118; Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639-40 (N.D. Tex. 1973) ("Congress has the power or duty to preserve our Native American Indians [also our Eskimos and Aleuts] as a cohesive culture until such time, if ever, as all of them are assimilated in the mainstream of American culture. . . . [S]ome sort of a formal organization or community must be extant so that it may be determined who is a member of the culture to be preserved."); United States v. Warner, 595 F.Supp. 595 (D. N.D. 1984); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); (upholding right of Indian prisoner to wear long hair as expression of religious belief protected by First Amendment); People v. Woody, 394 P.2d 813 (1964) (reversing criminal conviction of Navajo Indians for use of peyote on grounds use of drug constituted an integral element of their religious practices).

One cannot point to a specific place in the Constitution that says in so many words that the historical subsistence activities of Native Americans shall not be abridged. Nor can one find an express protection for the sanctity of the family[66] or the marital community,[67] the right to bear[68] or not to bear children,[69] the right to raise them free of overly intrusive governmental regulation,[70] or the freedom of association.[71] Nevertheless, an abiding commitment to diversity, privacy, and personal liberty, based on deeply rooted history and tradition, has led the Supreme Court to articulate "peripheral" rights without which "the specific [Bill of R]ights would be less secure." Griswold v. Connecticut, supra note 67, 381 U.S. at 483. These are rights "so rooted" in the "collective conscience of our people . . . as to be ranked fundamental." Id. at 493.

NAACP v. Alabama, 357 U.S. 449, 469 (1958), articulated the constitutional right to "freedom to engage in association for the advancement of beliefs and ideas [as] an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

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66/ Moore v. City of East Cleveland, 431 U.S. 494 (1977); Stanley v. Illinois, 405 U.S. 645 (1972).

67/ Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967).

68/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Skinner v. Oklahoma, 316 U.S. 535 (1942).

69/ Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

70/ Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

71/ Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

Amendment." The Court stated that the beliefs sought to be advanced by association may be political, economic, religious or cultural, and it is the effect of the state's action, not its intentions, which is relevant:

> In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

357 U.S. at 460-61. In Griswold v. Connecticut, the Court had occasion to further explain the right of association in the context of exploring the "penumbras" that emanate from the specific guarantees of the Bill of Rights and which "help give them life and substance." 381 U.S. at 484.

> [W]e have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members [citations omitted] . . . . [it] is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.

Id. at 483.

Wisconsin v. Yoder, 406 U.S. 205 (1972), a case dealing with the right of the Old Order Amish to live separate and apart and free from state compulsory education laws, failed to mention the association cases, but relied instead on the free exercise clause of the First Amendment. The case is instructive, both in its evaluation of the claims of the Old Order Amish for special treatment under the Constitution, and to show that the facts in any given case may call for the protections of one constitutional

amendment rather than another.[72] The Court found in Yoder that the state's requirement of compulsory secondary education would gravely endanger if not destroy the free exercise of respondents' religious beliefs." 406 U.S. at 219. Considerations that obviously persuaded the Court that the Old Order Amish way of life deserved constitutional protection were the testimony of experts concerning "300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life," id., coupled with a recognition that the Amish society was increasingly beset by the encroachments of an alien way of life.

> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.

Id. at 217.

Yet, the Court reasons, "a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Id. at 224. "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." Id. at 226. The question, of course, is how far to go in providing constitutional protection for "penumbral" rights (in the First and Fourteenth Amendments) and the unarticulated rights reserved by the Ninth Amendment.

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[72] Or the court may, as in Griswold, rely on "several fundamental constitutional guarantees." 381 U.S. at 485.

More recently, the Court, surveying the "treacherous field" of substantive due process, emphasized that the limits of substantive due process must be drawn from "the teachings of history [and] solid recognition of the basic values that underlie our society." Moore v. City of East Cleveland, 431 U.S. 494, 503, quoting Griswold v. Connecticut, 381 U.S. at 501 (Harlan, J., concurring). The Court "expressly points to history and tradition as the source for 'supplying . . . content to this Constitutional concept.'" Moore, 431 U.S. at 503 n.12 (citation omitted).

For instance, in Moore, where the Court was considering whether the Constitution protects the composition of the extended family from a city's zoning ordinance, the role of the family in the Nation's history and tradition was emphasized. "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Id. at 504.

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.

Id. at 504-05. The Native Alaskan village or tribe is very like the extended family so cherished and protected by the highest

Court in Moore. Clearly, for its members, the village or tribe serves the same function in inculcating values that the family is perceived to do in Western civilization or that the Old Order Amish society does for its members.

Subsistence activities of the village or tribe (hunting, fishing, gathering) are not of recent origin, nor are they exercised primarily for the personal pleasure or sport of any individual. Rather, they are "an accumulation of wisdom"[73] of the historical and traditional means of preserving the group whose members function in a communal, sharing and exchanging system very different from the free-enterprise, capitalistic ethic of Western civilization. Through the exercise of these subsistence activities, the life skills, moral and cultural values, and religious beliefs of the group are passed down from one generation to another. See part A supra.

The "basic values that underlie our society"[74] apply equally to subgroups of our society. Just as "the Constitution prevents East Cleveland from standardizing its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns," Moore, 431 U.S. at 506, the Constitution must equally prevent the state from standardizing lifeways and effectively outlawing a traditional subsistence society.

> The functions of shaping and transmitting values, which the Moore plurality identified as justifying protection for the extended family, inhere in a wide variety of enduring relationships; governmental interference with any such

[73] See Moore, 431 U.S. at 503-4.

[74] Moore, 431 U.S. at 503.

> relationship should be invalidated unless compellingly justified.

L. Tribe, American Constitutional Law 989 (1978).

This Court has already noted the fundamentally important role that subsistence hunting and fishing activities play in the lives of Native Alaskans:

> For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions by those of different cultures, many Alaska Eskimos, Indians and Aleuts eke out a livelihood by reliance on fish and game. A few non-Natives have adopted similar means of livelihood. See generally, McPhee, Coming into the Country (1977). Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of these people. It has been claimed that their very lifestyle is threatened if they are deprived of this traditional method of obtaining the wherewithal for existence.

State v. Tanana Valley Sportsmen's Association, 583 P.2d 854, 859 n.18 (Alaska 1978); see also Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979).

The religious use of moose meat for an Athabaskan potlatch has been accorded the protections of the First Amendment, Frank v. State, supra, and rural villagers' constitutional right to be tried by a jury of their peers has been upheld in Alvarado v. State, 486 P.2d 891 (Alaska 1971).

The record before the Alvarado court included the testimony of an expert who characterized Native village economies as relying on "hunting, fishing, and gathering activities, strong kinship bonds, [and] isolation from those parts of Alaska that approximate mainstream America . . . ." 486 P.2d at 894 (Dr. Frederick

Hadleigh-West). It also included written evidence that "Eskimos, Indians, and Aleuts, spring from cultures very different from those of other Alaskans or other Americans . . . . In an economy based importantly on a pattern of life of subsistence fishing and hunting, the large majority of these Alaskans are unemployed or only seasonally employed." Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land 3 (1968). The court, finding that "an essential cultural difference" existed between Native villages and urban Anchorage, and "in all likelihood this difference will continue to exist in the future," concluded that Alvarado was constitutionally entitled to a jury of peers selected from his community, not from the community of greater Anchorage. Alvarado, 486 P.2d at 900.[75] Thus, this Court has consistently given constitutional protection to Alaska Native lifeways.[76]

IV.
THE STATE STANDS BEFORE THE COURT IN A POSITION OF COMPLETE NONCOMPLIANCE WITH THE SUBSISTENCE LAWS; THE JUDGMENT OF THE TRIAL COURT DISMISSING THIS CASE WAS CORRECT

A. The Board of Game Has Not Adopted Subsistence Regulations As Required By Law.

The state does not dispute the express requirement of the state subsistence law that the Board of Game "shall adopt regulations...permitting the taking of game for subsistence uses." AS 16.05.255(b). Yet, insofar as the Board is involved, the

[75] The court's prediction that there would continue to be cultural differences between Native villages and urban centers was accurate. See generally Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985).

[76] See also Aguchak v. Montgomery Ward Co., 520 P.2d 1352 (Alaska 1974).

substantial body of acquired knowledge about Alaska's subsistence lifeways (Argument III A, supra) has been largely ignored. Concededly, the Board, as presently constituted, does not appear to be hostile to the subsistence way of life, and it has on a number of occasions modified the western sporting regime in ways intended (without expressly saying so) to ameliorate the harshness of the application of that management system to subsistence lifeways.[77] But never as a priority. Indeed, since the Board's approach is premised upon the sanctity of the sport-hunting rules, subsistence has yet to gain even equal footing with sport and commerce (trophy hunting).

The system for which the state seeks this Court's approval is therefore one which turns the subsistence preference, and legislative design, upside down. The state's approach must be reversed, as the courts below have attempted to do.

> Since it is the Western legal system which attempts to regulate the taking of wild resources, it is Western social research which bears the burden of explaining subsistence; unfortunately, to this point in the history of

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[77] The state argues that these accommodating modifications of the sporting system constitute compliance with the law (State's Br. at 4-5, 15-16); that the Board's approach, "whereby the board incorporated management mechanisms into general game hunting seasons and bag limits so as to ensure a reasonable opportunity for the continuation of subsistence uses, and to give subsistence uses a priority where restrictions apply," is adequate. Id. at 15 (emphasis added). The crux of the state's case is its assertion that "separate subsistence regulations are not required, and that so long as a reasonable opportunity exists for subsistence hunting by all Alaska residents, non-subsistence uses need not be completely eliminated [or, if the facts of this case are indicative of the state's position, non-subsistence uses need not be curtailed at all, see note 79, infra]. Id. at 16 (emphasis added). As we show in part B, infra, this "sporting chance" theory of subsistence, which has its genesis in 5 AAC 99.010 and the scheme devised to strip the Madison plaintiffs of subsistence protection, is flatly wrong.

> Alaska social history and policy development, the regulators neither understand, have much interest in, nor agree with the world view presented by social researchers. To the degree that the regulators can enforce their regulations on rural people, rural subsistence economies are in jeopardy.

Thomas D. Lonner, Perceptions of Subsistence and Public Policy Formation in Alaska 14 (ADF&G Technical Paper No. 68, undated). Although a number of the state's sport-hunting rules are antagonistic to subsistence socioeconomic and sociocultural systems, the habitual imposition of arbitrary sport-hunting seasons, the individual-bag-limit concept, and biologically irrelevant sex restrictions are the principal components of the state's management system which regularly intrude into and disrupt, with criminal and property-confiscation sanctions, the peace and dignity of the Alaska subsistence way of life.

The basic problem here, as former Subsistence Division Director Lonner pointed out in the above quote, is that the state's management policy and the hard facts of customary and traditional subsistence use have yet to meet each other. Despite the mounting evidence that sport and trophy hunting rules are alien to true subsistence lifeways, the state clings desperately to the entrenched "sporting chance" management system with which it is comfortable (see note 77, supra) and stubbornly insists on treating subsistence as an individual- or individual-family-oriented recreational activity. This approach is wholly at odds with the lifeways of subsistence Alaska, as the facts of this case demonstrate.

B. The Customary and Traditional Subsistence Uses of Wildlife Resources By Respondent Eluska and His Village Are Unreasonably Restricted By the Arbitrary Closed Seasons and Individual Bag Limits the State Seeks to Apply

The courts below were eminently correct in their conclusion that the sport-hunting rules applied to respondent Eluska's hunting territory do not constitute subsistence hunting regulations and are therefore invalid as applied to him. Mr. Eluska is not only a subsistence hunter in the individual or household sense, he is a part of the subsistence-based socioeconomic and sociocultural system of the village of Akhiok.[78/] Neither the regulation which the state seeks to apply

[78/] Akhiok is a Koniag village of approximately 100 persons, 96% of them Natives, at the southern end of Kodiak Island. ADF&G Habitat Division, Alaska Habitat Management Guide, Southwest Region, Volume II: Human Use of Fish & Wildlife, table 47, p. 500 (1985). Akhiok residents, by custom and tradition, hunt and fish on a year-round basis for deer, hare, harbor seal, sea lion, halibut, dolly varden, steelhead, butter clams, king crab, tanner crab and dungeness crab; salmon and migratory birds are available and harvested seasonally, depending on migrations. Kodiak Area Native Association and ADF&G Division of Subsistence, Kodiak Island Area Local Fish and Game Resource Guide 84 (December 1983). There is significant sharing and exchange of harvested subsistence resources, primarily among Akhiok households, but also secondarily with Native families in the city of Kodiak. Game is the most widely distributed wild resource, with 85% of Akhiok households receiving wild game from other households in the village, and 65% of the households giving harvested game resources to other households in Akhiok and secondarily in Kodiak. Id. at 40 and 59. These facts are confirmed in respondent Eluska's affidavit filed in the trial court. [R. 7-9]. That affidavit establishes that Mr. Eluska is a life-long subsistence user (para. 2), that Akhiok is a subsistence-based village ("a substantial portion of the village's livelihood is provided and depends on customary and traditional subsistence activities," para. 1), that his is a 6-person household (para. 3), that store-bought food is not easy to come by, even if he could afford it (para. 4) that deer are plentiful enough to fill the village's subsistence needs without harm to the herd (para. 5), and that "[t]hese deer, as is customary among Native peoples, are shared throughout the community--passed out to relatives and friends. Likewise in any given year my family was provided with meat by others in the village who had taken a deer, seal or sealion." Para. 5. The state's brief (p. 9) (continued)

to David Eluska, nor the subsequent regulatory changes placing further restrictions on the traditional use territory of Akhiok, reflect any effort to accommodate, let alone provide a priority for, the village's customary and traditional uses of deer for subsistence purposes.[79] The state has been on express notice since at least December 1983 that the deer seasons and individual bag limits are too restrictive,[80] yet the state has made no

(footnote 78 continued) transgresses candor when it implies that this is a "self-serving subsistence affidavit." If there is a self-serving affidavit involved in this case, it is the affidavit of Area Biologist Smith, filed by the state. [R. 62-63].

[79] The regulation in effect at the time of Mr. Eluska's alleged offense (the 1982-83 season) imposed the following restrictions: an individual bag limit of 7 deer, a six-month closed season (open season was 1 August through 31 January), with the further restriction that does could be taken only between 15 September and 31 January. The Board of Game imposed further restrictions for the 1983-84 season, reducing the individual bag limit to 5 deer, and shortening the season to close on 7 January. See state's Brief of Appellant at 4 n.1, filed in the court of appeals. The restrictions referred to applied alike to both subsistence and non-subsistence hunting. These restrictions have now been reclassified as "subsistence" and "general" hunting regulations. Game Regs. (see note 2, supra) at 36 and 66. Both sets of regulations are identical, and there is otherwise no evidence that subsistence deer hunting in the unit has received any preferred treatment of any kind.

[80] The Kodiak Island Area Local Fish and Game Resource Guide (see note 78, supra), in the preparation of which ADF&G's Subsistence Division participated, identified a number of "issues and concerns," including (p. 90):

> Rural residents report that the current seasons for hunting deer are too restrictive, because they depend on this resource as a major food source for most of the year.
>
> Current bag limits do not permit traditional hunting in which a proficient hunter may supply a number of families with meat.

Clearly, "corrective action [was] indicated," but there is no evidence that the Subsistence Division "mad[e] recommendations to the department" or to the Board, as mandated by AS 16.05.094(5) and (6).

effort to accord the subsistence preference mandated by state and federal law.

This case involves a readily identifiable rural subsistence economic system of the type being regularly documented on an ongoing basis in the state's subsistence research. There is no justification for the state's continuing refusal to adopt a subsistence management program specifically addressed to these subsistence-based socioeconomic systems, to which the application of the individual-oriented western sporting regime is manifestly inappropriate. The alternatives to the sport-hunting rules are obvious, e.g., a village-based or regional approach with harvest-level guidelines designed to account for the needs and uses of the village or region as a whole, including its sharing and exchange components and trading patterns--a program, in short, which recognizes that "[i]n rural Alaska...one hunter may be responsible not only for supplying his own immediate family but also for a system of community sharing with elders and others who need meat but cannot hunt." Dennis D. Kelso, Subsistence Use of Fish and Game Resources in Alaska: Considerations in Formulating Effective Management Policies, Transactions of the 47th North American Wildlife Conference 635 (ADF&G Technical Paper No. 65, 1982).

Such alternatives are not only possible, they also are highly desirable, because the present system produces little more than bad, uninformed management and cultural disruption. "[A]rbitrary harvest limits have no place in a sensible management program ... The net effect could be impairment of both subsistence use pat-

terns and management plans. An alternative approach would be based upon potentially flexible harvest levels or ranges derived from longitudinal data on resource populations and harvests by humans. Such an approach would allow for possible variation in use without adversely affecting the population base." Id. at 636.[81] Such an approach would also provide a framework for giving subsistence users a meaningful role in the development and implementation of management measures, a result that would not only contribute to more effective and cooperative management (id. at 637-38), but would also comply with the legislative intent to ensure users such a meaningful role in the management regime.[82]

[81] The Alaska Eskimo Whaling Commission, for example, allocates the harvest level according to a community-based harvest quota or guideline. See, e.g., Rosita Worl, Cultural Norms, Laws, and Modern Resource Management Regimes (1981, Arctic Coastal Zone Management Newsletter 34: 15-17). There is no reason, with the possible exception of arrogance, why the state could not approach its exercise of game-management jurisdiction in the same manner. Of course, such an approach would require the state to reduce the level of rhetoric about "poachers," and to pay more respect to the reality that subsistence users have the most at stake by far, and further that just because their rules of self-regulation are not published in the Alaska Administrative Code is no indication that they are ineffective. See authorities cited at note 64, supra; Thomas R. Berger, supra note 61, at 70-72.

[82] Congress sought to insure that any implementing structure was designed "for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska." ANILCA § 801(5). Congress also expressed its desire "that the utilization of the public lands is to cause the least adverse impact possible upon rural residents who depend upon subsistence uses for their economic and physical well-being and cultural vitality." H. Rep. No. 96-97, 96th Cong., 1st Sess., pt. I at 279 (1979). Among other things, this means that Congress intended that "rural communities and cultures will not be burdened by implementation of a complex, and in many instances culturally disruptive, regulatory system, unless necessary in specific instances to protect and administer [park] unit values." 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); id. at H10541 (12 Nov. 1980).

At bottom, the state's case rests upon a hope or a prayer that this Court will find that the state and national legislatures labored mightily over the subsistence issue, only to come up with a law that already existed: one that gives a subsistence user a sporting chance -- a "reasonable opportunity" (see note 77, supra) -- to harvest resources. As with its belief that "all Alaskans" are subsistence users (see Argument IIB, supra), the state's "reasonable opportunity" construction reads the "customary and traditional use" guideline right out of the law. We think it clear, and we submit, that the subsistence law is not so worthless; that the subsistence opportunity both legislatures sought to protect were "customary and traditional uses." As applied to subsistence-based socioeconomic systems like Akhiok, this standard must be applied to determine what is customary and traditional within that system, and then to provide for those uses -- unless sustained yield commands a restriction (it obviously does not in this case, given the liberal rules for both resident and nonresident sport and trophy hunting). The "opportunity" that the lawmakers promised Alaska's Native peoples was the opportunity to engage in "customary and traditional uses," not the "opportunity" to restructure their cultures.

C. Subsistence Hunters Charged With Game Violations Should Not Be Denied Their Days In Court For "Failure To Exhaust Administrative Remedies".

David Eluska did not petition the Board of Game for a change in seasons, or travel to urban Alaska to make sure that his petition would be considered. The state says that for this reason he should be punished with a criminal conviction. State's Br. at

20-28. As amici understand from personal experience, this is a ridiculous argument. The residents of Lime Village know what "exhaustion of administrative remedies" entails. After a Lime Village man was charged with taking a moose out of season and a village snowmachine was confiscated, lawyers representing the village petitioned the Board of Game for changes in the game regulations. Petitioning the Board of Game involved --

1. Preparation of a request for a change in regulations for submission to the Board by the December 18, 1984 deadline. The request had to be in writing, specifically stating what changes were requested, what existing regulations would be affected, and specific justifications for the proposed changes.

2. Receipt from the Board of Game of an 81 page booklet containing all proposed regulation changes to be considered at the March, 1985, Board meeting, and inviting written comments in support of a proposal to be submitted by a deadline of March 8, 1985.

3. Preparation and submission of written comments in support of proposed changes for Lime Village submitted by March 8, 1985.

4. Attendance at Board of Game meeting starting on March 20, 1985; the Lime Village proposal was not reached by the Board until March 27, despite an agenda date of March 22 for dealing with Interior proposals.

5. Review of final Board action taken on the Lime Village proposal (April 4, 1985).

6. Receipt of formal notice of adoption of Board regulation changes from the March, 1985 meeting (May 2, 1985).

These procedural steps consumed many hours of experienced attorneys' time, not to mention the added expense of transportation, lodging, and meals necessary for two four-day stays in Anchorage to be present at the relevant times when the Lime Village proposal was being addressed. (Staff reports, public hearings, and consideration of specific proposals happened on different days, so it was not possible for the Board to focus one day's meeting on the problems of Lime Village.) Despite these efforts, the specific objectives of the people of Lime Village were not obtained after this approximately five-month process.

It should also be noted that the Board has the absolute discretion to decide what areas of proposed changes it will and will not entertain at any given Board meeting. 5 AAC 96.610(b). The procedures for adopting game regulations are found in Part 7 of the Fish and Game Regulations within the section on Fish and Game Advisory Committees. There is no reference to an individual proposing game regulation changes. Rather, the whole section addresses itself to how the advisory committee system will work, and it is to the local advisory councils that the Board is instructed to respond with explanations of why proposed changes are not made. See generally 5 AAC 96.600-660.

This is not a scheme designed with the specific objective of having individual citizens petition the Boards for regulatory changes that they think might be beneficial. Thus it is certainly not a scheme well suited for the individual exhaustion of

administrative remedies.[83]

We do not intend to waste the Court's time by duplicating the Public Defender's legal arguments on the exhaustion-of-remedies issue, but do want to make five basic points. First, as shown above, state law requires the Boards to promulgate subsistence regulations, and the burden of changing regulations to make them adequate should be on the state. Second, exhaustion-of-remedies doctrines are not routinely applied if the penalty for failing to pursue administrative remedies is criminal liability. See McKart v. United States, 395 U.S. 185, 197 (1969).[84] Third, the doctrine is at its weakest when it would be used to deny people

[83] Public life in a village may not leave villagers with the time or energy to bring petitions to the Boards:

> Municipal city council meetings, IRA Council meetings, church council meetings, regional native corporation meetings, Local School Advisory Board meetings, individual agency-issue meetings (BLM, ADOTPF, ADEC, NPE, USFWS, etc...), regional nonprofit organization meetings, Regional Strategy meetings, CZM and CRSA Board meetings, elders council meetings, Inupiat Ilitqusait meetings, and many others, all compete for villagers' time and attention.

Gregory D. Moore, A Review of Game Management in Northwest Alaska 18 (Kotzebue, January 1984). People living in the Bush are engaged in subsistence activities, or they are trying to capture the rare seasonal wage-paying job to support their subsistence activities. They lack both the time and the wherewithal to employ the lawyers, biologists, social scientists and other experts necessary to a successful petition to the Board of Game. No doubt that is one of the reasons the legislature put the burden on the state.

[84] "[U]se of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any review of an assertedly invalid order....Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon [the defendant] if he is denied judicial review."

rights which have a constitutional dimension. See Moore v. City of East Cleveland, 431 U.S. 494, 497 n.5 (1977); cf. Yakus v. United States, 321 U.S. 414, 446-447 (1944). Fourth, even if constitutional rights are not involved, "those cases that have denied certain nonconstitutional defenses to criminal defendants for failure to exhaust remedies did so pursuant to statutes that implicitly or explicitly mandated such a holding," Moore, 431 U.S. 494 at 497 n.5, and Alaska's fish and game statutes and regulations say nothing implicit or explicit about exhaustion. In fact, as shown above, the Board of Game's regulatory system seems designed to discourage individual attempts to secure changes in the regulations. Finally, it is important to recognize that in this case the state is asking this Court to order a dramatic expansion of the exhaustion doctrine. David Eluska was charged with violating a general game regulation. He was not the subject of an individual administrative enforcement proceeding, and there is no way he could have asked for an individual permit to do what he did.[85]

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[85] Thus the cases the state cites in its brief are inapposite. In all but one of those cases the regulatory scheme at issue was challenged by (a) a participant in an administrative proceeding who had failed to pursue administrative remedies within the agency, or (b) a person, faced with a law or regulation of general applicability, who failed to use existing procedures to apply for an individual permit or variance. U.S. v. LaFroscia may be the one case which does not fit into this pattern. In that case a drug dealer, perhaps having no better criminal defense, challenged the regulation classifying the drug in question as a Schedule I controlled substance. After holding the governing statute constitutional and the specific rule valid, the district court also ruled that the defendant should have tried to take advantage of the "specific, detailed administrative procedures for decontrolling and reclassifying the various substances." U.S. v. LaFroscia, 354 F.Supp. 1338, 1341 (S.D. N.Y. 1973). Surprisingly enough, there is a procedure for getting controlled (continued)

Applying the exhaustion doctrine in this case would be like telling criminal defendants that in order to defend themselves against questionable statutes they must first ask the Legislature revise the statutes in question.[86]

D. There Is A Subsistence Defense; It Is Always Available; Once Properly Raised It Must Be Overcome With Clear and Convincing Evidence; It Requires Dismissal of the Charge Against David Eluska.

The conflict between wildlife laws crafted to further the interests of sport, commerce and conservation and the needs of people who use wildlife as a primary food source is as old as the early English game laws. See Argument IA, supra, and authorities there cited. As those laws have evolved and been "democratized" into the Anglo-American wildlife jurisprudence of this century (Argument IA, supra), the conflict has persisted between the sport-dominated rules and the subsistence lifeways of both tribes[87] and individuals seeking to live off the land on their own.[88] Yet, with a consistency that bears powerful testimony to

(footnote 85 continued) substances reclassified, and "any interested party" may petition the Attorney General to invoke it. See 21 U.S.C. §811(a). In the twelve years since LaFroscia was decided no nationally reported case has cited or relied on the alternative holding the state now invokes.

[86] Chief Justice Burger's dissent in Moore, on which the state relies, does not take a position as extreme as the state's. And the Chief Justice's discussion of the exhaustion doctrine is by no means a collective statement by the United States Supreme Court. Six Justices directly rejected his reasoning. Moore, 431 U.S. 494, 497 n.5 (opinion of Powell, J., joined by Brennan, Marshall and Blackmun, JJ.); id. at 541 (Stewart J., dissenting, joined by Rehnquist, J.). Two other Justices reached the case's merits, thus indicating their unwillingness to apply the doctrine. Id. at 513-521 (Stevens, J., concurring in the judgment); id. at 541-552 (White, J., dissenting).

[87] See, e.g., Frank Waters, The Man Who Killed The Deer (1942).

[88] See, e.g., Jeff Long, Outlaw (1985).

the fundamental value of the hunting and fishing rights of indigenous peoples whose socioeconomic and sociocultural existence depends upon customary and traditional hunting and fishing and gathering, American Indians (Argument IB, supra) and Alaska Natives (Argument IC, supra) have generally been exempted from the rules regulating the recreational conduct of the dominant culture. This general exemption is rooted in the recognition, albeit an uneasy one, that peoples who had no say in the coming of the white man nonetheless should not "have been required to surrender...all of their wealth to the government for 'common use' in order to obtain citizenship."89/

Against this general background, and in response to the inherent justice of the demands of Alaska's Native peoples, the 1978 Alaska Legislature and the 1980 Congress of the United States embarked upon the noble experiment of the subsistence-preference laws. Unlike their antecedents, which exempted Native hunting and fishing rights from the operation of western wildlife management laws, the subsistence-preference statutes took a different and unique, but equally just, approach: they superimposed upon the western scheme's allocation of the interests of recreation, commerce and conservation the overriding value of the subsistence way of life. They sought to reorder the priorities of the pre-existing system by imposing upon it a mandate to accord preference to the customary and traditional wildlife uses of subsistence lifeways; they sought to wrench from the prior system

89/ Thomas D. Lonner, The Spider and the Fly: American Dominion and the Survival of Alaska Native Subsistence 3 (October 1984, Alaska Native Review Commission).

an affirmative duty to protect those lifeways and the resources upon which they are wholly dependent. Argument II, supra. We have shown, moreover, that even if the legislatures had not heeded the claims of Alaska's Native peoples, their subsistence way of life would be entitled to constitutional protection in any event. Argument IIIB, supra. That the law-givers chose to extend the protection they afforded to non-Natives as well does not distract from the fundamental nature of the subsistence rights of Native peoples.

It is in this context that the Court must examine the justifications proffered by the state in support of its attempt to "inflict[] disgraceful punishment, if punishment could disgrace when inflicted upon innocence." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562 (1832). The state really has no justification. It merely offers up nothing more than platitudes about "the overall framework and unique characteristics of natural resources conservation measures" (State's Br. at 8-9) and the naked assertion that the subsistence defense recognized by the courts below "is without precedent in natural resources law." Id. at 11.[90/] The state seems to have "come unglued." Cf. Frank v. State, 604 P.2d 1068, 1074 (Alaska 1979). The state's position is due to be treated as it was in Frank, and given "no credence." Id.

The sporting rules applicable to Akhiok's traditional-use area allow recreational hunters from Anchorage or trophy hunters from Tulsa to fly into the area anytime during a period of five

[90/] The state also makes the silly argument that if its regulations are invalid under the subsistence law, then no hunting at all is permissible. State's Br. at 13.

months and one week and bag five deer the same day airborne.[91] There is no overall harvest ceiling, and no restriction on the number of non-local hunters who may come into the area. Under the rules as written, non-local hunters are free to kill in one season every deer inhabiting David Eluska's hunting grounds. At the same time, Mr. Eluska and the people of his village are barred from hunting this customary food source for nearly seven months out of the year,[92] and they are subjected to an inappropriate individual

[91] The prohibition against same-day-airborne hunting does not apply to the taking of deer. 5 AAC 92.085(4).

[92] It would probably be more accurate to say that the state's rules purport to bar such food harvesting. See, e.g., Steven R. Behnke, Wildlife Utilization and the Economy of Nondalton 70 (ADF&G Technical paper No. 47, March 1982):

> The role of hunting regulations in controlling wildlife harvests in Nondalton is difficult to assess. This study focussed on general patterns of resource use and harvest, but not on details of illegal harvest, an obviously sensitive and difficult area to research. People responded well to questions partially because potentially sensitive areas were avoided. Therefore this study has not been able to answer questions about the importance of harvests which are out of season or in excess of bag limits. Hunting regulations have probably played some role in restricting harvest of wildlife, however, regulatory seasons, for example, reduce the time during which animals can legally be taken. Bag limits are potentially restrictive in view of the customary patterns described above, since a small proportion of hunters take a large pecentage of the wild resources. Compared to weather, technology and local economic conditions, legal restrictions do not appear to play a major role in determining how much fish and game is harvested by Nondalton residents.
>
> In summary, it appears likely that the harvest levels of moose, (continued)

bag limit that refuses to recognize the resource-distribution components of their communal subsistence-based socioeconomic/ sociocultural system.

There can be no evidence "that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer." Antoine v. Washington, 420 U.S. 194, 207 (1975). Furthermore, the application of the culturally inappropriate rules devised for western sport hunters to Native subsistence communities like Akhiok constitutes nothing less than deliberate racial discrimination.[93] Finally, the state is

> (footnote 92 continued) caribou, and other resources used by Nondalton residents wre primarily regulated by factors internal to the local economy and society, as well as by weather and travel conditions. Legal restrictions played a relatively minor role in determining harvest levels.

[93] The state's preoccupation with the equal rights of "all Alaskans" enables it to apply culturally hostile rules to Native Alaskan subsistence communities which should be recognized as "discrete minorities," United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), who are entitled to the law's protection rather that its opprobrium. In forcing the sporting rules of western culture upon differently situated Native villages, the state actually engages in an act of intentional racial discrimination. See Gregory D. Moore, supra note 83, at 10; Laurence H. Tribe, American Constitutional Law 993 (1979):

> Equality can be denied when government fails to classify, with the result that its rules or programs do not distinguish between persons who, for equal protection purposes, should be regarded as differently situated. So it was with the majestic equality of French law, which Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris.

Cf. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 279 (Alaska 1984) (Compton, J., dissenting).

plainly wrong in its assertion that the defense recognized by the lower courts is unprecedented. To the contrary, we have shown numerous instances in which the states are excluded altogether from regulating wildlife uses on Indian lands. See note 16, supra, and accompanying text. Moreover, even where the states do have arguable jurisdiction over Indian hunting and fishing practices, the exercise of that jurisdiction is strictly limited to imperative conservation measures. Antoine v. Washington, supra, 420 U.S. at 207. Some of these cases, like Antoine, have arisen in the context of criminal charges for game-law violations, and the courts have uniformly held that the state, in order to proceed with its proposed prosecution, bears the burden of persuasion on the issue of conservation necessity.94/

There is thus compelling precedent for the judgments of the courts below, and the approach set out by the court of appeals should be endorsed as being basically correct. We think the court of appeals erred, however, in remanding this case for further proceedings, and that its judgment should accordingly be modified so as to affirm the trial court's dismissal of the state's action. The reason for this is the state's wholesale failure to comply with the affirmative duty imposed upon it by the legislature to adopt regulations permitting customary and traditional subsistence

94/ United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) (state may not regulate Indian fishing absent a showing by clear and convincing evidence that irreparable harm will occur); State v. Peterson, 297 N.W.2d 52, 55 (Wis. App. 1980) (pretrial hearing required at which the state must establish subject-matter jurisdiction by proving that a given regulation is reasonable and necessary to prevent substantial depletion of the fish supply); State v. Gurnoe, 192 N.W.2d 892, 902 (Wis. 1972); People v. Leblanc, 248 N.W.2d 199, 214-15 (Mich. 1976); see also United States v. Washington, supra, 384 F.Supp. at 342; Cohen, supra at 462 n. 49.

hunting.[95] In light of this persistent defiance of the law, the state should be precluded altogether from even a reasonable opportunity to justify the prosecution of bona fide subsistence hunters.

Hopefully the outcome of this case will force the state to commence the process of identifying and protecting the customary and traditional uses of the state's wildlife resources, as well as the resources themselves. In that event, a subsistence-defense procedure such as the one set forth by the court of appeals might be appropriate. It is important to recognize (as the state apparently does, see State's Br. at 30-31) that the defense would still be available. We suggest that it should work like this: whenever the state brings a criminal or property-confiscation action against a subsistence hunter, the hunter, in order to raise

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[95] There is not a single hunt in the state which is not restricted by the individual bag-limit rule, nor is there any big-game hunt which we have discovered that actually accommodates the customary and traditional harvest activities of Native subsistence villages. Nothing has changed as a result of the Board of Game's recent gambit of reclassification; the subsistence restrictions remain the same (see Game Regs), with the single exception of the new "tier II hunts." Game Regs. at 12-13 (to be codified as 5 AAC 92.054-.060). Under this system, the subsistence users who are entitled to the greatest protection are instead thrown into direct competition with urban sport hunters, and their subsistence rights are conditioned upon an individual-by-individual, hunt-by-hunt, five-dollars-per-hunt limited-entry-type application and permit procedure. The Court held in Madison that such an approach is contrary to legislative intent (696 P.2d at 178 n.17). The state proceeded to devise such a system anyway. The result, as predicted (id.), is "extremely controversial." We are now treated to the spectacle of such notions as a "subsistence" regulation for bats, shrews, rats, mice and porcupines (no closed season, no bag limit, except in Chugach State Park; same for the "general" hunt); all around the state, "one brown bear every four regulatory years" has supposedly been deemed adequate for those who actually do use brown bear for subsistence purposes; and self-defined urban sport hunters who have participated in certain hunts only on a random-drawing basis now find themselves, against their will, classified as "Tier I subsistence hunters." See generally Game Regs.

the subsistence defense, must establish his standing by an affidavit or other showing that he is either an individual subsistence user or a member of a village or other community with a subsistence-based socioeconomic system. In order to proceed with the prosecution, the state would then have to prove, at a preliminary hearing, that the rule it seeks to impose is a reasonable and nondiscriminatory one serving a compelling conservation necessity that cannot be served by any less restrictive means, or that the rule serves a compelling need to protect other subsistence uses having a higher priority and that no less intrusive method is available. Cf. Antoine v. Washington, supra, 420 U.S. at 207. In light of the fundamental nature of the right at issue here, the state should be required to meet its burden with clear and convincing evidence. United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981). See also Santosky v. Kramer, 455 U.S. 745 (1982); In re Walton, 676 P.2d 1078, 1089-90 (Alaska 1983) (Rabinowitz, J., dissenting).[96/]

[96/] This is not to say that even if the state is in full compliance with ANILCA and its own subsistence law, it necessarily has jurisdiction over all hunting and fishing. Native tribal governments in Alaska have jurisdiction over Indian Country and in such country their members are immune from state fish and game regulations except for laws necessary to perpetuate a species. The general rule is that within Indian Country the operation of state law is preempted absent Federal delegation of authority to the state. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1982); Williams v. Lee, 358 U.S. 217 (1958). See F. Cohen, Handbook of Federal Indian Law 270 (1982 ed.). "The principles guiding determinations of whether state jurisdiction properly may be applied in Alaska Native communities are the same as those used when the question arises concerning Indians elsewhere in the United States." Id. at 764.

Indian Country is the operative legal term for defining the relative spheres of state and tribal governmental authority. See generally Cohen at 27-46. Allotments are classified as Indian Country in 18 U.S.C. §1151(c), while "all dependent Indian communities" are Indian Country under 18 U.S.C. (continued)

Perhaps it is inevitable that the Alaska subsistence way of life

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(footnote 96 continued) §1151(b). Lands held by Native Corporations pursuant to the Alaska Native Claims Settlement Act (ANCSA) have been set aside for the use of Native peoples and as such fit within the flexible "dependent Indian community" definition. Id. This was the view of the Associate Solicitor for Indian Affairs in an opinion holding village corporation lands to be dependent Indian communities and thus Indian Country. Liquor Ordinance, Village of Allakaket, Alaska, Op. Assoc. Sol. Ind. Aff. (Oct. 1, 1981). "Furthermore, subsequent to ANCSA, lands in Alaska actually owned by a Native government have been judicially treated as Indian Country over which a Native government may exercise jurisdiction." D. Case, Alaska Natives and American Laws 458 (1984), citing Johnson v. Chilkat Indian Village, 457 F.Supp 384 (D. Alaska 1978).

Public Law 280, as extended by Public Law 85-615, granted Alaska civil and criminal jurisdiction over Indian Country. 28 U.S.C. §1360; 18 U.S.C. §1162. However, the effect of P.L. 280 has been greatly limited by a Supreme Court holding that it did not extend state regulatory authority to Indian Country. Bryan v. Itasca County, 426 U.S. 373 (1976). It only provides for application of state law to govern disputes between private parties. Id. The Ninth Circuit has suggested that state fish and game laws are "regulatory." United States v. Marcyes, 557 F.2d 1361, 1365 (9th Cir. 1977); see also Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983). Under Bryan, then, they do not apply to Indian hunting and fishing in Indian Country.

ANILCA merely provides the means by which the state might acquire jurisdiction over public lands -- by adopting laws of general applicability protecting subsistence. There is no hint of an intent to grant jurisdiction over Indian Country to the state. Such a transfer of jurisdiction would undermine tribal self-government and could only be accomplished by clear legislative language. Bryan v. Itasca County, 426 U.S. at 388-390. Construing ANILCA to abrogate Native governmental jurisdiction and the corresponding freedom from state regulation would fly in the face of long-standing Federal policies favoring Native self-government. See Cohen at 361, nn. 118-120. Indeed, it would be anomalous to find a diminishment of tribal rights in a statute which has been specifically held to have been passed for the benefit of Alaska Natives. People of the Village of Gambell v. Clark, 746 F.2d 572, 581 (9th Cir. 1984).

These arguments were not raised below and do not directly apply to the facts of this particular case. We have sketched them for the Court's information and because no discussion of Native peoples' subsistence hunting and fishing should ignore the authority which they themselves may be able to exercise over what they do.

is destined to follow "the fate of the passenger pigeon."[97/] As sad as that would be in the long run of history, it would be a present disgrace if the state were allowed to continue to hasten that end in open defiance of the express will of the Alaska Legislature and the Congress of the United States. Amici therefore urge the Court to forcefully infuse life into the legislative intent and thus afford people living a subsistence way of life the basic right to choose whether to continue their lifeway -- to determine their own future.

97/ Cf. Washington Dept. of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973). See Thomas D. Lonner, supra note 89. But cf. Carle v. Carle, 503 P.2d 1050 (Alaska 1972) (trial court's conclusion that the village way of life is succumbing to the predominant Caucasian urban society not borne out by the record).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed and modified, and the judgment of the trial court dismissing this action should be affirmed.

DATED: 30 September 1985

Respectfully submitted,

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APPENDIX A

PETITION TO THE BOARD OF GAME
TO ADOPT EMERGENCY SUBSISTENCE
HUNTING REGULATIONS FOR CERTAIN
SUBSISTENCE VILLAGES AND INDIVIDUALS

Alaska Legal Services Corporation, on behalf of the villages and individuals described below, petitions the Board of Game to adopt emergency subsistence hunting regulations providing for the customary and traditional subsistence uses of these persons and villages.

1. Anaktuvuk Pass. For untold generations the western arctic caribou herd has been a primary, indispensable subsistence resource for the Nunamiut peoples of Anaktuvuk Pass, a subsistence-economy village in the Central Brooks Range. By long-standing custom and tradition, the people of Anaktuvuk Pass hunt these caribou on a year-round basis whenever they are present, and especially during the spring and fall migrations. The herd is healthy and growing, with an estimated population of approximately 200,000. Despite the customary and traditional subsistence harvest pattern of the people of Anaktuvuk Pass, the Board has chosen the arbitrary calendar date of 30 April to close the caribou hunting season in GMU 26(A) and 24. Sometimes, as happened this year, this restrictive closing date arrives before the caribou have begun their northerly spring migration. This arbitrary closed season attempts to deprive the people of a vital resource upon which they are more dependent than ever during times like these, when the winter is long and food supplies are depleted, and when wage-paying jobs are virtually non-existent. The closed caribou season violates the subsistence rights of the people of Anaktuvuk Pass. The Board should eliminate it.

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2. Silas Tegoseak, individually and on behalf of persons similarly situated. Silas Tegoseak is an Inupiat Eskimo who follows a subsistence-based semi-nomadic lifeway which is his birthright. He lives part of the year in Fairbanks and part of the year in Barrow. He has a Native Allotment about 40 miles north of Fairbanks, on which he customarily and traditionally harvests some of the subsistence resources, particularly moose, which sustain him and his family and relatives. He has been criminally charged, under a sport hunting regulation adopted by the Board, with taking a cow moose on his allotment last September in GMU 20(B), in which the take is restricted to bulls. The attempt to apply this sport hunting regulation to Silas Tegoseak violates his subsistence hunting rights. The Board should adopt a subsistence hunting regulation permitting the customary and traditional subsistence uses of Mr. Tegoseak and persons similarly situated.

3. Evon Togiak, individually and on behalf of the people of Togiak. Evon Togiak is a 70-year-old Yup'ik Eskimo who resides in a 10-person household in his native village of Togiak, a subsistence-economy village in southwestern Alaska in which a wide variety of wild natural resources are harvested throughout the year. Moose, although not an abundant resource, is one of the resources customarily and traditionally harvested by Togiak people during the period, roughly, from mid-August through March. The Board has closed GMU 17(A) to all sport hunting of moose, but the Board has failed to recognize and permit the customary and traditional subsistence moose harvest of Evon Togiak and the

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people of Togiak. As a consequence of the Board's failure, Mr. Togiak has been criminally charged with taking two moose out of season on 25 March, and the meat which his family needed for food has been confiscated by the state. The Board should adopt subsistence hunting regulations permitting the customary and traditional subsistence use of moose by the people of Togiak.

4. Lime Village. As the Board knows, Lime Village is a Dena'ina Athabascan subsistence-economy village on the Stoney River in the mid-Kuskokwim region of southcentral Alaska. As the Board has found, the people of Lime Village customarily and traditionally harvest moose and caribou throughout the year. See Findings on Lime Village Management Area, Alaska Board of Game #85-36-GB (4 April 1985). Despite these findings, the Board continues to impose upon Lime Village closed hunting seasons which, for no good reason other than bad legal advice, abridge the subsistence rights of Lime Villagers. Although we have requested an expedited trial in federal court to protect these rights, Bobby v. State, No. A84-544 Civil (D. Alaska), we again urge the Board to eliminate the restrictive hunting seasons for those persons domiciled in Lime Village.

On behalf of the above persons and communities, the Board is requested to adopt a general subsistence hunting regulation, such as the one which is the subject of our separate petition, and to

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adopt specific regulations protecting the subsistence rights of the persons and communities discussed above.

DATED: 6 June 1985

Respectfully submitted,

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APPENDIX B

PETITION TO THE BOARD OF GAME FOR
THE ADOPTION OF EMERGENCY
SUBSISTENCE HUNTING REGULATIONS

Alaska Legal Services Corporation petitions the Board of Game to adopt emergency subsistence hunting regulations like those attached hereto, with such improvements as the Board may make. This petition is submitted on behalf of a number of clients from around the state, some of whom are separately petitioning for specific relief.

The occasion for emergency regulation is apparent. "The time that has elapsed from 1978 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility" to protect and provide for subsistence uses of the state's game resources. State v. Eluska, op. no. 456 at 11 (Alaska Court of Appeals 12 April 1985). Yet the state stands in virtually complete noncompliance with both the 1978 state subsistence law and the 1980 federal subsistence law. In addition, the state has taken the ludicrous position that under Madison all Alaskans are subsistence users, and that under Eluska it is impossible to distinguish a true subsistence user from a poacher. This combination of events creates a serious and immediate threat of irreparable harm to the legal rights of subsistence hunters and to the health of the game resources upon which they depend.

It is therefore incumbent upon the Board to take emergency action to commence compliance with the state and federal

subsistence laws. We request a written explanation in the event of denial of this petition.

DATED: 5 June 1985

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5 AAC 99.020. EMERGENCY SUBSISTENCE HUNTING REGULATIONS OF THE BOARD OF GAME.

(a) Purpose and Policy. The purpose of this emergency regulation is to initiate a process of identifying and protecting the customary and traditional subsistence uses of Alaska's game resources as required by the 1978 state subsistence law, AS 16.05.255(b) & 16.05.940(23), and the 1980 federal subsistence law, Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 1311 et seq. The Board recognizes that the Subsistence Division of the Department of Fish & Game and other state, federal and private persons and entities have conducted substantial research into the subsistence economies and lifeways of Alaska residents. The Board further recognizes that in many instances the current regulatory system is incompatible with and unnecessarily restrictive of customary and traditional uses of the state's game resources. It is the Board's policy to identify and alleviate such incompatibilities and unnecessary restrictions, and to accord first-priority preference to the beneficial uses of game resources for subsistence purposes. In implementing this emergency regulation, the Board is delegating authority to the Commissioner of Fish & Game and his designees to act in its behalf, as authorized by AS 16.05.270. All actions of the Commissioner under this emergency regulation will be reviewed by the Board at a public meeting to be scheduled within 120 days of the effective date of this regulation, and by the Board at its regular meetings on an ongoing basis until a Board-approved comprehensive regulatory system for subsistence hunting is in

place. At its public meeting to be held within 120 days, the Board will modify or alter this regulation as appropriate and adopt it as an interim regulation to be effective and continuously reviewed until a comprehensive Board-approved system is in place. All interested persons are invited to submit their views to the Board. It is the policy of the Board to involve local communities and individuals, local fish and game advisory committees, and regional fish and game councils in the decision-making and regulatory process to the maximum extent possible.

(b) Findings and Definitions. The Board finds that a state of emergency exists with respect to the management and protection of subsistence game resources and subsistence uses of game resources. This emergency situation results from court decisions which, among other things, hold that the Board has violated its duty to adopt subsistence hunting regulations as required by the 1978 state subsistence law, and which, as officially construed by the state, substantially impair the ability of management and enforcement officials to identify and protect legitimate subsistence uses and subsistence resources. Unless the Board acts on an emergency basis to protect the general welfare, there is a serious and substantial threat that game species in many parts of the state will be over-harvested by persons who do not properly qualify as subsistence hunters, and as a consequence the sustained yield of these species is jeapordized and the state's legal duty to manage game resources so as to accord a preference to legitimate subsistence uses is impaired. Based upon the research and other information currently available, the Board finds that

there is considerable variation in the nature and extent of customary and traditional subsistence uses of the state's game resources. By far the most common such use is that engaged in by communities and sub-communities having a subsistence economic system, frequently kinship-bound, with an elaborate division of labor and special roles in which a wide range of wild renewable resources are harvested both for personal and family use and for sharing, exchange and barter. Such subsistence economic systems usually exist as rural villages or towns ("subsistence villages"), but they may also exist within larger towns and cities as subsistence villages-within-towns ("subsistence subcommunities"). In addition, game resources are harvested for subsistence uses by a number of persons who live on their own in rural areas, who live in urban areas but whose ties are to subsistence villages or subcommunities, or who live in urban areas but who have been customary and traditional users of game resources for long periods, and perhaps others who need to be identified ("subsistence individuals"). All other uses of the state's game resources are "nonsubsistence uses."

(c) Criteria. The Commissioner shall identify subsistence uses of game resources, recognizing that subsistence uses are customary and traditional uses by Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing. Customary and traditional subsistence uses of game resources by Alaska residents will be identified by the Commissioner through application of the following criteria, with the understanding that a use pattern does

not have to strictly meet all criteria in order to receive protection under this emergency regulation and that the different criteria will carry different weight depending on the circumstances (e.g., whether being applied to identify subsistence villages, subcommunities or individuals):

(1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in seasonal cycles;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of game which is near or reasonably accessible from the user's residence;

(5) the means of handling, preparing, preserving and storing game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting effort or the products of that effort are distributed or shared among others, including customary trade, barter, sharing and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community for

purposes of subsistence uses may include specific villages or towns, with a historical preponderance of subsistence users, and in addition encompasses individuals, families, or groups who in fact meet the criteria described in this subsection;

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the wild renewable resources of an area, and which provides substantial economic, cultural, social and nutritional elements of the subsistence user's life; and

(9) a use pattern which arises out of kinship or similar ties to a subsistence village or subcommunity, or which arises out of such ties to a family or household engaged in customary and traditional subsistence uses of game resources.

The Commissioner shall apply these criteria in a flexible and realistic manner so that all villages, subcommunities and individuals who have historically used game resources for subsistence purposes will be recognized and protected as subsistence users who have a preference over nonsubsistence uses. Uses which do not meet these criteria will be classified as nonsubsistence uses.

(d) Classification and Mechanism for Implementation of Subsistence Preference. Applying the criteria set forth in subsection (c) of this emergency regulation, the Commissioner shall make the following determinations and take the following actions:

(1) Subsistence Villages. The Commissioner shall

identify all subsistence villages in the state and, working closely with these communities, shall determine approximate village harvest-level guidelines for all game species customarily and traditionally harvested by each such village, but not excluding new game species which may have recently moved, or may in the future move, into a village's traditional-use area. In designating subsistence villages, the Commissioner shall pay due deference to the National Park Service's designation of "resident zone communities" pursuant to 36 C.F.R. §13.43. Where necessary to protect one or more of a village's game resources from non-subsistence uses or other external pressures, the Commissioner shall attempt to identify and reasonably define the village's traditional subsistence hunting area, and impose such other restrictions as may be appropriate pursuant to this subsection and subsection (f) below. In approximating village harvest-level guidelines, the Commissioner shall take care to insure that the guidelines are flexible enough to encompass fluctuations in resource availability, harvest patterns, and the like. The purpose of such guidelines is not to restrict villages' customary and traditional uses, but rather to obtain information upon which to base sustained-yield analyses and determinations as to whether any nonsubsistence uses are to be allowed. Whenever the Commissioner determines it necessary for protective purposes to define and designate a village's traditional subsistence hunting area, he shall likewise be liberal and flexible, recognizing that two or

more subsistence villages may have overlapping traditional use areas. It is the intent of the Board that the Commissioner shall provide fully for the customary and traditional subsistence harvest opportunities of each subsistence village, subject only to the requirements of subsection (f) below. In particular, the Commissioner shall recognize that many current regulations derive from a management regime in which the primary objective was the regulation of non-subsistence uses, such as sport and commercial (guided/trophy) hunting, imposing such features as essentially arbitrary calendar-based seasons and individual bag limits -- features which frequently will be inappropriate for subsistence villages. The commissioner should replace these regulations with appropriate, realistic and flexible regulations, but he also should retain, on an interim basis, those regulations (e.g., certain controlled use areas, subsistence permit hunts) which he finds to be consistent and in conformity with this regulation. Unless necessasry to restrict subsistence hunting pursuant to subsection (f) below, the Commissioner shall not impose a subsistence permit system upon subsistence villages. For the purposes of this emergency regulation, it is the Board's determination that all persons domiciled in a designated subsistence village, like all persons domiciled in a "resident zone village" designated by the National Park Service with respect to subsistence hunting in national parks and monuments, will be authorized to engage in customary and traditional subsistence

hunting -- unless it is necessary to restrict subsistence hunting pursuant to subsection (f). The Commissioner shall work cooperatively with all subsistence villages in an effort to develop mutually agreeable regulations, with mutually shared implementation obligations, in which the people of the affected villages enjoy the maximum possible degree of participation in the formulation and implementation of appropriate regulations, including particularly those pertaining to village harvest-level guidelines, harvest reports and reporting systems, protective traditional use areas, seasonal cycles, and any regulations required by subsection (f).

(2) Subsistence Subcommunities. The Commissioner shall identify and provide protection for subsistence uses of game resources by subsistence subcommunities in the same manner, to the extent possible, as required by subsection (d)(1) above for the designation and protection of subsistence uses by subsistence villages. In identifying and authorizing subsistence uses for these subsistence subcommunities, the Commissioner should strive to avoid a subsistence permit system, but he is specifically authorized to employ such a system if he finds that there are no practical alternatives. Otherwise, the Commissioner shall regulate subsistence subcommunities in the same manner required by subsection (d)(1) for subsistence villages.

(3) Subsistence Individuals. The Commissioner shall identify subsistence individuals utilizing the criteria set

forth in subsection (c) above, and shall authorize their customary and traditional harvest opportunities through the issuance of a single subsistence hunting permit. It is the intent of the Board that any application/permit system adopted under this or any other part of this emergency regulation shall be as simple and burden-free as possible, shall be cost-free to the permittee, and shall make ample provision for the receipt of oral applications from those who are not able or do not wish to make application in written form. To the extent applicable, the provisions of subsection (d)(1) above apply as well to this subsection.

(4) Interim Compliance. The Board recognizes that the identification of subsistence subcommunities, and of subsistence individuals in particular, is a difficult task that will require time and perhaps trial-and-error experimentation. At the same time, the Board finds that this regulation is sufficient to put all state residents who desire to hunt game resources on notice as to their subsistence or nonsubsistence status. Any such person who does not have a good-faith basis for believing that he or she is a subsistence user within the scope of this regulation shall be governed by the regulations for nonsubsistence use, i.e., those regulations currently in effect, as they may be modified by the Commissioner pursuant to this regulation. At its meeting to be scheduled within 120 days, and at each regular meeting of the Board thereafter until a Board-approved comprehensive subsistence hunting regulatory

system is in place, the Board will specifically review each village, subcommunity and individual which the Commissioner has denied subsistence recognition. In addition, any such village, subcommunity or individual may petition the Board for relief under subsection (i) below.

(e) National Park and Park Monuments. Under §808 of ANILCA, 16 U.S.C. §3118, subsistence hunting in national parks and park monuments is to be governed by a subsistence hunting program developed by each park or monument's subsistence resource commission. Those programs have not yet been adopted, but it is the Board's intent to incorporate the subsistence hunting programs into the state's subsistence management system to the extent those programs may contain components that are within the state's management jurisdiction. In implementing this interim regulation the Commissioner shall consult with the subsistence resource commissions wherever appropriate. Only those persons domiciled in resident zone communities designated by the National Park Service, or who have valid subsistence permits issued by the National Park Service, are authorized to hunt in national parks and park monuments.

(f) Implementation of the Subsistence Preference. After identifying subsistence uses and determining the approximate amounts of game necessary to provide full opportunity for Alaska residents to engage in these customary and traditional uses, pursuant to subsections (a) through (e) above, the Commissioner shall proceed as follows:

(1) He will adopt regulations that permit the

subsistence taking of game resources in amounts sufficient to provide for the customary and traditional uses he has identified, consistently with sound conversation and management practices. In no instance may the Commissioner permit subsistence taking which would jeopardize or interfere with the maintenance of a specific game population on a sustained yield basis.

(2) Whenever the Commissioner determines that game resources are sufficient, under the sustained-yield principle, to fully provide for subsistence uses and also to provide for nonsubsistence uses, and where current regulations authorize nonsubsistence uses, the Commissioner shall continue the current regulations in effect, with any modifications required by the circumstances, and designate them as governing nonsubsistence uses. The Commissioner shall take due care to provide an opportunity for non-subsistence uses only to the extent that such non-subsistence uses do not jeopardize or interfere with the conservation and development of game resources on a sustained yield basis, or with the conservation and development of these resources for customary and traditional subsistence uses.

(3) When circumstances such as increased numbers of users, weather, predation or loss of habitat may jeopardize the sustained yield of a game population or fail to provide fully for subsistence uses, the Commissioner will exercise his authority by restricting all nonsubsistence harvest

before subsistence uses are restricted. If all available restrictions for nonsubsistence uses have been implemented and further restrictions are needed, the Commissioner will restrict the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who:

(i) live closest to the resource;

(ii) have the fewest available alternative resources; and

(iii) have the greatest customary and direct dependence upon the resource.

(4) Whenever the Commissioner determines under (f)(3) that it is necessary to restrict subsistence uses of game resources by subsistence villages and subsistence subcommunities in which a permit system otherwise would be inappropriate, he is authorized to implement such a system if he finds it necessary to accord priority to the preferred subsistence users he identifies pursuant to the criteria of (f)(3).

(g) Compliance with Federal Law. The Board has determined that this emergency regulation satisfies the requirements of both the federal and the state subsistence laws, and in particular that it will fully protect the subsistence priority of rural Alaskans as mandated by Title VIII of ANILCA, while at the same time protecting all subsistence users covered by state law. The Commissioner shall monitor the situation and immediately report to the Board any instance in which he determines that implementation

of this interim regulation will impair the subsistence preference mandated by federal law.

(h) Board Review. At each regular meeting of the Board until a comprehensive subsistence management system is in place, and at the meeting to be scheduled within 120 days, the Board will review this emergency regulation and all of the Commissioner's actions hereunder. At each such meeting the Board will consider recommendations from the public, the Commissioner, and any interested state or federal agencies, and will otherwise make such modifications to this regulation as the Board deems necessary and proper.

(i) Grievance Procedure. The Commissioner shall give appropriate public notice and meet all other requirements of law with respect to all actions he takes pursuant to this emergency regulation, and report all such action to the Board. Any person aggrieved by this regulation or any implementing action of the Commissioner may petition the Board for relief, and the Board will take prompt action on any such petition.

(j) Effective Date. This emergency regulation shall take effect on _____. As of that time, the provisions of 5 AAC 99.010 will be inapplicable to all matters within the jurisdiction of the Board of Game.

APPENDIX C

SUPPLEMENT TO
PETITION TO THE BOARD OF GAME
TO ADOPT EMERGENCY SUBSISTENCE
HUNTING REGULATIONS FOR CERTAIN
SUBSISTENCE VILLAGES AND INDIVIDUALS

The petition previously submitted on behalf of the villages of Anaktuvuk Pass, Togiak and Lime Village, and Silas Tegoseak individually, is hereby supplemented in light of the policies the Board is now pursuing.

As we understand the Department of Law-constrained policies which govern the actions contemplated and now being taken by the Board, (1) "all Alaskans" are deemed to be subsistence hunters entitled to the general subsistence preference; (2) the Board is precluded from recognizing and protecting the customary and traditional subsistence uses of villages and communities with subsistence-based socioeconomic systems as communities, but rather can only deal with individuals; (3) the Board cannot protect the rights of particular subsistence communities and subcommunities by such means as eliminating arbitrary closed seasons and individual bag limits without also eliminating such restrictions for all other Alaska residents, i.e., opening up a particular community's hunting grounds to all Alaskans; and (4) whenever the need to protect sustained yield or subsistence uses necessitates restrictions on general subsistence users, preferred subsistence users will be identified through a limited-entry-type application and point-award system which can be applied only to individuals, not to subsistence-based socioeconomic systems as communities or subcommunities.

Petitioners believe that these policies violate the federal

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subsistence law -- the supreme law of the land -- but they recognize that there is apparently nothing the Board can do to comply with federal law so long as the Board considers itself bound by the views of the Department of Law. Nevertheless, should the Board devise some way of protecting the legal subsistence rights of petitioners, petitioners wish to emphasize that they would have strenuous objections to the Board opening up their tribal hunting grounds to any person who has not participated in their customary and traditional subsistence harvest pattern, and that petitioners would have similar objections to the imposition of an individual-based limited-entry-type system on their communities.

DATED: 13 June 1985

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

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APPENDIX D

United States Depart

ATTACHMENT 1

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

FEB 25 1982

Honorable Jay S. Hammond
Governor of Alaska
Juneau, Alaska 99811

Dear Jay:

The Department of the Interior has completed its initial evaluation of the State of Alaska's subsistence management and use program. We are pleased to inform you that, with the exception of the concerns noted below, the State program appears to satisfy section 805(d) of the Alaska National Interest Lands Conservation Act (ANILCA). The material you have submitted to the Department demonstrates the State's desire to develop a workable subsistence program which meets the needs of Alaska residents and satisfies the objectives of ANILCA. We earnestly hope to be able to approve the State program as such action would be in accord with our commitment to States' rights, particularly the right to manage resident fish and game. The State's inability to provide such a program will, however, force us to assume fish and game management on Federal lands in Alaska. Such a step would run counter to our philosophy but enforcing the law is our sworn duty.

Our remaining concerns are enumerated below:

1. Section 805(d) states that the requirements of sections 803, 804, and 805 must be implemented through "laws of general applicability." To date, the State has not demonstrated that it has established "laws" which provide for all of the essential provisions of those sections. Policy Resolution 81-1-JB (Policy), for example, cannot be relied upon to satisfy Title VIII because it has not been promulgated as a regulation and thus is not binding on the Boards of Fisheries and Game.

2. The State program does not appear to provide an acceptable definition of the "subsistence uses" concept, as it is set forth in section 803. Title VIII and its legislative history establish that the federal definition of "subsistence uses" must be limited to "rural Alaska residents." Although the

State definition need not be identical to section 803, the State program must "provide for" this type of beneficial use by identifying rural subsistence users and extending the section 804 priority and section 805 participation scheme to those users. The approach adopted in the Policy does not satisfy this requirement because it fails to distinguish rural residents engaged in subsistence uses from other users who make "customary and traditional uses" of fish and game resources. As discussed above, any change made in the State program to accomodate the "rural residency" requirement must be promulgated as a "law of general applicability."

3. Finally, an important technical change should be made in the approach discussed in paragraph (e) of the Policy. To be consistent with section 804, the State program must provide that restrictions will be applied among rural residents engaged in subsistence uses when there is a threat to the sustained yield of a fish stock or game population or when there is a possibility that the continuation of rural subsistence uses will be jeopardized. Presently, only the sustained yield concern is reflected in paragraph (e) of the Policy.

To assist the State in achieving compliance with sections 803, 804 and 805, we have attached for your consideration an edited version of Joint Board Policy 81-1-JB. If enacted in its entirety as a regulation, the approach embodied in the suggested edited revision would comply with all applicable provisions of Title VIII. Then, the Department would be in a position to verify the State program's compliance with ANILCA.

The Interior Department is confident that these areas of concern will be resolved and that the Congressional intent that the State assume the lead role in the management of subsistence uses of fish and game resources on the public lands in Alaska will be realized. If the State requires further assistance in interpreting the requirements of ANILCA, please contact William P. Horn, Deputy Under Secretary, at (202) 343-5183.

I look forward to receiving the State's final submission.

Sincerely,

/s/ James G. Watt

SECRETARY

Enclosure

FEB 25 1982

EDITED VERSION

Proposed additions indicated by underscores
Proposed deletions indicated by slash marks

JOINT BOARDS OF FISHERIES AND GAME
POLICY ON SUBSISTENCE
RESOLUTION 81-1-JB

1. Definitions. For purposes of providing for the conservation, development and management of Alaska's fish and game resources,

(a) "Subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption.

(b) "Rural subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for customary trade, barter or sharing for personal or family consumption.

2. Procedures. In applying a subsistence priority the Boards will provide for conservation and development of Alaska's fish and game resources pursuant to the following procedures:

(a) Each Board will assess the biological status of fish or game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(b) Each Board will identify rural and other subsistence uses of fish or game resources by reference to the following criteria:

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(1) a long-term, consistent pattern of use (excluding interruption by circumstances beyond the user's control such as regulatory prohibitions);

(2) a use pattern recurring in specific seasons of each year;

(3) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, and conditioned by local circumstances;

(4) the consistent harvest and use of fish or game which is near or reasonably accessible from the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations (but not excluding recent technological advances where appropriate);

(6) a use pattern which includes the handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation;

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable "community" of persons, including customary trade, barter, sharing, and gift-giving. Customary trade may include limited exchanges for cash, but does not include significant commercial enterprises. A "community" for purposes of subsistence uses may include specific villages or towns, with a historical preponderance of subsistence users and in addition encompasses individuals, families, or groups;

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and in which that pattern of subsistence use provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

After identifying rural and other subsistence uses based upon these criteria, each Board will determine the approximate amount of fish or game necessary to provide fully for opportunities to engage in these customary and traditional uses.

(c) Each Board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional rural and other subsistence uses identified in paragraph (b) and consistent with sound conservation and management practices. In no instance may such taking jeopardize or interfere with the maintenance, on a sustained yield basis, of a specific fish stock or game population.

(d) These regulations may also provide an opportunity for non-subsistence uses of the resource, to the extent that such uses do not jeopardize or interfere with the conservation and development of fish or game resources, on a sustained yield basis, or with the opportunity for taking these resources for customary and traditional rural and other subsistence uses as provided in (c) above.

3. Priorities.

(a) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, or interfere with the opportunity for taking these resources for rural and other subsistence uses as provided in (c) above, each Board will exercise all practical options for restricting non-subsistence harvests before rural and other subsistence uses are restricted.

(b) If further restriction is necessary, the board shall give the highest priority to local residents in rural areas.

(b) If further restriction is necessary to assure the maintenance of fish stocks and game resources on a sustained yield basis or to assure the continuation of rural subsistence uses, each Board will give priority to rural subsistence uses.

(c) If additional resrictions are necessary among rural subsistence use allocations, the Boards will apply limitations and restrictions based on customary and direct dependence upon the resource as the mainstay of one's livelihood, proximity to the resource local residency, and the availability of alternative resources.

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(d) In no event, however, will a Board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained yield basis.

4. Councils. In fulfilling their regulatory and administrative functions, regional fish and game councils may consider all uses and fish and game resources. Under 5 AAC 96.200, 5 AAC 96.250 and 5 AAC 96.610, the councils shall take appropriate action, within their authority, to provide for rural and other subsistence uses. Such action may include, but need not be limited to, the preparation of annual reports and recommendations on proposed regulations, and shall provide a forum for the expression of rural subsistence user views.

4. Councils. In fulfilling their functions under 5 AAC 96.200, 5 AAC 96.250 and 5 AAC 96.610, regional fish and game councils shall be authorized to consider and take action to provide for rural subsistence uses, including, but not limited to, the preparation of annual reports and recommendations on proposed regulations concerned with rural subsistence uses and the provision of a forum for the expression of rural subsistence user views. The councils may also consider, and take action to provide for, other subsistence and non-subsistence uses.

APPENDIX E

ALASKA DEPARTMENT OF FISH AND GAME
SUBSISTENCE HUNTING PERMIT (TIER II) APPLICATION AND CERTIFICATION
[A SEPARATE FORM MUST BE FILLED OUT FOR EACH SUBSISTENCE HUNT]

1. NAME: _____
First Middle Initial Last

2. MAILING ADDRESS: _____
P.O. Box/Street

_____
City/Town State Zip

3. ADDRESS WHERE YOU LIVE (Primary Residence/Domicile*)

_____
Street or Property Description

_____
City/Town or Closest Community

(* See 5 AAC 92.990)

---

4. LIST THE HUNT NUMBER FROM THE EMERGENCY SUBSISTENCE PERMIT (TIER II) HUNT SUPPLEMENT FOR THE HUNT YOU WISH TO APPLY FOR: [LIST ONLY ONE] HUNT NUMBER: _____

OR

5. IF YOU ARE UNABLE TO PROVIDE THE HUNT NUMBER, PLEASE LIST THE TYPE OF ANIMAL YOU WISH TO HUNT (caribou, moose, etc.) AND THE GAME MANAGEMENT UNIT, SUBUNIT, AND AREA DESCRIBED IN THE CURRENT GAME REGULATIONS:

Animal	Game Management Unit, Subunit, and Area
_____	_____

---

6. WHICH OF THE FOLLOWING DESCRIBES WHERE YOUR PRIMARY RESIDENCE/ DOMICILE IS LOCATED (see instructions)? [CHECK ONLY ONE]

a. I live within the hunt area. ____

b. I live within the same game management unit(s) as the hunt for which I am applying, but do not live within the hunt area. ____

c. I live in a game management unit immediately adjacent to the game management unit in which the hunt is held. ____

d. I live in an area not described in a, b, or c. ____

---

7. You may be given one point for each year you legally killed an animal(s) in this hunt (same species of animal in the same area as the hunt you are now applying for). A maximum of 10 points may be claimed.

PLEASE LIST THE YEARS IN WHICH YOU LEGALLY KILLED AN ANIMAL(S) IN THIS HUNT.

19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__ 19__

)W DIRECTLY DEPENDENT ARE YOU ON HUNTING THIS GAME OPULATION AS A PRINCIPAL MEANS OF SUPPORT FOR OURSELF AND/OR YOUR FAMILY? (Principal means of support means that harvesting this animal is important because the harvest of wild resources is the primary way you feed yourself and/or your family.) [CHECK ONLY ONE]

a. Greatly dependent _____
b. Moderately dependent _____
c. Slightly dependent _____
d. Not dependent _____

IN YOUR USUAL HUNTING AREA, HOW AVAILABLE ARE OTHER KINDS OF BIG GAME AND/OR FISH WHICH ARE REASONABLE SUBSTITUTES FOR THE ANIMAL LISTED IN THIS APPLICATION?

a. Not available _____
b. Slightly available _____
c. Moderately available _____
d. Greatly available _____

---

10. IS YOUR HOUSEHOLD'S INCOME LARGE ENOUGH TO PURCHASE FOOD AND OTHER ITEMS AS REASONABLE ALTERNATIVES TO TAKING WILD FISH AND GAME? [CHECK ONLY ONE]

YES _____
NO _____

(Please keep in mind your assets, debts, family or household size, and other obligations. "Reasonable alternatives" are things which can be used instead of wild fish and game.)

---

11. I AM AT LEAST TWELVE (12) YEARS OLD AND QUALIFY FOR A RESIDENT ALASKA HUNTING LICENSE.

YES _____
NO _____

No more than two individuals from a single household may apply for a caribou subsistence permit. For all other species, no more than one individual from a single household may apply for a permit.

12. WHICH ONE OF THE FOLLOWING STATEMENTS APPLIES TO THIS APPLICATION? [CHECK ONLY ONE]

a. This application is for caribou hunting. No more than two members of my household are applying for a permit for caribou. _____

b. This application is <u>not</u> for caribou hunting. I am the only member of my household applying for a permit for this species. _____

---

13. I have enclosed payment for the $5.00 (bison and muskox $10) application fee.

YES _____
NO _____

WARNING: Making false statements on this application is a class A misdemeanor, punishable by a fine of not more than $5,000 and/or imprisonment of not more than one year.

CERTIFICATION

I, _____, do hereby certify that all of the information contained in this application is complete, true, and correct to the best of my knowledge. I further acknowledge that I am responsible for the truthfulness of the information.

SIGNED: _____ DATE: _____

_____ _____

Telephone Number Social Security Number

STAFF ANALYSIS OF PROPOSED REVISIONS
TO STATE SUBSISTENCE LAW

INTRODUCTION

A. NATURE OF THE PROBLEM

Several recent State court decisions have altered the interpretation and implementation of the current State subsistence law. According to the Alaska Department of Law and according to the U.S. Department of the Interior, the State is now out of compliance with Federal statutes concerning subsistence in Alaska. The Department of Interior has notified the State that the Federal government will be required by Federal law to pre-empt State management on Federal lands if the Alaska Legislature does not bring the State back into compliance by June 1, 1986.

To understand the issues facing the Legislature, it is necessary to understand, first, the key elements of the Federal law and, second, the recent State court decisions.

1. The Federal Subsistence Law

The Federal subsistence law establishes a preference for subsistence use of wildlife on Federal lands, which are approximately two-thirds of the State and comprise about 220 million acres. The Federal subsistence law grants to the State the option of managing subsistence on Federal lands if the State adopts laws that are "consistent with" three points of the Federal law: (1) the definition of subsistence uses; (2) the preference for subsistence uses, and (3) the establishment of regional councils to assist the Board of Fisheries and the Board of Game in rulemaking.

The first policy question facing the Legislature is whether the State should be in compliance. Since that is a policy question for the Legislature, this report will not make a recommendation, but will try to identify issues and provide information that may be useful in reaching a decision.

2. The Recent State Court Cases

The most important is Madison v. State of Alaska, decided by the Alaska Supreme Court in February 1985. The chief issue in Madison was whether subsistence under State law was limited to rural Alaskans. The current State statute, passed in 1978, does not expressly limit subsistence to rural Alaskans. However, the definition of subsistence uses in Federal law limits subsistence on Federal lands to rural Alaskans.

Therefore, in 1982, the Board of Fisheries and the Board of Game adopted a regulation which limited subsistence to rural Alaskans. It was that regulation which the Alaska Supreme Court struck down in Madison. The Court did so because the current State statute does not limit subsistence to rural Alaskans and because, in the opinion of the

Court, floor statements by some State legislators showed an intent to allow urban subsistence.

The effect of the Madison case was to greatly expand the class of subsistence users by allowing urban residents to become qualified for subsistence. Because current State law, as well as the Federal law, affords a preference to subsistence use, the effect of the greatly expanded class of subsistence users is that sport hunters are barred from about 40 or 50 of the most popular hunts in the State. That resulted in an outcry for reform of the State subsistence law.

Finally, two additional court decisions deserve mention. In 1985, a trial court ruled in State v. Eluska that the failure of the Board of Game to adopt regulations specifically providing for subsistence hunting of a particular deer population was a valid defense to a criminal prosecution of an individual apprehended for taking the deer out of season. In January 1986, another trial court issued a similar decision, State v. Skuse, concerning a violation of a fishing regulation. These two cases have thrown into doubt the validity and enforceability of many State regulations concerning seasons, bag limits, and methods of harvest.

B. POLICY QUESTIONS

As mentioned above, the main policy question facing the Legislature is whether the State should be in compliance with Federal law. At least two issues are relevant to deciding this question. One is legal; it focuses on whether the State is legally out of compliance. The other is factual; it focuses on the potential impacts of spliting fish and game management between the State and Federal governments.

With respect to the legal issue, lawyers differ on whether the State is out of compliance. In other words, they interpret the effect of the Madison decision differently. Lawyers for the Alaska Department of Law, the U.S. Department of the Interior, and the Alaskan Federation of Natives believe that the Madison decision puts the State out of compliance. Lawyers for the Alaska Legal Services Corporation and the Native American Rights Fund believe that Madison does not put the State out of compliance. Regardless of whether or not the State is legally out of compliance, two points are important. First, the Federal government believes that the State is out of compliance and therefore it will step in on June 1 to administer subsistence and fish and game on Federal lands. Second, regardless of the compliance question, the Legislature is always free to amend the State subsistence law to either comply or not comply. A result of noncompliance is Federal intervention. If the Federal government intervenes, it is conceivable that it could legally reach beyond Federal land. Congress could use its power over Indians to extend the Federal subsistence law to Native lands. congress could use its power over commerce to amend the Federal subsistence law to reach all wildlife involved in interstate commerce. Congress could perhaps use its power under the property clause to manage wildlife that use Federal land even when the wildlife are not on Federal land.

With respect to the factual issue, non-compliance could make fish and game management and law enforcement more difficult than it already is. The pattern of land ownership is fragmented. Fish and game do not pay attention to legal boundaries. It could be difficult to management populations that traverse lands subject of differing regulations. Different State and Federal regulations would also require users of wildlife to know whether they were on lands subject to State or Federal lands. It is impractical to mark boundaries. This makes law enforcement more difficult. Finally, that State regulatory process is much more open to public involvement than is the Federal. A sense of public participation and control could suffer if the Federal government intervenes to manage fish and wildlife on Federal lands. Thus, the question of State versus Federal control concerns jurisdiction more than it does land ownership.

In sum, the State can pretty much manage all fish and wildlife harvest if it complies with the definition of subsistence use, the preference for it, and regional council participation.

Other policy questions are addressed in the section by section analysis.

C. SUBSISTENCE AND SPORT CONCERNS ARE MATTERS OF PERSPECTIVE THAT DESERVE MUTUAL COOPERATION AND ACCOMMODATION.

Alaska is unique for its wildlife resources. It offers the best sport hunting, sport fishing and wildlife viewing opportunities in the United States. It also is the only state that has an ongoing subsistence culture. It also supports large commercial fishing, guiding, sport, recreational and tourism industries.

One assumption underlying the bill is that the State should maintain subsistence, sport, commercial, and nonconsumptive uses of wildlife. The bill tries to do that by striking a reasonable balance between them.

The State of alaska has long recognized the special role that subsistence plays in the lives of many Alaskans. As early as 1961, the State sought to protect subsistence use of migratory waterfowl. Since 1973, the State has provided a statutory preference for subsistence uses. In 1978, major amendments were made to the law, which provided further protection of subsistence. The bill recognizes that the policy of affording subsistence a preference is sound and should continue.

However, subsistence has been controversial. It is perhaps the most devisive issue in the state. It is a political, social, and legal issue that affects the allocation of resources. It is also fundamentally a resource issue, in that the continued health of Alaska's fish and game is necessary to all users.

Subsistence has been a major political issue at least since 1978, when the current subsistence law was adopted. In 1982, Alaska voters considered a referendum to repeal the subsistence preference. They voted against repeal.

Subsistence has been a long-standing legal issue. In several court cases in the 1970', and 1980's, Alaskans sought to protect what they viewed as their subsistence rights. In other cases, Alaskans have sought equal access to resources. Similar disputes occur in front of the Board of Fisheries and the Board of Game. However, until recently the results of court decisions in Madison, Eluska, and Skuse. ?

As a social issue, subsistence is capable of pitting Alaskans against Alaskans, rural against urban, sport against subsistence. It has obvious and unfortunate racial overtones. It engenders fear, about the loss of opportunities, in subsistence and sport users alike. These effects need to be avoided.

D. ONE APPROACH TO SOLVING THE CURRENT PROBLEMS

One way to approach subsistence is with a commitment to try to understand other peoples' concerns. Any bill concerning subsistence will call for difficult decisions by state lawmakers, the Board of Fisheries and the Board of Game. The decisions will be difficult because, for the most part, subsistence is an issue that asks lawmakers and board members to deal with cultures and values that may be different from their own and those of the constituents they represent.

The bill is a substantial reworking of the present State statute. Nevertheless, many of the key principles of the present statute are retained. It complies with the three points of Federal law.

The primary reason for rewriting the present statute is simply to make the law more clear. Both the Federal law and the current State law are broad conceptual statutes, that require translation into more specific guidance for daily operations and decision making. If the law can be made more clear, then perhaps Alaskans can at least agree on what it means and proceed to debate specific decisions about how to implement it. Several examples of concepts in need of clarity might be useful.

First, the Federal law and the current State law speak in terms of "customary and traditional" subsistence use, but they provide little guidance as to what is "customary and traditional." Second, the Federal law and the current State law speak of subsistence use of "wildlife", but whether the use and the preference go to all wildlife stocks and populations or just those that are customary and traditional is unanswered by both the Federal law and the current State law. Third, the Federal law speaks of subsistence as being for "rural" Alaskans, but it provides little guidance as to what "rural" means. Fourth, the Federal and current State laws both provide a preference for subsistence, but neither provides much guidance as to the meaning of what level of allocation is an appropriate preference. Fifth, the Federal law speaks of assuring an "opportunity" for subsistence, but what that "opportunity" means is unanswered.

The vagueness in the current State and Federal law is perhaps the source of much of the confusion and hostility that permeates the public subsistence debate and the debates that occur in front of the boards. As long as people cannot even agree on the terms they argue about, the

public debate will remain conceptual and unresolved. It will also be mostly irrelevant to the specific issues that confrcnt the boards.

A danger in not making the law more clear is that it will lead to shifting political pressures on the boards, as Alaska grows and changes. Those pressures may lead to the erosion of subsistence, sport and nonconsumptive uses of wildlife. The people and the resources may suffer.

Therefore, one hope for resolving the subsistence debate may lie in agreeing on the meaning of the terms used in the statute and agreeing on a method of allocating fish and game.

This bill tries to define terms, provide guidance to the boards, and establish a method of allocating. it retains some vagueness, in behalf of affording flexibility to the boards.

An important point about this bill is that it tries to change the nature of future subsistence debates by making them debates over facts rather than concepts. The types of debates that will occur, if this bill is adopted, will be debates over factual questions, such as how much harvest of a particular stock is necessary for subsistence; whether or not a particular fish stock or game population is s subsistence stock, and whether or not a particular area is "rural". These debates are worth pursuing, and they will all occur in front of the boards.

The results of a debate over specific factual circumstances will inevitably be less than perfect. The boards will err. Sometimes subsistence will be given too much and sometimes too little. Courts might reverse specific decisions by the boards, but the legal framework of the bill will stand so long as it complies with the three points of Federal law.

If the Legislature adopts a statute that gives meaning to the phrases contained within it, then perhaps Alaskans can shed their fears about each other. Perhaps then the broad conceptual debate will simple fade away. Perhaps then, with the help of the boards, we can be confident that we will make decisions that will be fair to each other.

SECTION BY SECTION DETAILED ANALYSIS

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Personal use fish are stocks for which the board authorizes what are called personal use fisheries. Most are dip net fisheries for salmon. They generally have bag limits that are higher than sport bag limits. Personal use fisheries exist on the Copper River and on some sockeye salmon stocks on the Kenai Peninsula.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses. To date, this has rarely occurred.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds two new paragraphs to the authority of the Board of Fisheries. the first concerns special management areas. It gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas (which so far have occurred on two trout fisheries), and children's fishing areas. It is probable that the board has always had these authorities by implication, but the authority with respect to children's fisheries had been questions by the Department of Law. This new paragraph makes that authority clear, and the fact that the paragraph lists several types of special fishing areas is not meant to exclude other types that are not mentioned.

The second new paragraph tracks the purposes of the Board of fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish

and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations. This will require the Department to estimate the number of subsistence users who need the resource. It will require the subsistence division of the Department and the boards to look at local use patterns.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The Federal legislative history also indicates that the boards, with assistance from the department and the regional councils, may consider local residency, economic dependence and the availability of alternative resources, in determining what resources and uses are customary and traditional. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional as being harvested by all Alaskans under nonsubsistence regulations. Sport groups have often alleged that bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations are not subsistence stocks or are not customary and traditional subsistence stocks. Whether or not this is true in particular circumstances is not decided by the proposed legislation. That matter should be left to factual determinations made by

the boards. This bill gives them authority to make those determinations.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of that surplus is necessary to provide a reasonable opportunity for subsistence.

The determination of whether a harvestable surplus exists must be consistent with sustained yield, sound management principles, and the maintenance of healthy fish stocks and game populations. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution, and "sound management principles" and "maintenance of healthy populations" are derived from the federal subsistence law. Like "harvestable surplus", these terms are terms of art within the profession of fish and wildlife management. They are somewhat vague terms, so a latter section of the proposed bill requires the boards, after consultation with the Department, to define them by regulation.

A reason for asking the boards, rather than the Department or the Legislature, to define them, is that they are technical terms of art requiring professional guidance. They also contain a mix of biological considerations, allocation considerations, and social considerations that are appropriate for the boards to balance. A second reason for defining them by regulation, rather than by statute, is that they will be difficult to define. Therefore, regulatory definitions can develop over time, rather than be locked in statute. A third reason for defining them is to protect the substantive interests of subsistence, sport, commercial, and non-consumptive users. The terms are currently in State and Federal laws, and if future experience shows that the terms are incapable of definition, then perhaps they should be stricken from our laws as meaningless phrases and perhaps our fish and game managers should then come up with other terms that have meaning. Finally, the result of leaving these terms undefined is that much litigation over allocation decisions focuses on procedural arguments, such as lack of public notice, rather than on the actual management decisions that prompt the litigation. Examples of this are the disputes in Cook Inlet over salmon allocation between sport, commercial and subsistence uses.

Federal law applies an additional limitation on subsistence in national parks and monuments that are open to subsistence. Subsistence is subservient to the "conservation of natural and healthy populations" of

wildlife in national parks and monuments. Although this standard was not included within the proposed bill, the boards and the Department should recognize the special Federal standard governing national parks and monuments, and subsistence within them, when the boards adopt regulations defining the terms sustained yield, maintenance of healthy populations, and sound management principles.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is reasonableness. Statutes and courts frequently use such standards, even though they may seem vague to the public at large. The standard means that the boards' decisions should be based on available information. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

The notion of a "reasonable opportunity to satisfy subsistence uses" does not guarantee a particular level of harvest.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with Federal law. It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the Federal law clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough surplus to allow a reasonable opportunity for subsistence. At Tier I the preference allocates enough of the resource to provide that reasonable opportunity, and any surplus that is left may go to other consumptive uses.

Tier II is when there is not enough harvestable surplus to provide a reasonable opportunity to subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, the Tier II hunts that have been closed to sport hunters will be reopened by section 6, 7, and 8 the bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some stocks that are presently

open only as Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the stocks are not customary and traditional subsistence stocks. Bison may be a case in point.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only be harvested under nonsubsistence regulations.

AS 16.05.258(f)

Subsection (f) provides authority for the boards to shift subsistence use of a resource to a limited extent. In making critical allocation decisions, the boards may recognize that subsistence is a flexible economy that depends on many resources that may to some extent be interchangeable among similar resources. This authority is not meant to allow the boards to prohibit subsistence use of a particular subsistence stock or population, but is meant to allow the boards to apportion and allocate subsistence reasonably among similar stocks and populations.

AS 16.05.258(g)

Subsection (g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h)

Subsection (i) is a technical amendment which protects the rights of military personnel, stationed in Alaska for more than 30 days, to hunt, fish and trap on military lands as provided in Federal law.

AS 16.05.258(i)

Subsection (i) requires the boards, after consultation with the Department, to define the meaning of "sustained yield", "sound management

principles", "maintenance of healthy populations," and "harvestable surplus." The reasons for doing so are discussed above under AS 16.05.258(b). In defining sound management principles the boards should take into account Federal law which requires, with respect to national parks, the "conservation of natural and healthy populations", as discussed above under AS 16.05.258(b).

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. If the board establishes such a process, then this section will require an appellant to use the process before going to court.

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the restrictions on nonsubsistence users will no longer be necessary.

Whenever the boards adopt permit programs, the boards and the Department should work cooperatively with regional councils, local advisory committees, and the public affected in order to assure public input, understanding, and support.

The new subsections (d) and (e) provide for notice of the terms of a permit and allow the boards to seek the assistance of Native village or regional corporations, and other community services appropriate to assist them in providing public notice.

Under subsection (f) the Department will administer subsistence permit programs, the Department is authorized to secure the assistance of people outside the department, such as members of village councils, staff of Native corporations, or village stores. Subsection (f) is

modeled after current statutes governing the issuance of licenses and tags.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and tradition trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

The bill adopts essentially the House-passed definition of "rural area." It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the case economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

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SECTION BY SECTION DETAILED ANALYSIS

Section 1

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Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses. To date, this has rarely occurred.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

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Section 2 adds two new paragraphs to the authority of the Board of Fisheries. the first concerns special management areas. It gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas (which so far have occurred on two trout fisheries), and children's fishing areas. It is probable that the board has always had these authorities by implication, but the authority with respect to children's fisheries had been questions by the Department of Law. This new paragraph makes that authority clear, and the fact that the paragraph lists several types of special fishing areas is not meant to exclude other types that are not mentioned.

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Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game.

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Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish

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The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The Federal legislative history also indicates that the boards, with assistance from the department and the regional councils, may consider local residency, economic dependence and the availability of alternative resources, in determining what resources and uses are customary and traditional. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

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strictly optional - are varied

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the restrictions on nonsubsistence users will no longer be necessary.

Whenever the boards adopt permit programs, the boards and the Department should work cooperatively with regional councils, local advisory committees, and the public affected in order to assure public input, understanding, and support.

The new subsections (d) and (e) provide for notice of the terms of a permit and allow the boards to seek the assistance of Native village or regional corporations, and other community services appropriate to assist them in providing public notice.

Under subsection (f) the Department will administer subsistence permit programs, the Department is authorized to secure the assistance of people outside the department, such as members of village councils, staff of Native corporations, or village stores. Subsection (f) is

modeled after current statutes governing the issuance of licenses and tags.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and tradition trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

no — this is different — circular — "essentially" is misleading

The bill adopts essentially the House-passed definition of "rural area." It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the case economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(
concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

Hooray!!!

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

what has been removed

stochon species clawback

no subsistence defense

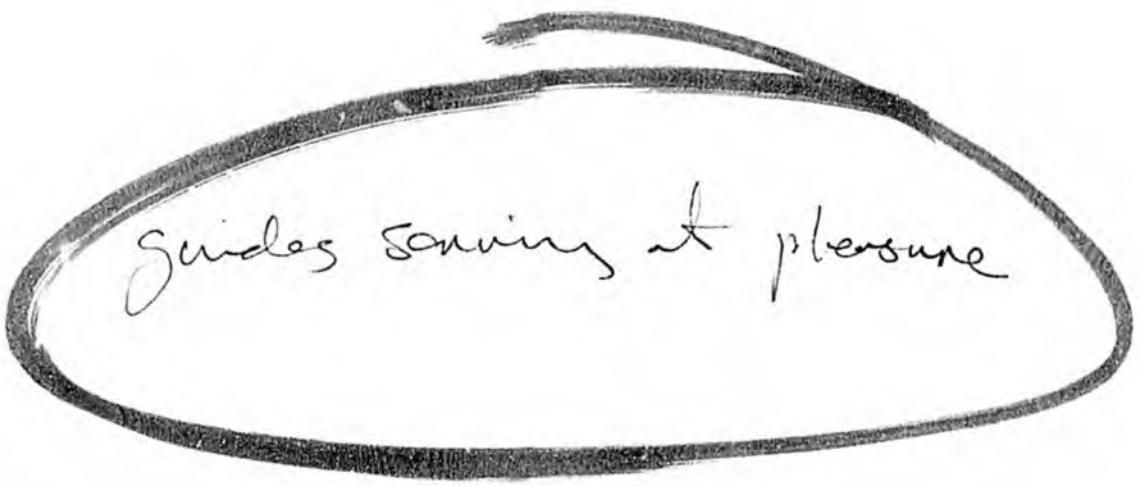
domicile - clarify

permits - if it comes up - removal requirements

shift -

Rp

subsistence protected - at long priority



SECTIONAL ANALYSIS
SCS FOR CSHB 288(SA)

Section 1

Amends the authority of the Board of Fisheries for classifying fish stocks. The categories added are "personal use fish" and "subsistence fish."

Section 2

Gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas, and children's fishing areas.
The second paragraph is worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Is identical to the second paragraph of section 2, except that section 3 applies to game.

Section 4

The proposed AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It is consistent with federal law.

AS 16.05.258(a) requires the Board of Fisheries and the Board of Game to identify the fish and stocks and game population that are customary and traditional subsistence stock and populations.

AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of the surplus is necessary to provide a reasonable opportunity for subsistence.

AS 16.05.258(c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with federal law.

AS 16.05.258(d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient.

AS 16.05.258(e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only harvested under nonsubsistence regulations.

AS 16.05.258(f) provides authority for the boards to apportion and allocate subsistence reasonably among similar stocks and populations.

AS 16.05.258(g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h) protects the rights of military personnel stationed in Alaska for more than 30 days, to hunt, fish and trap on military lands as provided in Federal law.

AS 16.05.258(i) requires the boards, after consultation with the department, to define the meaning of sustained yield, sound management principles, and harvestable surplus.

The proposed AS 16.05.259 addresses administrative appeals of decisions by the boards. It grants the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration.

Section 5

The proposed AS 16.05.261 says that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence.

Section 6

Amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits.

Section 7

Amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Amends the definition of subsistence uses to state that only residents domiciled in a rural area may qualify for subsistence which does not include harvests for commercial enterprises.

Section 9

Definition section.

Section 10

Repeals AS 16.05.251(b) (fish) and AS 16.05.255(b) (game). They require the boards to adopt subsistence regulations and establish the preference in current law. In the proposed bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Provides that the bill will take effect on June 1, 1986.

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

February 10, 1986

TO: AFN Board of Directors

FROM: Don Mitchell

SUBJECT: Abood Subsistence Bill

On February 4th the Senate State Affairs Committee unexpectedly reported a subsistence bill. A copy of the bill is attached. The bill is a substitute for HB 288, the bill passed by the House last session. Although it includes several of the concepts embodied in the House bill, the Abood bill makes a number of changes to title 16 which have nothing to do with subsistence.

BILL ANALYSIS

1. Drafting: Independent of its substantive effect the Abood bill has a number of technical drafting problems which should be remedied.

CS will define

Sec. 3 amends A.S. 16.05.251(a) to delegate the Board of Fisheries authority to regulate personal use fishing, but the bill includes no definition of "personal use fishing".

this doesn't make any difference

Sec. 4 establishes an elaborate methodology which the Board of Fisheries and Board of Game must each follow to adopt hunting and fishing regulations (including but not limited to subsistence regulations). The first step in this process is to identify "subsistence uses" of a fish stock or game population. The second step is to determine if the stock or population is healthy enough to sustain any harvest (for subsistence or any other purpose). The order in which these steps must be performed is nonsensical. If a stock or population which is the subject of "subsistence uses" cannot safely sustain a subsistence harvest no such harvest may be authorized. That being the case, identifying subsistence uses of a stock or population prior to determining whether the stock or population can safely sustain a harvest of any kind is a waste of time. The process should be reversed. An assessment of biological status should be the first step in the process for adopting regulations.

Sec. 7 establishes new definitions of the terms "subsistence fishing" and "subsistence hunting". The definitions state that subsistence fishing and hunting is hunting and fishing "by a resident domiciled in a rural area of the state for subsistence uses". However, the new definition of "subsistence uses" in the bill limits subsistence uses to "a resident domiciled in a rural area of the state". Consequently, inserting this phrase in the "subsistence fishing" and "subsistence hunting" definitions is redundant.

2. Shifting Subsistence Uses To Alternative Stocks And Populations: The bill repeals A.S. 16.05.251(b) and .255(b) - the sections which presently govern the adoption of subsistence regulations - and establishes a new section A.S. 16.05.258 in their place. The new section establishes a new process for subsistence rulemaking. Subsection (f) of the new section provides:

> In making allocation decisions the boards may apportion subsistence use among species, stocks, and populations that are similar and reasonably available.

CS will remove section

Bull Don knows better

If this provision were to become law the Board of Fisheries, for example, may shut down the king salmon fishery at Tyonek on the theory that it was providing the subsistence priority by shifting subsistence fishing to reds or some other species of salmon less coveted by sportsmen. Similarly, the Board of Game would be authorized to shut down subsistence hunting for moose or bear in a particular area if it could find another species of game to move the subsistence hunting effort to. Needless to say, this provision makes a mockery of the subsistence priority. It is also inconsistent with the regulatory standards set forth in title VIII of ANILCA. The legislative history of title VIII indicates that the federal subsistence priority is stock and population specific. Consequently, if this provision is enacted, the State will continue to be out of compliance with ANILCA.

3. Curtailing Nonsubsistence Uses Before Curtailing Subsistence Uses: Proposed section A.S. 16.05.258(c) is ambiguous as to whether all nonsubsistence uses of a stock or population must be eliminated before subsistence uses can be curtailed. In pertinent part, subsection (c) states:

> If a surplus is not sufficient to accommodate all consumptive uses of the surplus, but is sufficient to accommodate subsistence uses of the surplus, then subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy subsistence

uses of the surplus, and may provide opportunities to satisfy other consumptive uses of the surplus. (Emphasis added)

The federal subsistence priority requires all nonsubsistence uses of a stock or population to be eliminated before subsistence uses may be curtailed. If the language cited above authorizes the boards to do otherwise and the language is enacted, the State will continue to be out of compliance with ANILCA.

CS will remove

4. Sustained Yield, Sound Management, and the Maintenance of Healthy Fish Stocks and Game Populations: The Alaska Constitution requires fish stocks and game populations to be managed on a sustained yield basis. Consistent with this constitutional mandate, sustained yield is the regulatory standard in title 16 which presently triggers the ability of the Board of Fisheries and Board of Game to adopt any hunting and fishing regulations. For reasons that remain unclear, in addition to "sustained yield" the Abood bill establishes two additional standards, i.e., "sound management" and "the maintenance of healthy populations fish stocks and game populations", each of which must be met before a board may adopt any hunting or fishing regulations, including sport and commercial as well as subsistence. See proposed A.S. 16.05.258(b). If a fish stock is at sustained yield the Board of Fisheries would have no legal authority to adopt regulations authorizing fishing on the stock unless it first determined that such fishing would also be consistent with "sound management" and "the maintenance of a healthy stock". Neither of the new terms is defined. Instead the bill instructs the boards to adopt regulations defining all three terms. The addition of these new biological standards has nothing whatsoever to do with the subsistence controversy or the holding in the Madison case which the legislation is ostensible trying to fix. However, if enacted into law, the new biological standards will have a profound effect on all hunting and fishing. Since no one in Alaska has complained about the "sustained yield" standard, why Abood wants to use the subsistence bill to make such a radical change in fish and wildlife management policy is perplexing.

Right just like licenses

5. Subsistence Permits: Sec. 6 of the bill requires the boards to issue subsistence permits "for areas, villages, communities, groups, or individuals" whenever the implementation of the subsistence priority requires a reduction in nonsubsistence hunting opportunities. The language of the section provides no flexibility. The boards must issue subsistence permits regardless of how stupid it may be to do so.

6. Limitation of "Subsistence Uses" to Residents of Rural Alaska: The only reason subsistence legislation is needed is to limit the class of hunters and fishermen eligible to engage in "subsistence uses" to residents of rural Alaska. The Abood bill

appears to accomplish this goal, but in an unconstitutional way. On the one hand Sec. 7 satisfactorily amends the definition of "subsistence uses" in A.S. 16.05.940(23) to limit the purview of the definition to Alaska residents "domiciled in a rural area of the state". However, the bill then establishes a new definition of the term "domicile" which establishes a 12 month residency requirement. In addition to again taking the State out of compliance with title VIII (the legislative history of title VIII specifically prohibits durational residency requirements), a 12 month residency requirement is patently unconstitutional.

no-it doesn't

The above analysis highlights the provisions of the Abood bill which raise the most serious problems. The bill contains additional provisions which are either obnoxious or unnecessary but which do not conflict with the protection of subsistence hunting and fishing or with bringing the State back into compliance with the regulatory standards in title VIII of ANILCA. The Abood bill is now before the Senate Resources Committee chaired by Arliss Sturgulewski. The first work session on the bill has been scheduled for February 19th.

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

TO: Senate Resource Committee Members February 26, 1986

FROM: Senate Resources Committee Staff

RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date." and suggested changes.

SECTION BY SECTION ANALYSIS

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Small personal use fisheries exist on the Copper River and on some salmon stocks on the Kenai Peninsula, in Southeast Alaska, and on the Naknek River. In addition to areas where personal use fishing already occurs, it is envisioned that personal use fisheries would be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds a new paragraph to the authority of the Board of Fisheries.

This paragraph tracks the purposes of the Board of fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game. Two minor drafting changes are suggested for this section. In Alaska statutes, "game" is defined to include all wild animals.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations by looking at patterns of local use as established over time.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258.

This section call for game populations and fish stocks to be identified in each rural area. Stocks and populations are geographically specific groups of animals and fish, as specified in the definition section of this bill. The identification of each stock or population as subject to subsistence uses should be factually determined on a case by case basis. Areas, as set by the board, should be large enough to include both where a particularly stock or population is normally taken and where it is normally used. As an example, the boundaries of areas should not pose a barrier to a village that traditionally travels to a fish camp some distance from the village.

This identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentally win. Some of the fish and animals most important to sport users are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations. Whether or not these are or are not customary and traditional subsistence stocks is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable portion

exists and how much of that portion is necessary to provide a reasonable opportunity for subsistence. The determination of whether a harvestable portion exists must be consistent with sustained yield. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is a "reasonable opportunity to satisfy subsistence uses". Reasonable is a commonly accepted concept in law frequently used in statutes and applied by courts. Reasonable currently appears 1,356 times in the Alaska Statutes. The standard means that the boards' decisions should be based on available information. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

A "reasonable opportunity to satisfy subsistence uses" does not guarantee that every subsistence user will get every fish or animal he or she wants before any uses of lower priority are allowed. In hunting and fishing, that type of guarantee is impossible to provide. What this standard does provide is that every subsistence user, shall be able to hunt or fish with the reasonable expectation of taking the amount of fish and game needed.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with Federal law. It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the Federal law clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough surplus to allow a reasonable opportunity for subsistence. At Tier I, the preference allocates enough of the resource to provide that reasonable opportunity, with any surplus that is left going to other consumptive uses.

Tier II is when there is not enough harvestable surplus to provide a reasonable opportunity to subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that have been closed to sport hunters will be reopened by this bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some hunts that are presently open only to Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the animals are not customarily and traditionally taken for subsistence. Bison are an example.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and

administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient. This would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only be harvested under nonsubsistence regulations. This section is discussed in more detail previously in the discussion of subsection (a).

AS 16.05.258(g)

Subsection (g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h)

Subsection (h) is a response to the military's decision to close their land to hunting if the ability of military personnel to hunt on military land was limited by subsistence.

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. It should be emphasized that this ability to adopt an appeal procedure is strictly optional at the boards discretion and that there are a variety of forms the appeal procedure could take.

Section 5

Section 5 amends AS 16.05 by adding a new section, AS 16.05.261, which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct board decisions they disagree with through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

This section does not effect AS 16.05.930 (b) which allows people to take fish and game in case of emergency.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where it can support a wider group of users.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. The first of these is "domicile" which is defined as a person's "true and permanent home...". The definition states that domicle may be proved by presenting evidence of having had a permanent home in a particular location for the preceding 12 consecutive months or by "other evidence acceptable to the boards". The board of fisheries already has regulations on domicle and it is anticipated that the board of game would adopt similar regulations.

Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

A definition of personal use fishing is contained in this section. This definition is very similar to the definition in the House version of this bill. Neither sport, commercial, or personal use fishing is afforded any priority over any other type of fishing in this legislation. As indicated in section 1 it is envisioned that personal use fishing may be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill. This legislation is not intended to statutorily increase or decrease existing personal use fishing. The scope of these fisheries is an allocation decision left to the board.

The bill adopts a definition of "rural area" similar to the House definition is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or

area. The definition is designed to mesh with the definition of subsistence uses. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

TO: Senate Resource Committee Members February 19, 1986

FROM: Senate Resources Committee Staff MEL

RE: SCS for CS for HB 288 (State Affairs) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date." and suggested changes.

SECTION BY SECTION ANALYSIS

The following sectional is an amended and edited version of the section prepared for the Senate State Affairs Committee. Changes that are suggested in the attached Senate Resource Committee Work Draft are discussed in this sectional.

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Small personal use fisheries exist on the Copper River and on some salmon stocks on the Kenai Peninsula, in Southeast Alaska, and on the Naknek River. In addition to areas where personal use fishing already occurs, it envisioned that personal use fisheries would be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management

concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds two new paragraphs to the authority of the Board of Fisheries.

The first section lists a number of general powers for the fish board. The board already has the power to do all of these things except the establishment of childrens' fishing areas. Removal of this section is suggested because the powers listed do not conform to the title of the bill. It is believed that the remainder of the bill does conform to the title.

The second new paragraph tracks the purposes of the Board of fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game. Two minor drafting changes are suggested for this section. In Alaska statutes, "game" is defined to include all wild animals.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations by looking at local use patterns.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used

for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional to be harvested by all Alaskans under nonsubsistence regulations as specified in proposed subsection (e) of AS 16.05.258.

This identification of which fish stocks and game populations will or will not be subject to subsistence regulations is a situation where both groups can potentally win because some of the fish and animals most important to sportsmen are least important to subsistence users. Examples might be bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations. Whether or not these are or are not customary and traditional subsistence stocks is not decided by the proposed legislation. That matter should be left to factual determinations made by the boards. This bill gives them authority to make those determinations.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of that surplus is necessary to provide a reasonable opportunity for subsistence. Because of concern from the National Park Service, whose employees have indicated that national parks never have such a thing as "surplus" animals a small drafting change is recommended in subsections (b) & (c) to substitute "harvestable portion" for "surplus".

In SCS for CS HB 288 (State Affairs), the determination of whether a harvestable surplus exists must be consistent with sustained yield, sound management principles, and the maintenance of healthy fish stocks and game populations. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution. Because the terms "sound management" and "maintenance of healthy populations" are undefined and introduce new standards into the law, they have aroused a good deal of controversy. The Department of Fish and Game has indicated that the principals the drafters of the State Affairs CS were trying to embody in these terms, such as the slow expansion of a herd to its area's carrying capacity, are entirely proper within a definition of sustained yield. Because of this, it is recommended that the terms "sound management" and "maintenance of healthy populations" be deleted and a definition of - sustained yield" be added to the bill.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is a "reasonable opportunity to satisfy subsistence uses". Reasonable is a commonly accepted concept in law frequently used in statutes and applied by courts. The standard means that the boards' decisions should be based on available information. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

A "reasonable opportunity to satisfy subsistence uses" does not guarantee that every subsistence user will get every fish or animal he or she wants before any uses of lower priority are allowed. . In hunting and fishing, that type of guarantee is impossible to provide. What this standard does provide is that every subsistence user, shall be able to hunt or fish with the reasonable expectation of taking the amount of fish and game needed.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with Federal law. It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the Federal law clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough surplus to allow a reasonable opportunity for subsistence. At Tier I the preference allocates enough of the resource to provide that reasonable opportunity, and any surplus that is left may go to other consumptive uses.

Tier II is when there is not enough harvestable surplus to provide a reasonable opportunity to subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, almost all of the Tier II hunts that have been closed to sport hunters will be reopened by this bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some hunts that are presently open only to Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the animals are not customarily and traditionally taken for subsistence. Bison are an example.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient, this would be the normal state of affairs for almost all hunts and fisheries.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only be harvested under nonsubsistence regulations. This section is discussed in more detail previously in the discussion of subsection (a).

AS 16.05.258(f)

There are substantial doubts about the ability of this section to comply with ANILCA and its removal is recommended.

AS 16.05.258(g)

Subsection (g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h)

Subsection (h) was intended as a response to the military's decision to close their land to hunting if the ability of military personnel to hunt on military land was limited by subsistence. Through a drafting change, this section was changed to simply state the existing situation. The original language to prevent closure of the bases is attached.

AS 16.05.258(i)

Earlier changes have eliminated the need or purpose for this section.

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. The State Affairs Committee eliminated a second section of this section which would require an appellant to exhaust administrative remedies before going to court.

It should be emphasized that this ability to adopt an appeal procedure is strictly optional at the boards discretion and that there are a variety of forms the appeal procedure could take.

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

This section does not effect AS 16.05.930 (b) which allows people to take fish and game in case of emergency.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the

It is recommended that subsections (d),(e) and (f) be deleted. They provided detailed instructions on how to administer a permitting program. This information is already provided in the Administrative Procedures Act.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and traditional trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

The bill adopts a definition of "rural area" similar to the House definition It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the cash economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

It is recommended that definitions of "sustained yield" and "personal use fishing" be added to this section.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

SECTION BY SECTION ANALYSIS
OF PROPOSED COMMITTEE
SUBSISTENCE BILL -- DISCUSSION DRAFT

SENATE STATE AFFAIRS COMMITTEE

Senator Mitch Abood, Chairman November 19, 1985

Introduction

The proposed draft subsistence bill attempts to strike a delicate balance on many different issues that are involved in the current subsistence debate. In striking that balance, the bill seeks to satisfy two goals that are equally important: (1) protecting subsistence use of fish and wildlife by those who are truly dependent on the resources, and (2) improving the opportunity for sport users of the resources. If those two goals can be accomplished, then hopefully the "subsistence issue" will subside.

The draft bill goes much further in addressing issues related to subsistence than has any bill that was previously submitted to the Legislature. Last session, the Senate declined to act hastily on legislation originally submitted by the Governor. In so doing, the Senate established an opportunity to examine many issues that deserve to be addressed. The draft bill addresses these issues in a manner that more fairly protects subsistence and non-subsistence uses than did either the previously submitted legislation or the existing state and federal law.

In order for the State to manage fish and wildlife on state, federal, and private lands, including Native lands, the State must be consistent with three aspects of the federal law. Those "consistency requirements" concern the definition of "subsistence uses", a preference for subsistence uses in certain circumstances, and a mechanism for public participation in regulating subsistence. Regarding the definition of "subsistence uses", the federal law says that it applies only to rural residents of Alaska. The present state statute does not use the word "rural". In February 1985, the Alaska Supreme Court issued a decision, the Madison decision, that said that subsistence privileges could not be limited to rural residents under the state subsistence law as it presently exists. Therefore, the Madison decision puts the State at odds with the federal law. Accordingly, the U.S. Department of the Interior has notified the State that it will be required to implement the federal statute on federal lands and waters unless the State amends the state law so as to again be consistent with the definition of subsistence uses.

The draft bill meets the consistency requirements. In doing so it retains for Alaska the authority to manage fish and wildlife on all lands and waters in Alaska, regardless of ownership. Furthermore, to the fullest extent legally possible, the draft bill even extends Alaskan authority beyond the borders of Alaska when fish and wildlife of Alaska origin migrate beyond Alaskan borders.

There are several reasons for being consistent with the three requirements of the federal subsistence law. First, fish and wildlife do not pay attention to legal boundaries. It makes biological sense to manage populations of fish and game as biological populations, rather than under inconsistent regulations depending upon whether the population at any given moment is on state, federal or Native land.

Second, people who hunt and fish often do not know whether they are hunting or fishing on state, federal or Native land. Boundaries are unmarked and unsurveyed, and land ownership is changing as the federal government conveys state and Native land selections.

Third, even when all state and Native selections have been conveyed, sixty percent of Alaska will remain federal. Many federal lands, such as wildlife refuges, national forests, national park preserves, and unclassified federal lands, are heavily utilized for sport, commercial and subsistence harvest of fish and game. Therefore, for the state to lose regulatory authority over those harvests could jeopardize or diminish the privileges of those Alaskans and non-Alaskans who utilize federal lands, whether for subsistence, sport or commercial purposes.

Fourth, the regulatory process of the Alaska Board of Fisheries and the Alaska Board of Game is an open public process involving many opportunities for the public to propose and comment upon proposed regulations. In contrast, the federal process is much more closed, in that it involves only the publication of proposed regulations in the Federal Register and a limited opportunity for comment. It is hard to expect many Alaskans to avail themselves to the Federal Register. Therefore, any assertion of federal authority over subsistence and non-subsistence uses on federal lands would result in a loss of those open state procedures with respect to federal lands.

A section by section analysis of the proposed draft subsistence bill follows.

Section 1: Findings and Intent

Section 1 states the findings and intent of the draft bill.

A primary concern in any debate over fish and wildlife ought to be the health of the resources. Therefore, the first finding in Section 1 recognizes that all management decisions, even allocation decisions, must rest upon good biological information. Management according to land ownership, particularly where fish and wildlife utilize different lands under different ownerships, would be contrary to sound biological management.

The second finding recognizes the importance of fish and wildlife to all Alaskans in that fish and wildlife provide opportunities and benefits that are rarely available or are less available in other states. The reason that the draft bill recognizes this obvious fact is that by recognizing it the bill sets the stage for the delicate balance that the bill seeks to achieve by establishing mechanisms and granting authority to deal fairly with subsistence, sport, commercial, and non-consumptive needs for fish and wildlife.

The third and last statement of findings and intent is important. It incorporates the several basic intentions of the bill as a whole. First, it almost goes without saying that the subsistence issue is a source of division and controvery among Alaskans. It must be resolved in a manner that is fair and generally perceived as fair. Therefore, the third statement of findings and intent recognizes that there needs to be an equitable balance between sport, commercial, subsistence and non-conumptive users of fish and game.

Second, it also recognizes that in times of resource shortage there needs to be a reasonable preference for subsistence use of fish stocks and game populations that are truly important subsistence stocks. The Alaska Constitution provides that fish and wildlife are reserved to the people for common use. The Constitution also provides that fish and wildlife may be subject to preferences among users. Therefore, the Legislature has authority to establish a preference for subsistence and define it, protect it and limit it as provided by the bill.

Third, this section also states the intention of the Legislature that the Board of Fisheries and the Board of Game have sufficient authority, flexibility and information necessary to manage the resources and deal sensibly and knowledgeably with the many issues that come to the boards. The purpose of this provision is to state that the authorities delegated by this bill to the boards and to the Department of Fish and Game are intended to be sufficiently broad and flexible so that the boards can deal with allocation issues, protect subsistence, sport, commercial and other uses and protect, maintain and manage the resources upon which they depend.

Section 2: Responsibilities of the Subsistence Division

Section 2 amends existing law concerning the responsibilities of the Subsistence Division in the Department of Fish and Game. The Subsistence Division is a research and informational arm of the Department, rather than a management arm.

The draft bill expands and clarifies the informational duties of the Subsistence Division in that it requires the division to compile and analyze many different types of data that are useful to the boards in making knowledgeable decisions. The amendments require the division to assist the boards by identifying stocks of fish and populations of game that are used for subsistence, identifying the degree of importance that those stocks and populations have to customary and traditional subsistence use, the areas used by groups of subsistence users, the areas used by the wildlife upon which subsistence occurs, and the impacts of subsistence use and non-subsistence use. The bill also recognizes that in performing this informational role to assist the boards the division must interrelate many related needs for information. That is to say, for example, that identifying a population of game as an important subsistence resource is most useful if the division also identifies to the board other information about the resource in question, such as the uses to which the game is put, the importance of the use for subsistence purposes, the amount of those uses presently and traditionally occurring, the amount of the resource that is necessary to provide a reasonable opportunity for important uses to continue, the areas utilized for harvest, and the areas utilized by the game even when not under Alaska harvest since impacts of Alaskan activities may be felt outside of Alaska. Thus, these and other provisions in section 2 require the Subsistence Division to put subsistence use and subsistence issues in a broad factual context in order that the boards may make sound decisions.

Sections 3, 4, 6 and 7: Authority of the Board of Fisheries and the Board of Game

Sections 3 and 4 amend the existing authorities of the Board of Fisheries, and sections 6 and 7 amend the existing authorities of the Board of Game. The provisions of sections 3

and 4 parallel those of sections 6 and 7. In most respects, only the boards are different. The amendments are in separate sections because the first of each pair of sections (i.e. sections 3 and 6) relates to the general authorities of the Board of Fisheries and the Board of Game respectively, and the second of each pair of sections (i.e. sections 4 and 7) deals specifically with the regulatory authority of the respective board over subsistence. In existing state law, the general regulatory authority of the Board of Fisheries is found in AS 16.05.251(a); the subsistence regulatory authority of the Board of Fisheries is found in AS 16.05.251(b); the general regulatory authority of the Board of Game is found in AS 16.05.255(a); and the subsistence regulatory authority is found in AS 16.05.255(b) and AS 16.05.257. Because the authorities of the boards are found in different sections and subsections of the present statutes, the draft bill deals with them separately, but similarly. However, for purposes of this section-by-section analysis, it is simplier to discuss them as a package of related and similar amendments.

The amendments of sections 3 and 6 to the general authorities are largely self-explanatory. They clarify and fill gaps in authority that have arisen in the context of many issues related to the management of fish and game. Most of these are technical amendments. All previous subsistence bills have addressed these general provisions in one form or another, and this bill more than others tries to deal with many technical and legal problems that have arisen before the Board of Fisheries and the Board of Game.

The amendments in sections 4 and 7 are to the main subsistence provisions of existing law. Several important concepts are stated. Section 4 and 7 establishe a subsistence preference for subsistence use of fish and game. However, the preference does not apply to all fish stocks or game populations. One of the problems with the present subsistence law is that it arguablly creates a subsistence priority on every stock of fish or population of game for which there is a harvestable surplus, even if the resource is not an important subsistence fish stock or game population. This made little sense to sport users and inhibited public acceptance of the subsistence laws.

In the draft bill, the language of the preference is more clearly consistent with federal law than is the present language adopted in 1978. In many respects it is modeled after the federal language creating the federal subsistence preference, so as to assure consistency. Nevertheless, the federal law on the preference is sufficiently general and flexible, such that it provides the state with an opportunity to be consistent yet also protect and manage sport, commercial, and subsistence uses, and the resources themselves, more specifically and more appropriately than either existing state law or federal law. The following changes are significant.

First, the subsistence preference is only for nonwasteful subsistence uses. The concept of protecting only nonwasteful subsistence is found in federal law, but not in present state law. Therefore, there will be no problem with consistency. "Nonwasteful" is defined in section 16 of the bill.

Second, subsistence preference, as defined by section 16 of the bill, is a flexible preference. It seeks to balance the degree of preference with the degree of dependence on the resource. The federal law does not require that in all cases of resource shortage there must be a total exclusion of other uses. The concept of a flexible preference recognizes that when dependence on the fish stock in question is very high and shortages are severe, then total exclusion may be necessary in order to provide a reasonable preference. However, when the fish stock is only marginally significant to subsistence, or when it is only incidentally harvested, or when it is consistently harvested by sport means regardless of the ultimate use and the character of the user, or when it is practically unimportant as a subsistence resource, then any preference for subsistence use clearly should not automatically exclude non-subsistence uses even when shortage occurs. Instead, a less than exclusive preference would be appropriate and may be provided in a manner in which there is still some degree of preference even though other uses continue and even though all user groups reduce their harvests. For example, although there are exceptions, generally dall sheep, sandhill cranes and steelhead and rainbow trout have not been important customary and traditional subsistence stocks in many parts of the state. Even where they have been subsistence stocks, they have often been only occasionally harvested in a historic sense, simply because other resources were more plentiful and easily accessible. They are generally not highly important subsistence stocks for purposes of assuring that a reasonable opportunity for subsistence uses will continue. Nevertheless, sheep, cranes and steelhead and rainbow trout are very highly prized recreational resouces for sport and non-consuptive users. Accordingly, any preference at all should be less strict than would occur on stocks that are truly important for purposes of assuring that the opportunity for a subsistence lifestyle continues.

Third, the preference is only a preference over other consumptive uses. This is consistent with federal law. It means that the subsistence preference will not be a preference over certain practices that constitute taking of fish and game but which are non-consumptive in the usual sense of the term. For example, the Board of Fisheries has established some catch and release trout fisheries in which people take, but are not allowed to kill deliberately or consume, the resource. Similarly, the Department of Fish and Game often "takes" (as the term is defined legally) all the fish in a lake by poisoning them in order to clean out undesireable species prior to stocking. With respect to game, the department also "takes" game for purposes of transplanting game, controlling predators, and other reasons. In

national parks, opportunities for wildlife viewing and maintenance of substantially unhunted populations of game are non-consumptive dedications of the resources. Management tools like catch-and-release sport fisheries, "takings" for bioloigical or management reasons, and parks should not be prohibited or made substantially more difficult because of a subsistence preference, particularly if there is no significant subsistence dependence on a resource in question.

Fourth, this section addresses what has become known as Tier I and Tier II subsistence. The most important point in any discussion about Tier II subsistence is whether or not any bill considered by the legislature will re-open hunts (and allow repeal of present Tier II hunts and fisheries) that were created by necessity of the Madison decision. This bill will re-open those hunts and it will allow repeal of the Tier II hunts and fisheries. The manner of accomplishing that is complex, however, due to the interplay of the two levels of the preference (Tiers I and II) with the absence of the word "rural" in the existing state law. Therefore, in order to understand how we get those hunts re-opened, it is necessary to understand what tiers I and II mean in state and federal law and also who gets the preference.

The existing state law more clearly states the two levels of the subsistence preference than does the federal law, and the Alaska Supreme Court found in the Madison case that these two levels exist in the present state law. The federal subsistence law is less precise with respect to whether or not it, like the state law, contains two levels for the preference. However, legislative history of the federal law indicates that even the federal law contains the two levels now known as Tier I and Tier II. In both the federal and the present state statutes, the first level (Tier I) is when non-subsistence uses are restrained or eliminated, and the second level (Tier II) is when further restriction of harvest is necessary to protect the stock. In the latter instance, the preference goes to only those subsistence users who are customarily and directly dependent on the resource as a mainstay of livelihood, who are local residents, and who lack alternative resources.

A technical issue, with respect to solving the present Tier I and Tier II problems, arises because it is difficult (and quite an achievement) to be consistent with a less than precise federal statute. Therefore, by modeling sections 4 and 7 after the analogous provision in federal law, the draft bill is consistent, regardless of what the federal law says imprecisely about whether Tier I and Tier II implicitly exist in the federal statute.

Sections 5 and 8: "Targeting Issues" -- What are appropriate subsistence stocks; what are not appropriate subsistence stocks; when should the boards be allowed to shift or prohibited from shifting subsistence harvest to other stocks?

For lack of a better term, the issues addressed in sections 5 and 8 may be called "trageting issues". Sections 5 and 8 are parallel sections, with the former dealing with fish stocks and the latter dealing with game populations. In each section, subsections (e) and (f) of the amending language are the key provisions. Subsections (e) provide that if a fish (or game) stock or population is not a significant subsistence resource and if subsistence is not the best use of the resource, then subsistence may be prohibited even if the resource may be taken under other regulations. Subsections (e) also state the circumstances in which subsistence use of a resource may be shifted and may not be shifted to alternative fish stocks and game populations. With respect to fish stocks, the bill permits shifting only if there is a prior or contemporaneous stock that is suitable and available. With respect to game populations, shifting is only permitted if there is a suitable and available population. These legal standards for allowing or prohibiting shifting of a target stock are consistent with the federal law. They are consistent with several aspects of the federal law, including (1) the provisions of the federal law which make subsistence subject to sound management principles, (2) the federal constraint against wasteful subsistence use and (3) the guiding purpose of the federal statute, which is to provide the opportunity for rural Alaska residents engaged in a subsistence way of life to continue to do so.

In sections 5 and 8, subsection (f) of the amending language allows the respective boards to establish administrative appeal procedures and requires any potential plainfiff to exhaust administrative appeals before going into state court. This should keep many allocation issues out of the courts in that an administrative appeal process is a more economical and less time consuming method of settling many disputes than is judicial action.

Sections 5 and 8 also provide that subsistence fishing and hunting are subject to seasons, bag limits, methods and means restrictions and other regulations adopted by the boards. This is consistent with existing state law.

Section 9: Subsistence Hunting Defined

Section 9 amends the existing definition of subsistence hunting by clarifying that it is for "rural residents" of Alaska. This is necessary in order to accomplish repeal of the Tier II hunts, since they are the direct result of the absence of the word "rural" in the existing state statute. A very important question,

other than addressing Tier II problems, is how to define "rural", and the bill answers this in section 16 by defining "rural residents", rather than by defining "rural". The explanation is found under "Section 16" in this section-by-section analysis.

Section 10: Repeal of Automatically Exclusive Subsistence Hunting Areas

Under existing state law, AS 16.05.257(h)(2), any subsistence hunting area created by the Board of Game must be managed solely for subsistence hunting of the game population for which the area was created. Since the degree of the preference at Tier I subsistence may vary according to the importance of the stock and the degree of dependency, such subsistence hunting areas are in conflict with the preference as stated in the draft bill. Accordingly, they are repealed as defined in AS 16.05.257(h)(2). This is not to say however, that subsistence hunting areas may not be created or that they may not be exclusive. It is only to say that the present definition of them is at odds with the rest of the bill.

Section 11: Methods of Determining Customary and Traditional Subsistence Use and Allocations of Fish and Game

Section 11 establishes the rational procedure by which the boards shall determine customary and traditional subsistence uses and allocate resources. The provisions of section 11 are consistent with the informational tasks of the Subsistence Division, as stated in section 2 of the bill. Section 11, however, is new statutory language that says the boards shall first identify: (1) the amount of resources needed to reasonably provide a subsistence opportunity, (2) the customary and traditional subsistence use areas by species, stock or game population, and by groups of users, and (3) the important subsistence fish stocks and game populations. Second, each board then assess the biological status of the resources in question. Third, each board then determines the amount of harvestable surplus necessary to provide a reasonable subsistence opportunity with respect to the particular resource in question. Fourth, after that is determined, non-subsistence uses may be accommodated.

This framework is similar to existing board policies found in 5 AAC 99.010, the validity of which was threatened by the Madison decision. By statutorily enacting the framework, the problem of potential invalidity is solved.

More importantly, the provisions establish a rational means of making allocation decisions which protect sport, subsistence, commercial, and non-consumptive users from unfair comnpetition. The provisions do so by focusing on important subsistence stocks, by analyzing subsistence use in terms of areas used, and by protecting all uses accordingly.

Section 11 also allows the boards to adopt criteria for defining customary and traditional subsistence use, and until the boards do so, the draft bill re-adopts the eight point criteria for defining customary and traditional subsistence use that the boards have previously used.

Section 12: Subsistence Permits

Section 12 grants the boards authority to adopts programs for subsistence permits. No fee is suggested since the permits are technically not a license issued by the Department of Revenue. The draft language allows flexibility in designing a permit program. It recognizes that permits should be required when significant resource competition or other reasons make the gathering of data, through a permit system, a useful tool in management. Part of the flexible design of the permit authority contained in this section is the provision that permits need not always be handled on an individual basis, and that for purposes of efficiency it may be sufficient to design permits for areas, communities, discreet groups of individuals within communities, or simply individuals. The permit process will identify the fish stocks and the game populations that may be taken under the permit for subsistence.

Section 13: Technical amendment to existing law.

This corrects a misspelling in the existing statute and performs one other technical amendment.

Section 14: Definition of Subsistence Fishing

This is similar to the previously discussed definition for subsistence hunting.

Section 15: Definition of Subsistence Uses

This incorporates "rural residents" into the definition of subsistence uses. It is necessary for federal consistency.

Sections 16: New Definitions

Section 16 contains several new definitions. The most important ones concern the "maintenance of healthy and natural populations" as a clarification of sustained-yield principles, the definition of "rural Alaska resident" which is tied to the criteria for customary and traditional use rather than to the concept of some area of the state, and the definition of the variable and flexible "subsistence preference" which seeks to vary the degree of the preference with the degree of dependence on the resource in question.

DISCUSSION DRAFT 9/5/85 THIS IS A ROUGH DRAFT FOR DISCUSSION PURPOSES ONLY. TOGETHER WITH ANY CONCEPT CHANGES, SOME SECTIONS NEED TO BE FLESHED OUT, THE CRITERIA NEED TO BE REFINED, AND OTHER ADDITIONAL WORK NEEDS TO DONE BEFORE IT IS COMPLETE BILL FORM.

Section 1. FINDINGS The legislature finds that

(1) subsistence is important to residents of many small, remote communities in Alaska as a principal means of obtaining food;

(2) when the Congress of the United States referred, in Title VII of Public Law 96-487, ANILCA, to "(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska..." and found that "(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;" it was referring to rural residents in those areas where this is true;

(3) the opportunity to fish and hunt is vitally important to many Alaskans, throughout our state, for the experience as well as for food, and even in communities where there are practical alternatives means of obtaining food supplies, many residents place substantial reliance on fish and game as a part of their diet;

(4) it is the intent of the Legislature to establish a preference of subsistence uses as a principal of management of fish and wildlife by the Boards of Fish and Game in those areas, "where no practical alternative means are available to replace the the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on Subsistence uses";

(5) it is the intent of the Legislature that the Boards of Fish and Game have wide flexibility in managing Alaska's fish and wildlife and that the boards use this flexibility to ensure sustained yield and best use of all fish stocks and wildlife species.

AS 16.05.251 is amended to read:

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart fish reserve areas, refuges and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish;

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture and transport of fish;

(6) classifying as commercial fish, sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43.

(12) regulating selected stocks for catch and release sport fishing.

(13) regulating commercial, sport, personal use, and subsistence fishing.

Section 3 AS 16.05.251(b) is amended to read:

(b) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regulating [PERMITTING] the taking of fish for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of fish stocks on a sustained-yield basis. Whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the preferred [PRIORITY] use. If further

restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources.

Subsistence fishing authorized under this section is subject to reasonable regulation of seasons, catch limits and methods and means.

If a particular fish stock is not a customary and traditional or significant source of subsistence for residents in a rural subsistence area, and, in the board's judgement, the best use of that stock is not as a subsistence stock, the board may determine that a particular stock shall not be taken under subsistence regulations.

Sec.6 AS 16.05.255(a) is amended to read:

(a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

(1) setting apart game reserve areas, refuges and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of game;

(3) establishing the means and methods employed in the pursuit, capture and transport of game;

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(10) regulating sport and subsistence hunts.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regulating [PERMITTING] the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the preferred [PRIORITY] use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one'slivelihood;

(2) local residency; and

(3) availability of alternative resources.

Subsistence hunting authorized under this section is subject to reasonable regulation of seasons, bag limits and methods and means.

If a particular species is not a customary and traditional or significant source of subsistence for residents in a rural subsistence area, and, in the board's judgement, the best use of that species is not as a subsistence species, the board may determine that a particular species in a particular area shall not be taken under subsistence regulations.

Sec 4 ***AMEND AS 16.05.251(c) TO REQUIRE EXHAUSTION OF ADMINISTRATIVE APPEALS BEFORE FILING COURT ACTION***

Sec. 16.05.940. DEFINITIONS.

In AS 16.05 - AS 16.40

NEW SECTION [redacted]

(28) "personal use fishing" means the taking or attempting to take by Alaska residents for personal or family consumption and not for sale or barter, finfish, shellfish, or other fishery resources with gill net, dip net, seine, pot fishwheel long line, or other similar

means defined by the Board of Fisheries, where the board decides, in its judgement, the abundance of the resource will support these more efficient means of taking in addition to sportfishing.

(29) "resident of a rural subsistence area" means a person who for 12 consecutive months has maintained a permanent place of abode in the same rural subsistence area and who has continually maintained a voting residence in the same rural subsistence area; however, a member of the military service who has been stationed in the same rural subsistence area for the preceding 12 consecutive months is a resident of that rural subsistence area for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the same rural subsistence area for the preceding year is a resident of that rural subsistence area for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the same rural subsistence area is a resident of that rural subsistence area for the purposes of this paragraph;

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(23) "subsistence uses" means the customary and traditional <u>noncommercial</u> uses [IN ALASKA] of wild, renewable resources by <u>a resident of a rural subsistence area of the state</u> for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making andselling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; <u>in</u> [FOR THE PURPOSES OF] this paragraph "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

NEW SECTION

(B) "rural subsistence area" means a community or area of the state in which the Board of Fish or the Board of Game determines, "no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence resources". In making this determination the boards shall consider the following criteria:

(1) a lack of a cash economy, sources of employment, or stores within the community;

(2) a customary and traditional community dependence for sustenance on the consistent harvest and use, in a cost efficient manner, of fish or game which is near, or reasonably accessible from, the community;

(3) the remoteness of the community, its lack of access by road, regularly scheduled barge, railroad or airplane service;

(4) the population of the community, with communities in excess of 500 persons generally not being classified as part of rural subsistence areas;

ADDITIONAL SECTIONS TO CONSIDER:

SUBSTITUTION OF STOCK WHEN SUBSTITUTE RUN IS PRIOR OR CONCURRENT AND OF EQUAL OR BETTER QUALITY

CHANGE IN LICENSE SECTION TO REQUIRE PURCHASE OF LICENSE