

SUBSISTENCE

Miscellaneous

(FILE 1)

THE
CONSTITUTION
of the
STATE OF
ALASKA



Any qualified voter may apply to
urt to compel the governor, by
therwise, to perform his reappor-
or to correct any error in redis-
ortionment. Application to compel
o perform his reapportionment
iled within thirty days of the expi-
of the two ninety-day periods
article. Application to compel cor-
ror in redistricting or reapportion-
ed within thirty days following the
iginal jurisdiction in these matters
in the superior court. On appeal,
be reviewed by the supreme court
l the facts.

LE VII

ON, AND WELFARE

The legislature shall by general law
intain a system of public schools
ren of the State, and may provide
educational institutions. Schools
so established shall be free from
. No money shall be paid from
the direct benefit of any religious
ducational institution.

The University of Alaska is hereby
state university and constituted a
It shall have title to all real and
/ now or hereafter set aside for or
its property shall be administered
ccording to law.

The University of Alaska shall be
oard of regents. The regents shall
the governor, subject to confirma-
ty of the members of the legisla-
on. The board shall, in accordance

Public
Health
Public
Welfare

with law, formulate policy and appoint the presi-
dent of the university. He shall be the executive
officer of the board.

SECTION 4. The legislature shall provide for the
promotion and protection of public health.

SECTION 5. The legislature shall provide for
public welfare.

ARTICLE VIII

NATURAL RESOURCES

Statement
of Policy

SECTION 1. It is the policy of the State to en-
courage the settlement of its land and the develop-
ment of its resources by making them available for
maximum use consistent with the public interest.

General
Authority

SECTION 2. The legislature shall provide for the
utilization, development, and conservation of all
natural resources belonging to the State, including
land and waters, for the maximum benefit of its
people.

Common
Use

SECTION 3. Wherever occurring in the natural
state, fish, wildlife, and waters are reserved to the
people for common use.

Sustained
Yield

SECTION 4. Fish, forests, wildlife, grasslands,
and all other replenishable resources belonging to
the State shall be utilized, developed, and main-
tained on the sustained yield principle, subject to
preferences among beneficial uses.

Facilities
and
Improvements

SECTION 5. The legislature may provide for
facilities, improvements, and services to assure
greater utilization, development, reclamation, and
settlement of lands, and to assure fuller utilization
and development of the fisheries, wildlife, and
waters.

State Public
Domain

SECTION 6. Lands and interests therein, in-
cluding submerged and tidal lands, possessed or

1/15/85

WORK DRAFT

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to fishing and hunting; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS AND INTENT. (a) Sound management of fish and wildlife is more likely to be achieved if the management of fish and wildlife, including allocation among different uses, is done on a biological basis, rather than on the basis of land ownership.

(b) Maintaining healthy populations of fish and wildlife is important to the state because healthy populations provide opportunities for a subsistence life style, for trophy and other sport hunting and fishing, for commercial fishing and for wildlife viewing.

(c) To assure that these opportunities remain reasonably available it is necessary

(1) that there be an equitable balance among sport, commercial, subsistence, and nonconsumptive needs;

(2) that, when all consumptive uses of fish and game cannot be accommodated without harming the resource, there be a reasonable preference for subsistence use of fish stocks and game populations that are important to subsistence uses;

(3) that the Board of Fisheries and the Board of Game have the authority, flexibility, and information needed to maintain sustained yield, healthy populations, and opportunities for subsistence, sport, commercial and other consumptive and nonconsumptive uses of fish and game; and

(4) that the Board of Fisheries and the Board of Game have

1 authority to establish subsistence permit programs.

2 * Sec. 2. AS 16.05.050 is amended by adding new paragraphs to read:

3 (14) make recommendations to the Board of Fisheries and the
4 Board of Game regarding the adoption, amendment, and repeal of regu-
5 lations;

6 (15) provide information to the Board of Fisheries and the
7 Board of Game as needed to carry out their statutory duties.

8 * Sec. 3. AS 16.05.251(a) is amended to read:

9 (a) The Board of Fisheries may adopt regulations it considers
10 advisable in accordance with the Administrative Procedure Act (AS 44.-
11 62) for

12 (1) setting apart and designating fish reserve areas,
13 refuges and sanctuaries in the waters of the state over which it has
14 jurisdiction, subject to the approval of the legislature;

15 (2) managing fish reserve areas, refuges and sanctuaries;

16 (3) establishing open and closed seasons and areas for the
17 taking of fish;

18 (4) [(3)] setting quotas, bag limits, harvest levels,
19 escapement levels, and sex, [AND] size, age, and other limitations
20 pertaining to [ON] the taking of fish;

21 (5) [(4)] establishing the means and methods, including
22 gear, tackle, and vessels, employed in the pursuit, capture, and
23 transport of fish;

24 (6) [(5)] establishing marking and identification require-
25 ments for means used in pursuit, capture, possession, tagging, and
26 transport of fish;

27 (7) [(6)] classifying as commercial fish, sport fish,
28 personal use fish, subsistence fish, indigenous fish, exotic fish,
29 nonindigenous fish, hatchery fish, or predators or other categories

1 essential for regulatory purposes; a fish stock may be the subject of
2 more than one classification;

3 (8) protecting, maintaining and improving watersheds [(7)
4 WATERSHED] and habitats [HABITAT IMPROVEMENT], and for the management,
5 conservation, protection, use, disposal, propagation, and stocking of
6 fish; watershed and habitat regulations may be adopted under this
7 paragraph only after consultation with the Department of Natural
8 Resources;

9 (9) [(8)] investigating and determining the extent and
10 effect of disease, predation, and competition among fish in the state,
11 and exercising control measures considered necessary to the resources
12 of the state;

13 (10) [(9)] prohibiting and regulating the live capture,
14 possession, transport, or release of [NATIVE OR EXOTIC] fish or their
15 eggs;

16 (11) [(10)] establishing seasons, areas, quotas and methods
17 of harvest for aquatic plants;

18 (12) [(11)] establishing the times and dates during which
19 the issuance of fishing licenses, permits and registrations and the
20 transfer of permits and registrations between registration areas is
21 allowed; however, this paragraph does not apply to permits issued or
22 transferred under AS 16.43;

23 (13) designating and regulating special fishing areas,
24 including personal use areas, trophy management areas, catch-and-
25 release areas, and children's fishing areas, and designating stocks in
26 those areas for which special management is appropriate;

27 (14) establishing a procedure for administrative appeal of
28 board decisions; and

29 (15) regulating commercial, sport, subsistence, and personal

1 use fishing as needed for the conservation, development and utiliza-
2 tion of fisheries.

3 * Sec. 4. AS 16.05.255(a) is amended to read:

4 (a) The Board of Game may adopt regulations it considers advis-
5 able in accordance with the Administrative Procedure Act (AS 44.62)
6 for

7 (1) setting apart and designating game reserve areas,
8 refuges and sanctuaries in the water or on the land of the state over
9 which it has jurisdiction, subject to the approval of the legislature;

10 (2) managing game reserve areas, refuges and sanctuaries;

11 (3) establishing open and closed seasons and areas for the
12 taking of game;

13 (4) [(3)] establishing the means, [AND] methods, marking,
14 and identification requirements employed in the pursuit, capture,
15 possession, tagging and transport of game;

16 (5) [(4)] setting quotas, bag limits, harvest levels, and
17 sex, age, [AND] size, and other limitations on, and game population
18 goals pertaining to, the taking of game;

19 (6) [(5)] classifying game as game birds, song birds, big
20 game animals, fur bearing animals, predators or other categories;

21 (7) [(6)] methods, means, and harvest levels necessary to
22 control predation and competition among game in the state;

23 (8) protecting, maintaining, and improving watersheds [(7)
24 WATERSHED] and habitats [HABITAT IMPROVEMENT], and for the manage-
25 ment, conservation, protection, use, disposal, propagation and stock-
26 ing of game; watershed and habitat regulations may be adopted under
27 this paragraph only after consultation with the Department of Natural
28 Resources;

29 (9) [(8)] prohibiting the live capture, possession,

1 transport, or release of native or exotic game or their eggs;

2 (10) [(9)] establishing the times and dates during which the
3 issuance of game licenses, permits and registrations and the transfer
4 of permits and registrations between registration areas and game
5 management units or subunits is allowed;

6 (11) regulating sport hunts and subsistence hunts as needed
7 for the conservation, development, and utilization of game and nongame
8 species.

9 * Sec. 5. AS 16.05 is amended by adding new sections to read:

10 Sec. 16.05.258. METHODS OF DETERMINING CUSTOMARY AND TRADITIONAL
11 SUBSISTENCE USE AND ALLOCATING FISH AND GAME. (a) The Board of
12 Fisheries and the Board of Game shall:

13 (1) estimate the amount of fish and game needed to provide
14 a reasonable opportunity for rural residents to continue to engage in
15 a customary and traditional subsistence way of life; determinations
16 shall be based on research, analysis, comments, and recommendations of
17 the department;

18 (2) identify and designate the areas used for subsistence
19 harvest, and areas formerly used for subsistence harvest, according to
20 fish stock and game population, and according to subsistence user
21 population; the zones may overlap where different groups of subsis-
22 tence users have customarily and traditionally used the same areas;

23 (3) identify fish stocks and game populations that custom-
24 arily and traditionally have been used by, and are important to, rural
25 residents for subsistence use.

26 (b) The Board of Fisheries or the Board of Game shall assess the
27 biological status of, respectively, the important subsistence fish
28 stocks and the important subsistence game populations in the use
29 zones, and shall determine whether a surplus may be harvested during

1 a regulatory year consistent with the sustained yield principle, sound
2 management principles, and the maintenance of healthy fish stocks, and
3 other wildlife populations.

4 (c) After identifying the important subsistence fish stocks or
5 game populations, the appropriate board shall determine the amount of
6 harvestable surplus of the stock or population that will provide a
7 reasonable opportunity to engage in customary and traditional subsis-
8 tence uses of the stocks or populations.

9 (d) The Board of Fisheries and the Board of Game shall adopt
10 regulations, in accordance with the Administrative Procedure Act
11 (AS 44.62), for subsistence fishing and subsistence hunting unless
12 adoption of the regulations could jeopardize or interfere with the
13 maintenance of fish stocks, game populations, or other wildlife popu-
14 lations on a sustained-yield basis, or could be inconsistent with
15 sound management principles or with the maintenance of healthy fish
16 stocks, game populations, or other wildlife populations. The regula-
17 tions may be the same as, different from, or in addition to regula-
18 tions governing other consumptive uses of the stocks or populations.

19 (e) Except as otherwise provided in this chapter or in other
20 state or federal laws, subsistence fishing and subsistence hunting is
21 accorded a preference over other consumptive takings and uses of fish,
22 game, or other wildlife. Whenever it is necessary, after reasonably
23 regulating seasons, bag or catch limits, and means and methods, to
24 further restrict subsistence fishing or subsistence hunting to protect
25 the continued health and viability of a fish stock or game population,
26 assure sound management, assure the maintenance of a fish stock or
27 game population on a sustained-yield basis, or protect continued
28 future subsistence fishing or subsistence hunting, the preference may
29 be limited by applying the following criteria:

1 (1) customary and direct dependence on the fish stock or
2 game population as the mainstay of livelihood;

3 (2) local residency; and

4 (3) availability of alternative resources.

5 (f) Each board may adopt regulations under this chapter that
6 authorize taking for nonsubsistence uses a stock or population iden-
7 tified as important for subsistence use, to the extent that the non-
8 subsistence uses do not jeopardize or interfere with sound management
9 principles, sustained yield, the maintenance of healthy populations,
10 or the opportunity for taking these resources for subsistence uses
11 under this chapter.

12 (g) The boards, acting jointly, shall adopt regulations that
13 establish criteria that the boards must consider when defining and
14 identifying customary and traditional subsistence uses and customary
15 and traditional subsistence use areas. The regulations may include,
16 but need not be limited to, the following criteria:

17 (1) long-term, consistent patterns of use recurring in
18 specific seasons each year;

19 (2) use patterns consisting of methods and means of harvest
20 characterized by efficiency and economy of effort and cost, and condi-
21 tioned by local circumstances;

22 (3) the consistent harvest and use of fish or game that is
23 near, or reasonably accessible from, the user's residence;

24 (4) use patterns that include the handing down of knowledge
25 of fishing or hunting skills, values, and lore from generation to
26 generation;

27 (5) use patterns in which the hunting or fishing effort or
28 the products of that effort are distributed or shared among others
29 within a definable community of persons, including customary trade,

1 barter, sharing, and gift-giving; customary trade does not include
2 significant commercial enterprises; an area may include specific
3 villages or towns with a historical dependence on subsistence uses;

4 (6) use patterns that include reliance for subsistence
5 purposes on a wide diversity of the fish and game resources of an area
6 and provide substantial economic, cultural, social, and nutritional
7 elements of the life of area residents; and

8 (7) lack of a developed cash economy that could provide all
9 residents of the area a reasonable opportunity for participation.

10 (h) If the appropriate board determines that (1) a particular
11 fish stock or game population is not a customary and traditional
12 subsistence resource or not a significant source of subsistence use
13 and (2) subsistence is not the best use of that fish stock or game
14 population, the board may provide that the fish stock or game popu-
15 lation may not be taken under subsistence regulations, but may be
16 taken under other regulations. The Board of Fisheries may shift
17 subsistence use of a fish stock to a suitable prior or contempora-
18 neous stock of the same or a different species. The Board of Game may
19 shift subsistence use of a game population to another population if a
20 suitable alternative population of the same or a different species is
21 available.

22 (i) The subsistence preference shall provide a reasonable oppor-
23 tunity for subsistence fishing or subsistence hunting. The preference
24 may vary, may be graduated, and may be balanced against the degree of
25 economic and traditional dependence on the resource in question. If
26 dependence on the resource in question is high, the preference shall
27 provide a full opportunity for satisfaction of subsistence needs,
28 including potentially exclusive subsistence use when a resource
29 shortage occurs. If dependence on the resource in question is low,

1 the preference may be less and need not be potentially exclusive. As
2 the degree of dependence varies, the degree of the preference may vary
3 accordingly.

4 Sec. 16.05.259. JUDICIAL APPEAL OF REGULATORY ACTIONS. An
5 aggrieved person must exhaust all administrative remedies before
6 bringing a legal action challenging the adoption or repeal of a regu-
7 lation of the Board of Fisheries or the Board of Game.

8 * Sec. 6. AS 16.05.330 is amended by adding new subsections to read:

9 (c) The Board of Fisheries and the Board of Game may adopt
10 regulations, under the Administrative Procedure Act (AS 44.62), pro-
11 viding for the issuance and expiration of subsistence fishing permits,
12 subsistence hunting permits, and combination subsistence fishing and
13 hunting permits as needed for authorizing, regulating and monitoring
14 the subsistence harvest of fish and game. The boards shall adopt
15 these regulations when the subsistence preference requires a reduction
16 in the harvest of a fish stock or game population by nonsubsistence
17 users, or when special seasons, bag limits or other provisions are
18 necessary, to provide a reasonable opportunity for subsistence tak-
19 ings. A permit program need not be established in any particular area
20 of the state or for any particular fish stock or game population
21 unless circumstances warrant.

22 (d) The commissioner shall administer subsistence permit pro-
23 grams that may be established. The commissioner may appoint and
24 authorize compensation of persons to take applications and issue
25 permits and tags, and may require reports, as provided for licenses
26 and tags under AS 16.05.360 - 16.05.390.

27 (e) This section may not be construed as altering other require-
28 ments of state or federal law for licenses, permits, stamps, tags, or
29 seals.

1 * Sec. 7. AS 16.05.940(22) is amended to read:

2 (22) "subsistence fishing" means the nonwasteful taking of,
3 fishing for, or possession of fish, shellfish, or other fisheries
4 resources in accordance with regulations adopted under AS 16.05.258
5 for subsistence uses with gill net, seine, fish wheel, long line, or
6 other methods and means defined by the Board of Fisheries;

7 * Sec. 8. AS 16.05.940(23) is amended to read:

8 (23) "subsistence uses" means the nonwasteful, customary and
9 traditional uses by residents of rural subsistence areas in Alaska of
10 wild, renewable resources for direct personal or family consumption as
11 food, shelter, fuel, clothing, tools, or transportation, for the
12 making and selling of handicraft articles out of nonedible by-products
13 of fish and wildlife resources taken for personal or family consump-
14 tion, and for the customary trade, barter, or sharing for personal or
15 family consumption; in [FOR THE PURPOSES OF] this paragraph, "family"
16 means [ALL] persons related by blood, marriage, or adoption, and a
17 [ANY] person living in [WITHIN] the household on a permanent basis;

18 * Sec. 9. AS 16.05.940 is amended by adding new paragraphs to read:

19 (28) "fish stock" means a species, subspecies, geographic
20 grouping or other category of fish manageable as a unit;

21 (29) "game population" means a group of game animals of a
22 single species or geographic subgroup;

23 (30) "nonwasteful" means making reasonable use of a har-
24 vested fish or game animal or most of its parts;

25 (31) "residents of rural subsistence areas" means state
26 residents domiciled in rural areas of the state that the Board of
27 Fisheries and the Board of Game determine, under AS 16.05.258, are
28 customary and traditional subsistence use areas;

29 (32) "subsistence hunting" means the nonwasteful taking of

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game animals by a person qualified under AS 16.05.258 for subsistence uses by methods and means defined by the Board of Game.

* Sec. 10. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

* Sec. 11. This Act takes effect June 1, 1986.

1 IN THE SENATE

BY THE STATE AFFAIRS COMMITTEE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to fishing and hunting; and provid-
7 ing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. FINDINGS AND INTENT. (a) Sound management of fish and
10 wildlife is more likely to be achieved if the management of fish and wild-
11 life, including allocation among different uses, is done on a biological
12 basis, rather than on the basis of land ownership.

13 (b) Maintaining healthy populations of fish and wildlife is important
14 to the state because healthy populations provide opportunities for a sub-
15 sistence life style, for trophy and other sport hunting and fishing, for
16 commercial fishing and for wildlife viewing.

17 (c) To assure that these opportunities remain reasonably available it
18 is necessary

19 (1) that there be an equitable balance among sport, commercial,
20 subsistence, and nonconsumptive needs;

21 (2) that, when all consumptive uses of fish and game cannot be
22 accommodated without harming the resource, there be a reasonable preference
23 for subsistence use of fish stocks and game populations that are important
24 to subsistence uses;

25 (3) that the Board of Fisheries and the Board of Game have the
26 authority, flexibility, and information needed to maintain sustained yield,
27 healthy populations, and opportunities for subsistence, sport, commercial
28 and other consumptive and nonconsumptive uses of fish and game; and

29 (4) that the Board of Fisheries and the Board of Game have

16.05.050(14) New Section

The Board of Fish and Game
Make recommendations to the

regarding adoption, amendment and repeal of ~~the~~ regulations
Regarding all fish, wildlife or fish or wildlife mgmt.
(15) Provide information to the Board of Fish and Game
needed for them to carry out their statutory
mandated duties.

authority to establish subsistence permit programs.

* Sec. 2. AS 16.05.094 is amended to read:

Sec. 16.05.094. DUTIES OF DIVISION OF SUBSISTENCE HUNTING AND FISHING. The division of subsistence hunting and fishing shall

(1) compile and analyze existing data and data gathered in future studies, and conduct studies to gather information, including data from subsistence users, the public, other divisions of the department, and other state or federal agencies, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state; while analyzing and studying, the division shall, as clearly as possible, identify

My concern about judgement aspects impair perception of objectivity provide info to board

(A) the species, stocks, and populations of fish and wildlife used for customary and traditional subsistence in each area of the state;

(B) the degree of significance that these species, stocks, and populations have to customary and traditional subsistence in each area of the state;

(C) the customary and traditional subsistence uses of fish and wildlife by species, stock, and population in each area of the state;

(D) the areas used for subsistence harvest, and areas formerly used for subsistence harvest, according to

(i) fish stock and wildlife population; and

(ii) subsistence user population;

(E) the areas, watersheds, flyways, and other habitats, whether or not within the state, used by fish and wildlife that are subject to subsistence uses; in identifying these habitats, the division shall seek the assistance of other divisions of the department, and other state or federal agencies having

cause problems to fall
about Fed agencies having
jurisdiction over w.l.

jurisdiction over fish and wildlife;

Bio?is

(F) the effect, if any, that subsistence use of each species, stock, or population has on the maintenance of healthy populations, on the sustained yield of these species, stocks, or populations, on other subsistence users, and on sport or commercial users whether or not in the state; in identifying these effects, the division shall seek the assistance of other divisions of the department and other state or federal agencies having jurisdiction over fish and wildlife;

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

prohib
expansive

(A) species, stock, or population of fish and wildlife;

(B) population of customary and traditional subsistence users; and

(C) subsistence use area;

(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 customary and traditional 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; in making recommendations

1 the division shall consult with appropriate divisions of the depart-
2 ment and, when appropriate, with other state or federal agencies
3 having jurisdiction over fish and wildlife; recommendations must be
4 approved by the commissioner;

5 ✓ (7) participate with other divisions of the department and
6 with other departments of state and federal government in the prepara-
7 tion of statewide, [AND] regional, or area management plans affecting
8 fish and wildlife and their habitats so that those plans recognize
9 [REORGANIZE] and incorporate the needs of subsistence users of fish
10 and game.]

11 * ~~Sec. 3~~ AS 16.05.251(a) is amended to read:

12 (a) The Board of Fisheries may adopt regulations it considers
13 advisable in accordance with the Administrative Procedure Act (AS 44.-
14 62) for

15 (1) setting apart and designating fish reserve areas,
16 refuges and sanctuaries in the waters of the state over which it has
17 jurisdiction, subject to the approval of the legislature;

18 < (2) managing fish reserve areas, refuges and sanctuaries; >

19 (3) establishing open and closed seasons and areas for the
20 taking of fish;

21 (4) [(3)] setting quotas, bag limits, harvest levels,
22 escapement levels, and sex, [AND] size, age, and other limitations
23 pertaining to [ON] the taking of fish [in waters subject to state
24 jurisdiction;] ?

25 (5) [(4)] establishing the means and methods, ^{including} such as gear,
26 tackle and vessels employed in the pursuit, capture, and transport of
27 fish;

28 (6) [(5)] establishing marking and identification require-
29 ments for means used in pursuit, capture, possession, tagging, and

1 in those areas for which special management is appropriate;

2 (14) establishing a procedure for administrative appeal of
3 board decisions; and

4 (15) regulating commercial, sport, subsistence, and personal
5 use fishing as needed for the conservation, development and utiliza-
6 tion of fisheries.

7 * Sec. 4. AS 16.05.255(a) is amended to read:

8 (a) The Board of Game may adopt regulations it considers advis-
9 able in accordance with the Administrative Procedure Act (AS 44.62)
10 for

11 (1) setting apart and designating game reserve areas,
12 refuges and sanctuaries in the water or on the land of the state over
13 which it has jurisdiction, subject to the approval of the legislature;

14 (2) managing game reserve areas, refuges and sanctuaries;

15 (3) establishing open and closed seasons and areas for the
16 taking of game;

17 (4) [(3)] establishing the means, [AND] methods, marking,
18 and identification requirements employed in the pursuit, capture,
19 possession, tagging and transport of game;

20 (5) [(4)] setting quotas, bag limits, harvest levels, and
21 sex, age, [AND] size, and other limitations on, and game population
22 goals pertaining to, the taking of game;

23 (6) [(5)] classifying game as game birds, song birds, big
24 game animals, fur bearing animals, predators or other categories;

25 (7) [(6)] methods, means, and harvest levels necessary to
26 control predation and competition among game in the state;

27 (8) protecting, maintaining, and improving watersheds [(7)
28 WATERSHED] and habitats [HABITAT IMPROVEMENT], and for the manage-
29 ment, conservation, protection, use, disposal, propagation and

1 stocking of game; watershed and habitat regulations may be adopted
2 under this paragraph only after consultation with the Department of
3 Natural Resources;

4 (9) [(8)] prohibiting the live capture, possession, trans-
5 port, or release of native or exotic game or their eggs;

6 (10) [(9)] establishing the times and dates during which the
7 issuance of game licenses, permits and registrations and the transfer
8 of permits and registrations between registration areas and game
9 management units or subunits is allowed;

10 (11) regulating sport hunts and subsistence hunts as needed
11 for the conservation, development, and utilization of game and nongame
12 species.

13 Sec. 5. AS 16.05 is amended by adding new sections to read:

14 *from problems of complexity*
15 Sec. 16.05.258. METHODS OF DETERMINING CUSTOMARY AND TRADITIONA
16 SUBSISTENCE USE AND ALLOCATING FISH AND GAME. (a) The Board of
17 Fisheries and the Board of Game, *separately or jointly - decided by the Board*
18 [acting jointly], shall:

19 (1) estimate the amount of fish and game needed to provide
20 a reasonable opportunity for rural residents to continue to engage in
21 a customary and traditional subsistence way of life; determinations
22 shall be based on research, analysis, comments, and recommendations of
23 *level of detail unnecessary* the [subsistence division] *Department of Fish + Game.*

24 (2) identify and designate the areas used for subsistence
25 harvest, and areas formerly used for subsistence harvest, according to
26 fish stock and game population, and according to subsistence user
27 population; the zones may overlap where different groups of subsis-
28 tence users have customarily and traditionally used the same areas;

29 (3) identify fish stocks and game populations that custom-
arily and traditionally have been used by, and are important to, rural
residents for subsistence use.

need better linkage between findings + Regs

1 (b) The Board of Fisheries or the Board of Game shall assess the
2 biological status of, respectively, the important subsistence fish
3 stocks and the important subsistence game populations in the use
4 zones, and shall determine whether a surplus may be harvested during
5 a regulatory year consistent with the sustained yield principle, sound
6 management principles, and the maintenance of healthy fish stocks,
7 game populations, or other wildlife populations.

8 (c) After identifying the important subsistence fish stocks or
9 game populations, the appropriate board shall determine the amount of
10 harvestable surplus of the stock or population that will provide a
11 reasonable opportunity to engage in customary and traditional subsis-
12 tence uses of the stocks or populations.

13 (d) The Board of Fisheries and the Board of Game shall adopt
14 regulations, in accordance with the Administrative Procedure Act
15 (AS 44.62), for subsistence fishing and subsistence hunting unless
16 adoption of the regulations could jeopardize or interfere with the
17 maintenance of fish stocks, game populations, or other wildlife popu-
18 lations on a sustained-yield basis, or could be inconsistent with
19 sound management principles or with the maintenance of healthy fish
20 stocks, game populations, or other wildlife populations. The
21 regulations may be the same as, different from, or in addition to
22 regulations governing other consumptive uses of the stocks or
23 populations.

24 *post*
25 *3 mi limit*
26 (e) Except as otherwise provided in this chapter or in other
27 state or federal laws, subsistence fishing and subsistence hunting [on
28 land or water subject to state jurisdiction is accorded a subsistence
29 preference over other consumptive takings and uses of fish, game, or
other wildlife. This preference is not a preference over
nonconsumptive takings and uses of fish, game, or other wildlife, such

1 as catch-and-release fishing if the fish stock is substantially
2 unrelated to customary and traditional subsistence needs, or over the
3 taking, capture, tagging, or transport of fish, game, or other
4 wildlife for biological or management purposes, or over nonconsumptive
5 uses of game in areas, such as national parks, that are open only to
6 subsistence hunting.]

7 *beyond reasonable*
8 *regulations*
9 *on seasons*
10 *by limits of*
11 *methods & means*
12 *?*
13 Whenever it is necessary to restrict subsistence
14 fishing or subsistence hunting [on land or water subject to state
15 jurisdiction] to protect the continued health and viability of a fish
16 stock, game population, or other wildlife population, assure sound
17 management, assure the maintenance of a fish stock or game population
18 on a sustained-yield basis, or protect continued future subsistence
19 fishing or subsistence hunting,] the preference may be limited by
20 applying the following criteria:

- 21 (1) customary and direct dependence on the fish stock or
22 game population as the mainstay of livelihood;
- 23 (2) local residency; and
- 24 (3) availability of alternative resources.

25 (f) Each board may adopt regulations under this chapter that
26 authorize taking for nonsubsistence uses a stock or population iden-
27 tified as important for subsistence use, to the extent that the non-
28 subsistence uses do not jeopardize or interfere with sound management
29 principles, sustained yield, the maintenance of healthy populations,
or the opportunity for taking these resources for [customary and
traditional] subsistence uses under this chapter.

30 *clarity*
31 *may*
32 *lose*
33 *center*
34 (g) The boards, acting jointly, shall adopt regulations that
35 establish criteria that the boards must consider when defining and
36 identifying customary and traditional subsistence uses and if appro-
37 priate customary and traditional subsistence use areas. The regula-
38 tions may include, but need not be limited to, the following criteria:

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

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

5 2 (3) [a] use pattern, consisting of methods and means of har-
6 vest characterized by efficiency and economy of effort and cost, and
7 conditioned by local circumstances;

8 3 (4) the consistent harvest and use of fish or game that is
9 near, or reasonably accessible from, the user's residence;

10 (5) the means of handling, preparing, preserving, and
11 storing fish or game that has been used traditionally by past genera-
12 tions, but not excluding appropriate recent technological advances;

13 (d) a use pattern that includes the handing down of knowl-
14 edge of fishing or hunting skills, values, and lore from generation to
15 generation;

16 (e) a use pattern in which the hunting or fishing effort or
17 the products of that effort are distributed or shared among others
18 within a definable community of persons, including customary trade,
19 barter, sharing, and gift-giving; customary trade does not include
20 significant commercial enterprises; a ^{men} [community] may include specific
21 villages or towns, with a historical ^{dependence on} [preponderance] of subsistence
22 use, and encompasses individuals, families, or groups who meet the
23 criteria described in this subsection; and

24 (f) a use pattern that includes reliance for subsistence
25 purposes on a wide diversity of the fish and game resources of an area
26 and provides substantial economic, cultural, social, and nutritional
27 elements of the subsistence user's life.

28 (h) If the appropriate board determines that (1) a particular
29 fish stock or game population is not a customary and traditional

1 subsistence resource or not a significant source of subsistence use
2 and (2) subsistence is not the best use of that fish stock or game
3 population, the board may provide that the fish stock or game popu-
4 lation may not be taken under subsistence regulations, but may be
5 taken under other regulations. // The Board of Fisheries may shift
6 subsistence use of a fish stock to a suitable prior or contempora-
7 neous stock of the same or a different species. The Board of Game may
8 shift subsistence use of a game population to another population if a
9 suitable alternative population of the same or a different species is
10 available. *define suitable*

11 (i) Each board may adopt regulations, under the Administrative
12 Procedure Act (AS 44.62), that prohibit the taking of fish or game for
13 subsistence uses by persons who have not qualified previously for
14 subsistence takings.

15 (j) The subsistence preference shall provide a reasonable oppor-
16 tunity for subsistence fishing or subsistence hunting. The preference
17 may vary, may be graduated, and may be balanced against the degree of
18 economic and traditional dependence on the resource in question. If
19 dependence on the resource in question is high, the preference shall
20 provide a full opportunity for satisfaction of subsistence needs,
21 including potentially exclusive subsistence use when a resource
22 shortage occurs. If dependence on the resource in question is low,
23 the preference may be less and need not be potentially exclusive. As
24 the degree of dependence varies, the degree of the preference may vary
25 accordingly.

26 Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries
27 and the Board of Game, acting jointly, shall establish an appeal
28 procedure for persons aggrieved by the adoption or repeal of a fishing
29 or hunting regulation. An aggrieved person must exhaust this

1 administrative remedy before bringing a legal action challenging the
2 adoption or repeal of the regulation.

3 * Sec. 6. AS 16.05.330 is amended by adding new subsections to read:

4 (c) The Board of Fisheries and the Board of Game may adopt
5 regulations, under the Administrative Procedure Act (AS 44.62), pro-
6 viding for the issuance and expiration of subsistence fishing permits,
7 subsistence hunting permits, and combination subsistence fishing and
8 hunting permits as needed for authorizing, regulating and monitoring
9 the subsistence harvest of fish and game. The boards shall adopt
10 these regulations when the subsistence preference requires a reduction
11 in the harvest of a fish stock or game population by nonsubsistence
12 users, or when special seasons, bag limits or other provisions are
13 necessary, to provide a reasonable opportunity for subsistence tak-
14 ings. A permit program need not be established in any particular area
15 of the state or for any particular fish stock or game population
16 unless circumstances warrant.

17 (d) Each board may establish programs ^{for} [to] issue ^{ance of} subsistence
18 permits [to individuals, groups, communities, villages, or areas.]
19 Nothing in this section shall be construed as altering other require-
20 ments of state or federal law for licenses, permits, stamps, tags, or
21 seals.

22 (e) With the assistance of the department, the boards shall
23 provide reasonable public notice of the following information to users
24 of a group, community, village, or area subsistence permit:

25 (1) the terms of the permit;

26 (2) the fish stocks and game populations authorized to be
27 taken under the permit;

28 (3) the subsistence use areas covered by the permit.

29 [(f) The Board of Fisheries and the Board of Game may use village

1 and regional corporations formed under 43 U.S.C. 1601 - 1628 (Alaska
2 Native Claims Settlement Act) and community, postal, media, or other
3 services appropriate for providing notice under (e) of this section.]

4 (g) The commissioner shall administer subsistence permit pro-
5 grams that may be established. The commissioner may appoint state
6 employees or other persons to take applications and issue permits and
7 tags. A person appointed by the commissioner, may administer oaths
8 for permit and tag applications. The commissioner or the appropriate
9 board may require a report from persons using a permit concerning the
10 time, manner, and place of taking fish and game, the kinds and
11 quantity taken, and other information helpful in administering the
12 fish and game resources of the state. Except for state employees, a
13 person appointed by the commissioner under this subsection is entitled
14 to compensation of \$50 per year or \$1 for each permit or tag issued,
15 whichever is greater.

16 (h) A person who holds a limited entry permit may not engage in
17 subsistence fishing for a species of fish authorized under the limited
18 entry permit unless the person proves to the satisfaction of the
19 commissioner's appointee that

20 (1) the limited entry permit was not and will not be used
21 during the season in which the subsistence fishing occurred or is to
22 occur;

23 (2) the species of fish was not taken under the limited
24 entry permit for personal or family consumption; or

25 (3) if a species of fish taken under the limited entry
26 permit was used or kept for personal or family consumption, the person
27 needs additional subsistence fish of the same species for reasons
28 approved by the department.

29 Sec. 7. AS 16.05.930(e) is amended to read:

1 (e) This chapter does not prevent the traditional trade or
2 barter of fish and game taken by subsistence hunting or subsistence
3 fishing, except that the commissioner may prohibit the trade or barter
4 of subsistence-taken fish and game by regulation, emergency order, or
5 otherwise, if a determination on the record is made that the trade or
6 barter is resulting in a waste of the resource, damage to fish stocks
7 or game populations, or circumvention of fish or game management
8 programs.

9 * Sec. 8. AS 16.05.940(22) is amended to read:

10 *the out ind.* (22) "subsistence fishing" means the nonwasteful taking of,
11 *bins* fishing for, or possession of fish, shellfish, or other fisheries
12 *work* resources by a person qualified under AS 16.05.258 for subsistence
13 uses with gill net, seine, fish wheel, long line, or other methods and
14 means defined by the Board of Fisheries;

15 * Sec. 9. AS 16.05.940(23) is amended to read:

16 (23) "subsistence uses" means the nonwasteful, customary and
17 traditional uses by a resident of rural [IN] Alaska of wild, renewable
18 resources for direct personal or family consumption as food, shelter,
19 fuel, clothing, tools, or transportation, for the making and selling
20 of handicraft articles out of nonedible by-products of fish and wild-
21 life resources taken for personal or family consumption, and for the
22 customary trade, barter, or sharing for personal or family consump-
23 tion; in [FOR THE PURPOSES OF] this paragraph, "family" means [ALL]
24 persons related by blood, marriage, or adoption, and a [ANY] person
25 living in [WITHIN] the household on a permanent basis;

26 * Sec. 10. AS 16.05.940 is amended by adding new paragraphs to read:

27 (28) "fish stock" means a species, subspecies, geographic
28 grouping or other category of fish manageable as a unit, [that, at any
29 time during any season of the year, may be found in water subject to

1 state jurisdiction;

2 (29) "game population" means a group of game animals of a
3 single species or subgroup [whose members in whole or in part use, or
4 may be found at any time or during any season of the year in or on,
5 land, air, or water subject to state jurisdiction;]

6 (30) "nonwasteful" means making reasonable use of a har-
7 vested fish or game animal or most of its parts;

8 (31) "resident of rural Alaska" means a state resident
9 engaged in customary and traditional subsistence as a way of life;

10 *take out*
11 *incl. bias* (32) "subsistence hunting" means the nonwasteful taking of
12 game animals by a person qualified under AS 16.05.258 for subsistence
13 uses by methods and means defined by the Board of Game.

14 * Sec. 11. AS 16.05.251(b), 16.05.255(b), and 16.05.257(b) are re-
15 pealed. *Repeal all*

16 * Sec. 12. This Act takes effect June 1, 1986.

17
18 domiciled in a rural area of the state that is
19 determined to be a customary and traditional
20 subsistence use area by the Boards of Fish and
21 Game under AS 16.05.258.
22
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1 IN THE SENATE

BY THE STATE AFFAIRS COMMITTEE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to fishing and hunting; and provid-
7 ing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. FINDINGS AND INTENT. (a) Sound management of fish and
10 wildlife is more likely to be achieved if the management of fish and wild-
11 life, including allocation among different uses, is done on a biological
12 basis, rather than on the basis of land ownership.

13 (b) Maintaining healthy populations of fish and wildlife is important
14 to the state because healthy populations provide opportunities for a sub-
15 sistence life style, for trophy and other sport hunting and fishing, for
16 commercial fishing and for wildlife viewing.

17 (c) To assure that these opportunities remain reasonably available it
18 is necessary

19 (1) that there be an equitable balance among sport, commercial,
20 subsistence, and nonconsumptive needs;

21 (2) that, when all consumptive uses of fish and game cannot be
22 accommodated without harming the resource, there be a reasonable preference
23 for subsistence use of fish stocks and game populations that are important
24 to subsistence uses;

25 (3) that the Board of Fisheries and the Board of Game have the
26 authority, flexibility, and information needed to maintain sustained yield,
27 healthy populations, and opportunities for subsistence, sport, commercial
28 and other consumptive and nonconsumptive uses of fish and game; and

29 (4) that the Board of Fisheries and the Board of Game have

try - detailed v. general charge

1 authority to establish subsistence permit programs.

2 * Sec. 2. AS 16.05.094 is amended to read:

3 [Sec. 16.05.094. DUTIES OF DIVISION OF SUBSISTENCE HUNTING AND
4 FISHING. The division of subsistence hunting and fishing shall

5 (1) compile and analyze existing data and data gathered in
6 future studies, and conduct studies to gather information, including
7 data from subsistence users, the public, other divisions of the de-
8 partment, and other state or federal agencies, on all aspects of the
9 role of subsistence hunting and fishing in the lives of the residents
10 of the state; while analyzing and studying, the division shall, as
11 clearly as possible, identify

12 try
13 concern about
14 judgement
15 aspects
16 impair
17 perception
18 of objectivity
19 provide
20 input to
21 board

(A) the species, stocks, and populations of fish and
13 wildlife used for customary and traditional subsistence in each
14 area of the state;

(B) the degree of significance that these species,
16 stocks, and populations have to customary and traditional subsis-
17 tence in each area of the state;

(C) the customary and traditional subsistence uses of
19 fish and wildlife by species, stock, and population in each area
20 of the state;

(D) the areas used for subsistence harvest, and areas
22 formerly used for subsistence harvest, according to

(i) fish stock and wildlife population; and

(ii) subsistence user population;

(E) the areas, watersheds, flyways, and other habi-
26 tats, whether or not within the state, used by fish and wildlife
27 that are subject to subsistence uses; in identifying these habi-
28 tats, the division shall seek the assistance of other divisions
29 of the department, and other state or federal agencies having

cause problems to talk
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jurisdiction over w.l.

1 jurisdiction over fish and wildlife;

2 (F) the effect, if any, that subsistence use of each
3 species, stock, or population has on the maintenance of healthy
4 populations, on the sustained yield of these species, stocks, or
5 populations, on other subsistence users, and on sport or commer-
6 cial users whether or not in the state; in identifying these
7 effects, the division shall seek the assistance of other divi-
8 sions of the department and other state or federal agencies
9 having jurisdiction over fish and wildlife;

610?5

10 (2) quantify or estimate the amount, nutritional value, and
11 extent of dependence on food acquired through subsistence hunting and
12 fishing according to

13 (A) species, stock, or population of fish and wild-
14 life;

15 (B) population of customary and traditional subsis-
16 tence users; and

17 (C) subsistence use area;

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

20 (4) assist the department, the Board of Fisheries, and the
21 Board of Game in determining what uses of fish and game, as well as
22 which users and what methods, should be termed customary and tradi-
23 tional subsistence uses, users, and methods;

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

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

prohib
expansive

1 the division shall consult with appropriate divisions of the depart-
2 ment and, when appropriate, with other state or federal agencies
3 having jurisdiction over fish and wildlife; recommendations must be
4 approved by the commissioner;

5 ✓ (7) participate with other divisions of the department and
6 with other departments of state and federal government in the prepara-
7 tion of statewide, [AND] regional, or area management plans affecting
8 fish and wildlife and their habitats so that those plans recognize
9 [REORGANIZE] and incorporate the needs of subsistence users of fish
10 and game.]

11 * Sec. 3. AS 16.05.251(a) is amended to read:

12 (a) The Board of Fisheries may adopt regulations it considers
13 advisable in accordance with the Administrative Procedure Act (AS 44.-
14 62) for

15 (1) setting apart and designating fish reserve areas,
16 refuges and sanctuaries in the waters of the state over which it has
17 jurisdiction, subject to the approval of the legislature;

18 (2) managing fish reserve areas, refuges and sanctuaries;

19 (3) establishing open and closed seasons and areas for the
20 taking of fish;

21 (4) [(3)] setting quotas, bag limits, harvest levels,
22 escapement levels, and sex, [AND] size, age, and other limitations
23 pertaining to [ON] the taking of fish in waters subject to state
24 jurisdiction;

25 (5) [(4)] establishing the means and methods, such as gear,
26 tackle and vessels employed in the pursuit, capture, and transport of
27 fish;

28 (6) [(5)] establishing marking and identification require-
29 ments for means used in pursuit, capture, possession, tagging, and

fig. gov's off. - deemphasis on personal use

1 transport of fish;

2 (7) [(6)] classifying as commercial fish, sport fish,
3 personal use fish, subsistence fish, indigenous fish, exotic fish,
4 nonindigenous fish, hatchery fish, or predators or other categories
5 essential for regulatory purposes; a fish stock may be the subject of
6 more than one classification;

7 (8) protecting, maintaining and improving watersheds [(7)
8 WATERSHED] and habitats [HABITAT IMPROVEMENT], and for the management,
9 conservation, protection, use, disposal, propagation, and stocking of
10 fish; watershed and habitat regulations may be adopted under this
11 paragraph only after consultation with the Department of Natural
12 Resources; >

13 (9) [(8)] investigating and determining the extent and
14 effect of disease, predation, and competition among fish in the state,
15 and exercising control measures considered necessary to the resources
16 of the state;

17 (10) [(9)] prohibiting and regulating the live capture,
18 possession, transport, or release of [NATIVE OR EXOTIC] fish or their
19 eggs;

20 (11) [(10)] establishing seasons, areas, quotas and methods
21 of harvest for aquatic plants;

22 (12) [(11)] establishing the times and dates during which
23 the issuance of fishing licenses, permits and registrations and the
24 transfer of permits and registrations between registration areas is
25 allowed; however, this paragraph does not apply to permits issued or
26 transferred under AS 16.43;

27 (13) designating and regulating special fishing areas,
28 including personal use areas, trophy management areas, catch-and-
29 release areas, and children's fishing areas, and designating species

1 in those areas for which special management is appropriate;

2 (14) establishing a procedure for administrative appeal of
3 board decisions; and

4 (15) regulating commercial, sport, subsistence, and personal
5 use fishing as needed for the conservation, development and utiliza-
6 tion of fisheries.

7 * Sec. 4. AS 16.05.255(a) is amended to read:

8 (a) The Board of Game may adopt regulations it considers advis-
9 able in accordance with the Administrative Procedure Act (AS 44.62)
10 for

11 (1) setting apart and designating game reserve areas,
12 refuges and sanctuaries in the water or on the land of the state over
13 which it has jurisdiction, subject to the approval of the legislature;

14 (2) managing game reserve areas, refuges and sanctuaries;

15 (3) establishing open and closed seasons and areas for the
16 taking of game;

17 (4) [(3)] establishing the means, [AND] methods, marking,
18 and identification requirements employed in the pursuit, capture,
19 possession, tagging and transport of game;

20 (5) [(4)] setting quotas, bag limits, harvest levels, and
21 sex, age, [AND] size, and other limitations on, and game population
22 goals pertaining to, the taking of game;

23 (6) [(5)] classifying game as game birds, song birds, big
24 game animals, fur bearing animals, predators or other categories;

25 (7) [(6)] methods, means, and harvest levels necessary to
26 control predation and competition among game in the state;

27 (8) protecting, maintaining, and improving watersheds [(7)
28 WATERSHED] and habitats [HABITAT IMPROVEMENT], and for the manage-
29 ment, conservation, protection, use, disposal, propagation and

1 stocking of game; watershed and habitat regulations may be adopted
2 under this paragraph only after consultation with the Department of
3 Natural Resources;

4 (9) [(8)] prohibiting the live capture, possession, trans-
5 port, or release of native or exotic game or their eggs;

6 (10) [(9)] establishing the times and dates during which the
7 issuance of game licenses, permits and registrations and the transfer
8 of permits and registrations between registration areas and game
9 management units or subunits is allowed;

10 (11) regulating sport hunts and subsistence hunts as needed
11 for the conservation, development, and utilization of game and nongame
12 species.

13 Sec. 5. AS 16.05 is amended by adding new sections to read:

14 *frs problems of complexity* Sec. 16.05.258. METHODS OF DETERMINING CUSTOMARY AND TRADITIONAL
15 SUBSISTENCE USE AND ALLOCATING FISH AND GAME. (a) The Board of
16 Fisheries and the Board of Game, acting jointly, shall:

17 (1) estimate the amount of fish and game needed to provide
18 a reasonable opportunity for rural residents to continue to engage in
19 a customary and traditional subsistence way of life; determinations
20 shall be based on research, analysis, comments, and recommendations of
21 *level of detail unnecessary* the subsistence division;

22 (2) identify and designate the areas used for subsistence
23 *number for number* harvest, and areas formerly used for subsistence harvest, according to
24 *up small number* fish stock and game population, and according to subsistence user
25 population; the zones may overlap where different groups of subsis-
26 tence users have customarily and traditionally used the same areas;

27 (3) identify fish stocks and game populations that custom-
28 arily and traditionally have been used by, and are important to, rural
29 residents for subsistence use.

need better linkage between findings & regs

1 (b) The Board of Fisheries or the Board of Game shall assess the
2 biological status of, respectively, the important subsistence fish
3 stocks and the important subsistence game populations in the use
4 zones, and shall determine whether a surplus may be harvested during
5 a regulatory year consistent with the sustained yield principle, sound
6 management principles, and the maintenance of healthy fish stocks,
7 game populations, or other wildlife populations.

8 (c) After identifying the important subsistence fish stocks or
9 game populations, the appropriate board shall determine the amount of
10 harvestable surplus of the stock or population that will provide a
11 reasonable opportunity to engage in customary and traditional subsis-
12 tence uses of the stocks or populations.

13 (d) The Board of Fisheries and the Board of Game shall adopt
14 regulations, in accordance with the Administrative Procedure Act
15 (AS 44.62), for subsistence fishing and subsistence hunting unless
16 adoption of the regulations could jeopardize or interfere with the
17 maintenance of fish stocks, game populations, or other wildlife popu-
18 lations on a sustained-yield basis, or could be inconsistent with
19 sound management principles or with the maintenance of healthy fish
20 stocks, game populations, or other wildlife populations. The
21 regulations may be the same as, different from, or in addition to
22 regulations governing other consumptive uses of the stocks or
23 populations.

24 (e) Except as otherwise provided in this chapter or in other
25 state or federal laws, subsistence fishing and subsistence hunting on
26 land or water subject to state jurisdiction ^{why?} is accorded a subsistence
27 preference over other consumptive takings and uses of fish, game, or
28 other wildlife. This preference is not a preference over
29 nonconsumptive takings and uses of fish, game, or other wildlife, such

1 as catch-and-release fishing if the fish stock is substantially
2 unrelated to customary and traditional subsistence needs, or over the
3 taking, capture, tagging, or transport of fish, game, or other
4 wildlife for biological or management purposes, or over nonconsumptive
5 uses of game in areas, such as national parks, that are open only to
6 subsistence hunting. Whenever it is necessary to restrict subsistence
7 fishing or subsistence hunting on land or water subject to state
8 jurisdiction to protect the continued health and viability of a fish
9 stock, game population, or other wildlife population, assure sound
10 management, assure the maintenance of a fish stock or game population
11 on a sustained-yield basis, or protect continued future subsistence
12 fishing or subsistence hunting, the preference may be limited by
13 applying the following criteria:

14 (1) customary and direct dependence on the fish stock or
15 game population as the mainstay of livelihood;

16 (2) local residency; and

17 (3) availability of alternative resources.

18 (f) Each board may adopt regulations under this chapter that
19 authorize taking for nonsubsistence uses a stock or population iden-
20 tified as important for subsistence use, to the extent that the non-
21 subsistence uses do not jeopardize or interfere with sound management
22 principles, sustained yield, the maintenance of healthy populations,
23 or the opportunity for taking these resources for customary and
24 traditional subsistence uses under this chapter.

25 *clarity* (g) The boards, acting jointly, shall adopt regulations that
26 *may lose center* establish criteria that the boards must consider when defining and
27 identifying customary and traditional subsistence uses and, *if appro-*
28 *]* appropriate, customary and traditional subsistence use areas. The regula-
29 tions may include, but need not be limited to, the following criteria:

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

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

5 (3) a use pattern consisting of methods and means of har-
6 vest characterized by efficiency and economy of effort and cost, and
7 conditioned by local circumstances;

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

10 (5) the means of handling, preparing, preserving, and
11 storing fish or game that has been used traditionally by past genera-
12 tions, but not excluding appropriate recent technological advances;

13 (6) a use pattern that includes the handing down of knowl-
14 edge of fishing or hunting skills, values, and lore from generation to
15 generation;

16 (7) a use pattern in which the hunting or fishing effort or
17 the products of that effort are distributed or shared among others
18 within a definable community of persons, including customary trade,
19 barter, sharing, and gift-giving; customary trade does not include
20 significant commercial enterprises; a community may include specific
21 villages or towns, with a historical preponderance of subsistence
22 users, and encompasses individuals, families, or groups who meet the
23 criteria described in this subsection; and

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

28 (h) If the appropriate board determines that (1) a particular
29 fish stock or game population is not a customary and traditional

1 subsistence resource or not a significant source of subsistence use
2 and (2) subsistence is not the best use of that fish stock or game
3 population, the board may provide that the fish stock or game popu-
4 lation may not be taken under subsistence regulations, but may be
5 taken under other regulations. // The Board of Fisheries may shift
6 subsistence use of a fish stock to a suitable prior or contempora-
7 neous stock of the same or a different species. The Board of Game may
8 shift subsistence use of a game population to another population if a
9 suitable alternative population of the same or a different species is
10 available.

11 (i) Each board may adopt regulations, under the Administrative
12 Procedure Act (AS 44.62), that prohibit the taking of fish or game for
13 subsistence uses by persons who have not qualified previously for
14 subsistence takings.

15 (j) The subsistence preference shall provide a reasonable oppor-
16 tunity for subsistence fishing or subsistence hunting. The preference
17 may vary, may be graduated, and may be balanced against the degree of
18 economic and traditional dependence on the resource in question. If
19 dependence on the resource in question is high, the preference shall
20 provide a full opportunity for satisfaction of subsistence needs,
21 including potentially exclusive subsistence use when a resource
22 shortage occurs. If dependence on the resource in question is low,
23 the preference may be less and need not be potentially exclusive. As
24 the degree of dependence varies, the degree of the preference may vary
25 accordingly.

26 Sec. 16.05.259. ADMINISTRATIVE APPEALS. The Board of Fisheries
27 and the Board of Game, acting jointly, shall establish an appeal
28 procedure for persons aggrieved by the adoption or repeal of a fishing
29 or hunting regulation. An aggrieved person must exhaust this

1 administrative remedy before bringing a legal action challenging the
2 adoption or repeal of the regulation.

3 * Sec. 6. AS 16.05.330 is amended by adding new subsections to read:

4 (c) The Board of Fisheries and the Board of Game may adopt
5 regulations, under the Administrative Procedure Act (AS 44.62), pro-
6 viding for the issuance and expiration of subsistence fishing permits,
7 subsistence hunting permits, and combination subsistence fishing and
8 hunting permits as needed for authorizing, regulating and monitoring
9 the subsistence harvest of fish and game. The boards shall adopt
10 these regulations when the subsistence preference requires a reduction
11 in the harvest of a fish stock or game population by nonsubsistence
12 users, or when special seasons, bag limits or other provisions are
13 necessary, to provide a reasonable opportunity for subsistence tak-
14 ings. A permit program need not be established in any particular area
15 of the state or for any particular fish stock or game population
16 unless circumstances warrant.

17 (d) Each board may establish programs to issue subsistence
18 permits to individuals, groups, communities, villages, or areas.
19 Nothing in this section shall be construed as altering other require-
20 ments of state or federal law for licenses, permits, stamps, tags, or
21 seals.

22 (e) With the assistance of the department, the boards shall
23 provide reasonable public notice of the following information to users
24 of a group, community, village, or area subsistence permit:

- 25 *does this need some major new program*
- 26 (1) the terms of the permit;
 - 27 (2) the fish stocks and game populations authorized to be
28 taken under the permit;
 - 29 (3) the subsistence use areas covered by the permit.

(f) The Board of Fisheries and the Board of Game may use village

1 and regional corporations formed under 43 U.S.C. 1601 - 1628 (Alaska
2 Native Claims Settlement Act) and community, postal, media, or other
3 services appropriate for providing notice under (e) of this section.

4 (g) The commissioner shall administer subsistence permit pro-
5 grams that may be established. The commissioner may appoint state
6 employees or other persons to take applications and issue permits and
7 tags. A person appointed by the commissioner, may administer oaths
8 for permit and tag applications. The commissioner or the appropriate
9 board may require a report from persons using a permit concerning the
10 time, manner, and place of taking fish and game, the kinds and
11 quantity taken, and other information helpful in administering the
12 fish and game resources of the state. Except for state employees, a
13 person appointed by the commissioner under this subsection is entitled
14 to compensation of \$50 per year or \$1 for each permit or tag issued,
15 whichever is greater.

16 (h) A person who holds a limited entry permit may not engage in
17 subsistence fishing for a species of fish authorized under the limited
18 entry permit unless the person proves to the satisfaction of the
19 commissioner's appointee that

20 (1) the limited entry permit was not and will not be used
21 during the season in which the subsistence fishing occurred or is to
22 occur;

23 (2) the species of fish was not taken under the limited
24 entry permit for personal or family consumption; or

25 (3) if a species of fish taken under the limited entry
26 permit was used or kept for personal or family consumption, the person
27 needs additional subsistence fish of the same species for reasons
28 approved by the department.

29 Sec. 7. AS 16.05.930(e) is amended to read:

1 (e) This chapter does not prevent the traditional trade or
2 barter of fish and game taken by subsistence hunting or subsistence
3 fishing, except that the commissioner may prohibit the trade or barter
4 of subsistence-taken fish and game by regulation, emergency order, or
5 otherwise, if a determination on the record is made that the trade or
6 barter is resulting in a waste of the resource, damage to fish stocks
7 or game populations, or circumvention of fish or game management
8 programs.

9 * Sec. 8. AS 16.05.940(22) is amended to read:

10 *the out ind.* (22) "subsistence fishing" means the nonwasteful taking of,
11 *bins* fishing for, or possession of fish, shellfish, or other fisheries
12 resources by a person qualified under AS 16.05.258 for subsistence
13 uses with gill net, seine, fish wheel, long line, or other methods and
14 means defined by the Board of Fisheries;

15 * Sec. 9. AS 16.05.940(23) is amended to read:

16 (23) "subsistence uses" means the nonwasteful, customary and
17 traditional uses by a resident of rural [IN] Alaska of wild, renewable
18 resources for direct personal or family consumption as food, shelter,
19 fuel, clothing, tools, or transportation, for the making and selling
20 of handicraft articles out of nonedible by-products of fish and wild-
21 life resources taken for personal or family consumption, and for the
22 customary trade, barter, or sharing for personal or family consump-
23 tion; in [FOR THE PURPOSES OF] this paragraph, "family" means [ALL]
24 persons related by blood, marriage, or adoption, and a [ANY] person
25 living in [WITHIN] the household on a permanent basis;


26 * Sec. 10. AS 16.05.940 is amended by adding new paragraphs to read:

27 (28) "fish stock" means a species, subspecies, geographic
28 grouping or other category of fish manageable as a unit that, at any
29 time during any season of the year, may be found in water subject to

1 state jurisdiction;

2 (29) "game population" means a group of game animals of a
3 single species or subgroup whose members in whole or in part use, or
4 may be found at any time or during any season of the year in or on,
5 land, air, or water subject to state jurisdiction;

6 (30) "nonwasteful" means making reasonable use of a har-
7 vested fish or game animal or most of its parts;

8  (31) "resident of rural Alaska" means a state resident
9 engaged in customary and traditional subsistence as a way of life;

10 take out (32) "subsistence hunting" means the nonwasteful taking of
11 incl. bias game animals by a person qualified under AS 16.05.258 for subsistence
12 uses by methods and means defined by the Board of Game.

13 * Sec. 11. AS 16.05.251(b), 16.05.255(b), and 16.05.257(h) are re-
14 pealed. Repeal all ↑

15 * Sec. 12. This Act takes effect June 1, 1986.
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Agrees w/ prob on def of rural resident
prob w/ indiv application.

Part V. Priority

Law - concern over graduated part.

doesn't like $\left\langle \begin{array}{l} \text{sound management principle} \\ \text{healthy pop} \end{array} \right\rangle$

Thinks is too
nebulous

says not mentioned
in AN/CA

+ wildlife
what does it mean - define

ch on subsis cust - and trud modification

Subsistence div respon. - letter of intent
which div

appeal process - nobody may sue until
ash board ~~to reconsider~~ change
it.

fish, same, wildlife
inclusive

limited entry section

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611



December 24, 1985

Senator Mitch Abood
Committee on State Affairs
Alaska Senate
1024 West Sixth Avenue
Anchorage, Alaska 99501

Dear Senator Abood:

Since its inception in 1966, the Alaska Federation of Natives (AFN) and its member corporations, associations and villages have worked closely with the Alaska Legislature, the United States Congress and other interested parties to ensure that statutes and regulations governing the taking of fish stocks and game populations in Alaska recognize and protect - and in appropriate instances provide a priority for - the taking of such stocks and populations by rural Alaska residents (both Native and nonNative) for subsistence uses. For that reason, I appreciate the opportunity to review and provide preliminary comments on SB 8001, the draft subsistence legislation which your staff has prepared in anticipation of the upcoming legislative session.

As drafted, SB 8001 raises a number of technical concerns as to how the regulatory scheme it would establish is intended to operate in practice. In addition, SB 8001 raises policy concerns of elemental importance. However, before addressing each in detail, it might be helpful to briefly review the goals which AFN believes any new subsistence legislation should be drafted to achieve.

As you know, a small, but vocal, group of Alaskans have long opposed the policies embodied in both the 1978 state and the 1980 federal subsistence statutes. In particular, they believe that providing a priority for the taking of fish stocks and game populations by rural Alaskans for subsistence uses is neither necessary nor appropriate. In 1982 this group obtained the requisite number of signatures to put an initiative to repeal the state subsistence statute on the 1982 ballot. As a result, the subsistence issue was thoroughly debated statewide during the months preceding the 1982 election. After considering all of the arguments both pro and con, Alaskans voted - by an overwhelming margin - against the initiative and in favor of retaining the state subsistence statute and the priority for subsistence

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uses which it contains. It is significant that throughout the course of the 1982 debate both the sponsors and the opponents of the initiative assumed that the 1978 statute limited the identification of "subsistence uses" of fish stocks and game populations to hunting and fishing for personal and family consumption by residents of rural Alaska.

With the defeat of the subsistence initiative in November 1982, AFN hoped that having been put to a vote of the people, the controversy about the subsistence issue and the acrimony which it had engendered would subside. And indeed it did. For the two years succeeding the 1982 election the regulatory system established by the subsistence statute worked and the members of the Board of Fisheries and Board of Game had little difficulty crafting regulations which both ensured that subsistence uses by rural residents were protected and at the same time provided all Alaskans with a fair and reasonable opportunity to hunt and fish.

Unfortunately, the quiet was shattered when the Alaska Supreme Court issued its opinion in Madison v. Alaska Department of Fish and Game. Significantly, the Alaska Supreme Court did not hold either that limiting the identification of "subsistence uses" of fish stocks and game populations to hunting and fishing for personal and family consumption by rural Alaska residents was not an important public policy or that limiting "subsistence uses" to rural Alaska residents violates either the Alaska or United States Constitution. Rather, the Court held that based upon the legislative history of the 1978 statute, it did not believe that the members of the Tenth Alaska Legislature intended to limit the purview of the statutory definition of the term "subsistence uses" to rural Alaska residents.

Although including all Alaskans within the purview of the "subsistence uses" definition may initially seem an attractive result to many hunters and fishermen living in urban areas such as Anchorage and Fairbanks, in actual practice doing so has severely limited the ability of the Board of Fisheries and Board of Game to regulate hunting and fishing in a fair and rational manner, and, ironically, has resulted in a significant reduction in hunting opportunities for urban Alaskans. And since the definition of "subsistence uses" in section 803 of the Alaska National Interest Lands Conservation Act (ANILCA) specifically limits the purview of that definition to "rural Alaska residents", the Madison opinion has also resulted in a finding by the Secretary of the Interior that the state subsistence management program

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is no longer in compliance with the federal regulatory guidelines set forth in title VIII of that statute.

For these reasons, among others, Governor Sheffield submitted legislation to the legislature last session to amend the 1978 statute in a manner consistent with ANILCA. The House Resources Committee held a series of statewide hearings on the subsistence issue and drafted and reported a substitute for the Governor's bill. The House Resources Committee bill was modified by the House Judiciary Committee and passed by the Alaska House of Representatives. The Senate State Affairs Committee, however, declined to consider and report any subsistence legislation prior to adjournment. Rather, the Committee held several hearings during the interim for the purpose of obtaining information necessary to draft and introduce its own bill. It is my understanding that SB 8001 reflects the Committee's work in this regard.

In commenting on SB 8001 it is important to restate the primary goal which AFN believes any new subsistence legislation should reflect. In brief, the purpose of subsistence legislation enacted during the 1986 session should be to amend the regulatory guidelines in the 1978 statute in a manner consistent with the regulatory guidelines set forth in title VIII of ANILCA. To do otherwise would defeat the very purpose the legislature has expended so much time and energy on the subsistence issue since the Madison decision and would do nothing to alleviate the threat that the Secretary of the Interior may compel the Board of Fisheries and Board of Game to adopt fishing and hunting regulations pursuant to federal, rather than state, regulatory standards.

Unfortunately, as presently drafted, the regulatory standards set forth in SB 8001 are at substantial variance with the regulatory standards established by title VIII of ANILCA. In addition, at least one section of the statute may be unconstitutional.

In discerning the regulatory standards established by title VIII of ANILCA, the reports of the congressional committees which drafted and reported the title and the primary sponsor's explanation of the title are of considerable importance. Indeed, the United States Court of Appeals for the Ninth Circuit has held that the views of Representative Morris K. Udall, the primary sponsor of title VIII and the chairman of the House Committee on Interior and Insular Affairs, are a definitive explanation of the congressional intent embodied in title VIII. See People of the Village of Gambell v. Clark, F.2d (1985).

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In a number of significant respects, section 5 of SB 8001 (proposed A.S. 16.05.258) is inconsistent with sections 803 and 804 of ANILCA as detailed in both the relevant committee reports and Representative Udall's explanation of title VIII.

Proposed A.S. 16.05.258(h), for example, authorizes the Board of Fisheries and Board of Game to exempt a particular fish stock or game population from the subsistence management system if it determines that the particular stock or population is not the subject of "significant" subsistence uses and that subsistence uses are not the "best use" of the stock or population. In addition, the section also authorizes a board to eliminate subsistence uses of a fish stock or game population even of a stock or population which is subject to significant subsistence uses if the board can find another stock or population which it determines to be "suitable" for subsistence uses. The "suitable" stock or population upon which subsistence uses may be displaced need not even be of the same species as the original stock or population from which subsistence uses are being eliminated.

This approach directly contravenes the regulatory standards established by sections 803 and 804 of ANILCA. The Senate Committee on Energy and Natural Resources was the primary drafter of the version of title VIII enacted into law. The Committee's report on the title clearly and unequivocally states that the ANILCA subsistence priority applies to every fish stock and game population. Whether a particular stock or population is or is not the subject of subsistence uses - and if so to what extent - is a question of fact to be evaluated on a case-by-case basis. If a stock or population is the subject of subsistence uses (either to a significant or a less than significant extent), sections 803 and 804 require the Board of Fisheries or Board of Game, as appropriate, to adopt regulations which authorize - and if necessary provide a priority for - subsistence uses of the stock or population. As the Committee explained at the time it first reported title VIII:

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 need not be imposed by the State rulemaking authority. However, if the continued viability of a particular population

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or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, the State rulemaking authority...is required by this section to establish regulations which restrict the taking of such population to Alaska residents engaged in subsistence uses. If "subsistence uses" must be further restricted to protect the continued viability of the population or to ensure the satisfaction of rural subsistence needs, the State rulemaking authority...must limit such uses to local residents of the affected area, or, if necessary, only those local residents residents with the most customary and direct dependence on the population as the mainstay of livelihood and with the least access to alternative food supplies. Senate Rept. No. 95-1300, 95th Cong. 2d Sess. 221-222 (1978)(Emphasis added). See also Senate Rept. No. 96-413, 96th Cong., 1st Sess. 269-270 (1979).

This view is consistent with Representative Udall's explanation as to how the subsistence management system of which he was principal sponsor would operate:

"The subsistence preference [in section 804 of ANILCA] applies to individual wildlife populations and fish, and state regulation of the taking of each population and stock must be consistent with section 804. The State must identify the customary and traditional subsistence uses of each population and stock by rural residents." 126 Cong. Rec. 29279 (November 12, 1980)(remarks of Morris K. Udall)(hereinafter "Udall") (Emphasis added).

Consequently, to the extent A.S. 16.05.258(h) authorizes the Board of Fisheries or Board of Game to restrict or eliminate subsistence uses of a fish stock or game population which it knows has been the subject of such uses, A.S. 16.05.258(h) is inconsistent with sections 803 and 804 of ANILCA.

A.S. 16.05.258(j) is also inconsistent with ANILCA. The text of the subsection implies that the boards may identify greater

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and lesser degrees of subsistence uses of a fish stock or game population and that if it determines that particular subsistence uses of a particular stock or population reflect "dependence on the resource...[which] is low", the board need not eliminate other uses before restricting subsistence uses. As articulated by the Senate Committee on Energy and Natural Resources in the text cited above, such a result is directly contrary to the regulatory standard established by sections 803 and 804 of ANILCA. It is also directly contrary to Representative Udall's intent. As Representative Udall explained on November 13, 1980:

"Once the customary and traditional subsistence uses of a particular wildlife population or fish stock have been determined, the State must next determine whether its viability is such that the harvest demands of all user groups can be satisfied without endangering the health of the resource. If the population is sufficiently viable then all user groups may participate in the harvest, but regulations concerning such subjects as seasons and means of taking must be adopted which have the least adverse impact upon rural residents engaged in subsistence uses of the population.

If the population cannot safely sustain a harvest by all user groups, then the State must adopt regulations establishing subsistence uses as the priority uses of such population. All genuine subsistence uses must be met before the State may permit taking of the population for any type of non-subsistence uses." Udall 29280 (Emphasis added).

In a related regard, A.S. 16.05.330(h)'s prohibition on the taking of fish stocks for "subsistence uses" by any person who also fishes commercially for the same species is similarly inconsistent with ANILCA. It is also fundamentally unfair (one result of implementation of A.S. 16.05.330(h) would be to eliminate most of the subsistence salmon fisheries on the Kuskokwam and lower Yukon Rivers). Nothing in the text of title VIII or its

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legislative history indicates that the Congress intended the opportunity to engage in subsistence uses of a fish stock to be conditioned upon whether a person otherwise eligible to engage in such uses does or does not fish for the stock commercially. Indeed, the hardship which implementation of such a rule would impose is directly contrary to the congressional policy set forth in section 802 that regulatory activities "cause the least adverse impact possible on rural residents who depend upon subsistence uses..."

A.S. 16.05.258(i) is a cause for even greater concern. The subsection indicates that whether the taking of fish stocks and game populations for personal and family consumption by a rural Alaska resident is or is not a subsistence use is dependent upon whether the resident did or did not engage in such uses prior to enactment of SB 8001. In other words, the subsection grants today's rural hunters and fishermen grandfather rights to participate in the subsistence management system and then disenfranchises their children. Like the subsections previously discussed, A.S. 16.05.258(i) is inconsistent with the intent of Congress embodied in title VIII of ANILCA. As the Senate Committee on Energy and Natural Resources indicated unequivocally in 1979, the limitation of the identification of "subsistence uses" to rural Alaska residents:

...[I]s not intended to impose a "dura-
tional" rural residency requirement in the
definition [of "subsistence uses"] or im-
pede the traditional movement of Alaska
residents between the rural areas and the
major population centers and vice versa.
Senate Rept. No. 96-413, 96th Cong., 1st
Sess. 233 (1979).

Representative Udall has articulated the same intent albeit in even stronger language:

[W]e [i.e. the members of the House Com-
mittee on Interior and Insular Affairs]
promised that any legislation enacted
into law would recognize the importance
of the subsistence way of life to the
survival of the Alaska Native people,
and would contain management provisions
which recognize the responsibility of the

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Federal government to protect the opportunity from generation to generation for the continuation of subsistence uses by the Alaska Native people so that Alaska Natives now engaged in subsistence uses, their descendants, and their descendants' descendants, will have the opportunity determine for themselves their own cultural orientation and the rate and degree of evolution, if any, of their Alaska Native culture. We made good on that promise by including a detailed subsistence title in the version of H.R. 39 which was passed by the House of Representatives during the 95th Congress." Udall 29278 (Emphasis added).

Implementation of A.S. 16.05.258(i) would produce a result exactly the opposite of the result intended by both the Senate Committee on Energy and Natural Resources and Representative Udall. Eliminating "subsistence uses" over time (as persons now engaged in such uses become too old to hunt and fish) by keying eligibility to participate in "subsistence uses" on the date a hunter or fishermen first began hunting and fishing to help feed his family or first moved to rural Alaska is patently inconsistent with title VIII of ANILCA. In addition to its inconsistency with title VIII, limiting the class of hunters and fishermen eligible to participate in "subsistence uses" in this manner raises significant constitutional problems. Because classifying hunters and fishermen in this manner has no apparent rational basis, enactment of such a statute would violate the Equal Protection Clause of both the Alaska and United States Constitutions. It would also establish the type of durational residency requirement which the Congress has specifically prohibited and which rarely survives constitutional challenge.

Another section of SB 8001 is even more troubling. The only reason for enacting new subsistence legislation is to amend the 1978 statute to delegate the Board of Fisheries and Board of Game the regulatory authority; they possessed prior to the Madison decision and to conform the state regulatory standards to the regulatory standards set forth in title VIII of ANILCA. The only change needed to accomplish this goal is to limit the "subsistence uses" of fish stocks and game populations to the taking of such stocks and populations by "rural Alaska residents". Although section 8 of SB 8001 purports to achieve this goal

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by amending A.S. 16.05.940(23) to limit "subsistence uses" to uses "by a resident of rural Alaska", the same section defines the term "resident of rural Alaska" in a manner which allows persons who do not reside in rural Alaska to nevertheless be considered as doing so. Section 8 of SB 8001 amends A.S. 16.05.940 as follows:

(31) "resident of rural Alaska" means a state resident engaged in customary and traditional subsistence as a way of life.

The definition does not require the state resident to actually reside in any particular area of Alaska. Consequently, a resident of Anchorage, Fairbanks or Juneau "engaged in customary and traditional subsistence as a way of life" - a phrase which is not itself defined - would, as a matter of law, be considered a "resident of rural Alaska" and hence eligible to engage in "subsistence uses". Such a result is directly contrary to the intent of title VIII of ANILCA. As the Senate Committee on Energy and Natural Resources explained its intent in limiting the identification of "subsistence uses" exclusively to state residents who in fact reside in rural Alaska:

Although many residents of cities such as Ketchikan, Juneau, Anchorage, and Fairbanks harvest renewable resources from the public lands for personal and 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. Senate Rept. No. 96-413, 96th Cong., 1st Sess. 233 (1979) (Emphasis added).

Simply put, enactment of SB 8001 would defeat the very purpose it purportedly has been drafted to achieve.

In addition to the concerns addressed above, SB 8001 also raises myriad other policy concerns each of which must be addressed prior to the enactment of any new subsistence legislation into

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law. Three are worth particular mention.

As you know, section 4, art. VIII of the Alaska Constitution requires fish stocks and game populations to be utilized on the "sustained yield principle" and since statehood the Board of Fish and Game and the Board of Fisheries and Board of Game have adopted fishing and hunting regulations pursuant to this standard. If enacted into law, the new A.S. 16.05.258(d) set forth in section 5 of SB 8001 would alter this standard with respect to the taking of fish stocks and game populations for subsistence uses. Although hunting and fishing for sport and commercial purposes apparently would continue to be regulated under the "sustained yield" standard, A.S. 16.05.258(d) would prohibit the Board of Fisheries and Board of Game from adopting regulations authorizing the taking of a stock or population for subsistence uses if doing so would be consistent with the sustained yield principle but "inconsistent...with the maintenance of healthy fish stocks, game populations, or other wildlife populations". This is a significant deviation from the existing regulatory standard. Why such a radical change of policy has been included in SB 8001 is particularly perplexing since I am not familiar with any testimony presented to the Senate State Affairs Committee which raised this issue.

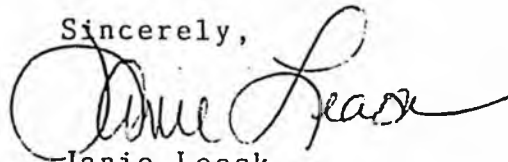
Subsection (e) of the same section raises a similar problem. The subsection gratuitously implies that as a matter of state policy nonconsumptive uses of a fish stock or game population should have a priority over the taking of such stock or population for subsistence uses. For the Senate State Affairs Committee to sponsor a bill which, if enacted into law, would advance the interests of primarily nonresident catch-and-release sport fishermen and backpackers by subordinating subsistence to catch-and-release fishing and by restricting the ability of state citizens residing in rural villages near or within the boundaries of national parks to obtain food to feed their families is troubling to say the least, particularly when the Congress specifically declined to delegate the National Park Service or any other agency authority to close a national park or any other federal land in Alaska, or any portion thereof, to subsistence uses in order to advance "public use and enjoyment", i.e. nonconsumptive uses. Compare section 816 of ANILCA with Department of the Interior Proposed Subsistence Title, Hearings on H.R. 39 before the Subcomm. on General Oversight and Alaska Lands of the Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Part XVI 258 (1977).

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Lastly, it is difficult to understand why the State Affairs Committee believes that the duties of the Division of Subsistence need to be rewritten in such a detailed fashion. Although the subsistence issue has certainly been a source of controversy over the years, I am not familiar with any significant criticism of either the work which the Division of Subsistence has performed or the degree of professionalism with which Division employees have performed that work.

I hope the preceding discussion has been helpful in highlighting AFN's concerns about SB 8001. On behalf of the AFN board of directors I would again like to express AFN's appreciation for the opportunity to comment on the draft. Although for the reasons set forth in detail above the present draft is not consistent with title VIII of ANILCA in a number of significant respects, the Senate State Affairs Committee's work on the subsistence issue has hopefully laid the groundwork for the enactment of legislation during the 1986 session which is consistent with title VIII. If between now and the commencement of the 1986 session either I or AFN staff can be of further assistance to you and the Committee in revising SB 8001 or in assisting your work on this important public policy issue in any other respect, please do not hesitate to contact me.

Sincerely,



Janie Leask
President

xc: Governor Bill Sheffield
William P. Horn
AFN Board of Directors

SENATE BILL NO. _____

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

1 For an Act entitled: "An Act relating to fishing and hunting."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Sec. 1. FINDINGS AND INTENT.

4 (1) Sound management of fish and wildlife will be best achieved
5 if the management of fish and wildlife, including allocation ^{among} [between]
6 different ^{uses} [user groups] is done on a biological basis, rather than on
7 the basis of land ownership.

8 (2) Maintaining healthy ^{reword} [and natural] populations of fish and
9 wildlife is important to Alaska in that healthy and natural
10 populations of fish and wildlife provide unique opportunities for a
11 subsistence life-style, for trophy and other hunting and fishing, for
12 commercial fishing and for wildlife viewing.

13 (3) In order to assure that these opportunities shall continue to
14 be reasonably available it is necessary:

15 (a) that there be an equitable ^{and appropriate} balance ^{allocation?} [between] ^{among} sport,
16 commercial, subsistence, and non-consumptive ^{uses?} [needs],

Li Ryan
17 (b) that in times of resource shortage there be a reasonable
18 preference for subsistence use of stocks of fish and populations of
19 game that are important to subsistence uses,

20 (c) that the Board of Fisheries and the Board of Game have
21 sufficient authority, flexibility and information necessary to manage

1 uses of fish and wildlife to maintain sustained yield, to maintain
2 healthy [and natural populations,] and to maintain meaningful
3 opportunities for subsistence, sport, commercial and other consumptive
4 and non-consumptive uses of fish and game.

MB. (4) ^{to} establish sys & Res. ^{by} permit sys.

5 * Sec. 2. AS 16.05.094 is amended to read:

6 The division of subsistence hunting and fishing shall:

7 (1) compile and analyze existing data and data gathered in future
8 studies, and conduct studies to gather information including data from
9 subsistence users, the public, other divisions within the Department
10 and other state or federal agencies, on all aspects of subsistence
11 hunting and fishing in the lives of the residents of the state;
12 provided that in doing such analysis and studies the division shall as
13 clearly as possible set forth and identify --

14 (A) the species, stocks, and populations of fish and
15 wildlife used for customary and traditional subsistence uses in
16 specific areas of the State;

17 (B) the degree of significance that such species, stocks and
18 populations have to customary and traditional subsistence uses and
19 users in specific areas of the state;

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would
eliminate
PS 2-7

1 (C) customary and traditional subsistence uses of fish and
2 wildlife by species, stock and population of such fish and wildlife in
3 specific areas of the state;

4 (D) areas customarily and traditionally used for, and
5 presently used for subsistence harvest by species, stock and
6 population of fish and wildlife and by population of subsistence
7 users,

8 (E) areas, habitats, flyways, watersheds and the like,
9 whether within or not within the borders of Alaska, that are utilized
10 by fish and wildlife subject to subsistence uses; provided that such
11 areas, habitats, flyways, watersheds and the like shall be identified
12 in cooperation with other divisions of the Department and other state
13 or federal agencies having jurisdiction over fish and wildlife;

14 (F) the impacts and extent of impact, if any, that
15 subsistence use of specific species, stocks, or populations have on
16 the maintenance of healthy and natural populations of such fish and
17 wildlife, on the sustained-yield of such species, stocks or
18 populations, on other subsistence users and sport or commercial users
19 whether within or not within the borders Alaska; provided that such
20 impacts shall be identified in cooperation with other divisions of the

21

1 Department and other state or federal agencies having jurisdiction
2 over fish and wildlife.

3 (2) seek to quantify in a timely fashion the amount, nutritional
4 value, and extent of dependence on food acquired through subsistence
5 hunting and fishing, by species, stock, or population of fish and
6 wildlife and by population of customary and traditional subsistence
7 users, and by subsistence use area;

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

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

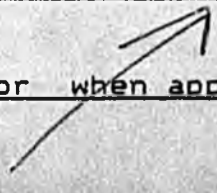
14 (5) evaluate the impact of state and federal laws and
15 regulations on subsistence hunting and fishing and, when corrective
16 action is indicated, make recommendations to the department;

17 (6) make recommendations to the Board of Game and the Board of
18 Fisheries regarding adoption, amendment and repeal of regulations
19 effecting subsistence hunting and fishing; provided that such

20 recommendations shall be made after prior consultation with other
21 divisions of the department, or when appropriate with other state or

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1 federal agencies having jurisdiction over fish and wildlife; and
2 provided further that such recommendations must be approved by the
3 Commissioner of the department;

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4 (7) participate with other divisions of the department and with
5 other departments of state and federal government in the preparation
6 of statewide, [AND] regional or area management plans affecting fish,
7 wildlife and their habitats so that those plans recognize
8 [REORGANIZE] and incorporate the needs of subsistence users of fish
9 and game.

10 * Sec. 3. AS 16.05.251(a) is amended to read:

11 (a) The Board of Fisheries may adopt regulations it
12 considers advisable in accordance with the Administrative Procedure
13 Act (AS 44.62) for

14 (1) setting apart and designating fish reserve areas,
15 refuges and sanctuaries in the water of the state over which it has
16 jurisdiction, subject to approval of the legislature;

17 (2) management of fish reserve areas, refuges and
18 sanctuary;

19 [(2)] (3) establishing open and closed seasons and
20 areas for the taking of fish;

21

1 [(3)] (4) setting quotas, bag limits, harvest levels,
2 escapements, and sex, [AND] size, age and other limitations pertaining
3 to [on] the taking of fish in Alaska waters or migratory fish when
4 bound for Alaska waters;

5 [(4)] (5) establishing the means and methods, such as
6 appropriate gear, tackle, vessels and other such items, employed in
7 the pursuit, capture, and transport of fish;

8 [(5)] (6) establishing marking and identification
9 requirements used in pursuit, capture, possession, tagging and
10 transport of fish;

11 [(6)] (7) classifying as commercial fish, sport fish,
12 personal use fish, subsistence fish, native fish, exotic fish,
13 non-native fish, hatchery fish, or predators or other categories
14 essential for regulatory purposes; provided that a fish stock or game
15 population may be the subject of more than one classification;

16 [(7)] (8) watershed and habitat protection, maintenance
17 and improvement, and management, conservation, protection, use,
18 disposal, propagation and stocking of fish; provided that any habitat
19 regulations shall be co-ordinated with the Department of Natural
20 Resources;

21

1 [(8)] (9) investigating and determining the extent and
2 effect of disease, predation, competition among fish in the state.
3 exercising control measures considered necessary to the resources of
4 the state;

5 [(9)] (10) prohibiting and regulating the live capture,
6 possession, transport, or release of native or exotic fish or their
7 eggs;

8 [(10)] (11) establishing seasons, areas, quotas, and
9 methods of harvest for aquatic plants;

10 [(11)] (12) establishing the times and dates during
11 which the issuance of fishing licenses, permits and registrations and
12 the transfer of permits and registrations between registration areas
13 is allowed; however, this paragraph does not apply to permits issued
14 or transferred under AS 16.43;

15 (13) designating and regulating special fishing areas,
16 including but not limited to personal use areas, trophy management
17 areas, catch-and-release areas, children's fishing areas, and the
18 like, and designating species in such areas appropriate for such
19 special management;

20 (14) establishing a procedure for administrative appeal
21 of decisions by the Board; and

1 (15) otherwise regulating commercial, sport,
2 subsistence, and personal use fishing as necessary for the
3 conservation, development and utilization of fisheries.

4 * Sec. 4. AS 16.05.251(b) is amended to read:

5 (b) The Board of Fisheries shall adopt regulations in
6 accordance with the Administrative Procedure Act (AS 44.62) for
7 [PERMITTING] the taking of fish for subsistence uses unless the board
8 determines, in accordance with the Administrative Procedure Act, that
9 adoption of such regulations could [WILL] jeopardize or interfere with
10 the maintenance of fish stocks so as to be inconsistent with sound

11 management principles, [the maintenance of healthy and natural
12 populations of fish,] or [ON] a sustained-yield basis. Except as

13 otherwise provided in this Act or in other state or federal laws, the
14 taking of fish on all lands and waters subject to Alaska jurisdiction
15 for nonwasteful customary and traditional subsistence uses shall be
16 accorded subsistence preference over other consumptive taking and uses
17 of fish; provided that such preference shall not be construed as a
18 preference over non-consumptive taking and uses of fish such as
19 catch-and-release fisheries where the fish population or stock is not
20 substantially related to customary and traditional subsistence need or
21 where the taking, capture, tagging or transport of fish is done for

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1 biological or management purposes. Whenever it is necessary to
 2 restrict the taking of fish stocks on such lands or waters for
 3 subsistence uses in order to protect the continued viability of such
 4 stocks as healthy and natural fish stocks, or to assure sound
 5 management or to assure the maintenance of fish stocks on a
 6 sustained-yield basis, or to continue subsistence uses [ASSURE THE
 7 CONTINUATION OF SUBSISTENCE USES OF SUCH RESOURCES], such preference
 8 shall be implemented through appropriate limitations based on the
 9 application of the following criteria: [SUBSISTENCE USE SHALL BE THE
 10 PRIORITY USE. IF FURTHER RESTRICTION IS NECESSARY, THE BOARD SHALL
 11 ESTABLISH RESTRICTIONS AND LIMITATIONS ON AND PRIORITIES FOR THESE
 12 CONSUMPTIVE USES ON THE BASIS OF THE FOLLOWING CRITERIA:]

13 (1) customary and direct dependence [UPON] on the
 14 [POPULATIONS RESOURCE] subsistence fish stocks as the mainstay of
 15 [ONE'S] subsistence livelihood;

16 (2) local residency; and

17 (3) the availability of alternative resources.

18 * Sec. 5. AS 16.05.251 is amended by adding new subsections to read:

19 (d) Subsistence fishing authorized under this section is subject
 20 to reasonable regulation of seasons, catch limits, methods, and means.

1 (e) If the Board of Fisheries determines that (1) a particular
 2 fish stock is not a customary and traditional subsistence resource or
 3 not a significant source of subsistence use for rural subsistence area
 4 residents and (2) subsistence is not the best use of that fish stock,
 5 the board may provide that the fish stock may not be taken under
 6 subsistence regulations, but may be taken under other regulations if
 7 appropriate; and provided further that the board may shift subsistence
 8 use of a fish stock to another stock only if there is a prior or
 9 contemporaneous stock of the same species or a different species that
 10 is suitable and available.

11 (f) The Board of Fisheries shall establish an appeal procedure
 12 for persons aggrieved by the adoption or repeal of a regulation of the
 13 board. The aggrieved person must exhaust this administrative remedy
 14 before bringing a legal action challenging the regulation.

15 * Sec. 6. AS 16.05.255(a) is amended to read:

16 (a) The Board of Game may adopt regulations it considers
 17 advisable in accordance with the Administrative Procedure Act (AS
 18 44.62) for:

19 (1) setting apart and designating game reserve areas,
 20 refuges and sanctuaries in the water or on the land of the state over
 21 which it has jurisdiction, subject to the approval of the legislature;

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to provide*

1 (2) management of game reserve areas, refuges and
2 sanctuaries;

3 [[2]] (3) establishing open and closed seasons and areas
4 for the taking of game;

5 [[3]] (4) establishing the means, [AND] methods, marking and
6 identification requirements employed in the pursuit, capture,
7 possession, tagging and transport of game;

8 [[4]] (5) setting quotas, bag limits, harvest levels, and
9 sex, age, [AND] size, and other limitations and game population goals
10 pertaining to the taking of game;

11 [[5]] (6) classifying game as game birds, song birds, big
12 game animals, fur bearing animals, predators or other categories;

13 [[6]] (7) methods, means, and harvest levels necessary to
14 control predation and competition among game in the state;

15 [[7]] (8) watershed and habitat protection, maintenance and
16 improvement, and management conservation, protection, use, disposal,
17 propagation and stocking of game; provided that any habitat
18 regulations shall be co-ordinated with the Department of Natural
19 Resources;

20 [[8]] (9) prohibiting the live capture, possession,
21 transport, or release of native or exotic game or their eggs;

1 [(9)] (10) establishing the times and dates during which
2 the issuance of game licenses, permits and registrations and the
3 transfer of permits and registrations between registration areas and
4 game management units or subunits is allowed;

5 (11) regulating sport hunts and subsistence hunts as
6 necessary for the conservation, development and utilization of game
7 and non-game species.

8 * Sec. 7. AS 16.05.255(b) is amended to read:

9 (b) The Board of Game shall adopt regulations in accordance
10 with the Administrative Procedure Act (AS 44.62) for [PERMITTING] the
11 taking of game for subsistence uses unless the board determines, in
12 accordance with the Administrative Procedure Act, that adoption of
13 such regulations could [WILL] jeopardize or interfere with the
14 maintenance of game populations so as to be inconsistent with sound
15 management principles, the maintenance of healthy [and natural]
16 populations of game, or [ON] a sustained-yield basis. Except as
17 otherwise provided in this Act or in other state or federal laws, the
18 taking of game on all lands and waters subject to Alaska jurisdiction
19 for nonwasteful customary and traditional subsistence uses shall be
20 accorded subsistence preference over the consumptive taking and uses
21 of game for other purposes; provided that such preference shall not be

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1 construed as a preference over either non-consumptive uses of game in
 2 areas such as national parks that are closed to all but subsistence
 3 hunting, or over non-consumptive taking of game such as the taking,
 4 capture, tagging or transport of game when done for biological or
 5 management purposes. Whenever it is necessary to restrict the taking
 6 of populations of game on such lands or waters for subsistence uses in
 7 order to protect the continued viability of such populations [as
 8 healthy and natural populations], or to assure sound management or to
 9 assure the maintenance of game resources on a sustained-yield basis,
 10 or to continue subsistence uses [ASSURE THE CONTINUATION OF
 11 SUBSISTENCE USES OF SUCH RESOURCES], such preference shall be
 12 implemented through appropriate limitations based on the application
 13 of the following criteria: [SUBSISTENCE USE SHALL BE THE PRIORITY
 14 USE. IF FURTHER RESTRICTION IS NECESSARY, THE BOARD SHALL ESTABLISH
 15 RESTRICTIONS AND LIMITATIONS ON AND PRIORITIES FOR THESE CONSUMPTIVE
 16 USES ON THE BASIS OF THE FOLLOWING CRITERIA:]

*MB thinks
these criteria
need to be clarified
by 11/15/81. H&S & C. King*

- 18 (1) customary and direct dependence [UPON] on the
 [POPULATIONS' subsistence population of game [RESOURCE] as the
 19 mainstay of [ONE'S] subsistence livelihood;
- 20 (2) local residency; and
- 21 (3) the availability of alternative resources.

1 * Sec. 8. AS 16.05.255 is amended by adding a new subsection to read:

2 (d) Subsistence hunting authorized under this section is subject
3 to reasonable regulation of seasons, bag limits, methods, and means.

4 (e) If the Board of Game determines that (1) a particular game
5 species is not a customary and traditional subsistence resource or not
6 a significant source of subsistence use for rural subsistence area
7 residents and (2) subsistence is not the best use of that game
8 population, the board may provide that the game population may not be
9 taken under subsistence regulations but may be taken under other
10 regulations. The board may shift subsistence use of a game population
11 if there is a suitable and available alternative population of the
12 species or a different species.

13 (f) The Board of Game shall establish an appeal procedure for
14 persons aggrieved by the adoption or repeal or enforcement of a
15 subsistence hunting regulation of the board. The aggrieved person
16 must exhaust this administrative remedy before bringing a legal action
17 challenging the regulation.

18 * Sec. 9. AS 16.05.257 (h)(1) is amended to read:

19 (h) "subsistence hunting" means the taking of game animals
20 by a [STATE] rural resident of Alaska qualified for nonwasteful,

21 ~~Revised~~

1 customary and traditional subsistence uses by methods and means
2 defined by the Board of Game;

3 * Sec. 10. AS 16.05.257(h)(2) is repealed.

4 * Sec. 11. AS 16.05 is amended by adding the following section:

5 Sec. 16.05.258. METHODS OF DETERMINING CUSTOMARY AND TRADITIONAL
6 SUBSISTENCE USE AND ALLOCATIONS OF FISH AND GAME. (a) In joint
7 session, the Board of Fisheries and the Board of Game shall:

8 (1) identify and quantify the amount of customary and
9 traditional subsistence uses of fish and game that is necessary to
10 provide a reasonable opportunity for rural residents engaged in a
11 subsistence way of life to do so; provided that such determinations
12 shall be based at least upon the research, analysis, comments and
13 recommendations of the subsistence division of the department that are
14 reviewed and concurred in by the other divisions of the department.

15 (2) identify and designate customary and traditional
16 subsistence use zones utilized by such rural residents; provided that
17 such zones may overlap where different groups of subsistence users
18 have customarily and traditionally used the same areas;

19 (3) identify fish stocks and game populations that
20 customarily and traditionally have been important subsistence stocks
21 and populations utilized by such rural residents for subsistence use.

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1 (b) The Board of Fisheries or the Board of Game will assess the
2 biological status of respective fish stocks and game populations that
3 are important subsistence stocks and populations within the use zones
4 and determine whether a surplus may be harvested during a regulatory
5 year consistent with the utilization, development and conservation of
6 such stocks and populations on the sustained yield principle,
7 consistent with the maintenance of healthy and natural populations of
8 the resource, and consistent with the public interest.

9 (c) After identifying subsistence uses of a fish stock or game
10 population that is important to customary and traditional subsistence
11 use and after determining the amount of harvestable surplus, the
12 appropriate board will determine the amount of harvestable surplus of
13 such stock or population required to provide a reasonable opportunity
14 to engage in customary and traditional subsistence uses, and will
15 adopt regulations which authorize the taking of such stock or
16 population for subsistence uses; provided that such regulations may be
17 the same as, different from or in addition to regulations governing
18 other consumptive uses of the stock or population.

19 (d) Each board will, in its discretion, adopt regulations
20 pursuant to AS 16.05 which authorize the taking, for non-subsistence
21 uses, of any stock or population identified as important for

1 subsistence use, to the extent that the non-subsistence uses do not
2 jeopardize or interfere with sound management principles, with the
3 conservation, utilization and development of fish and game resources
4 on a sustained yield basis or the maintenance of natural and healthy
5 populations, or with the opportunity for taking these resources for
6 customary and traditional subsistence uses, as provided by the
7 chapter.

8 (e) In joint session the boards shall adopt regulations
9 establishing criteria which the boards shall consider for purposes of
10 defining and identifying customary and traditional subsistence use
11 and, where appropriate, customary and traditional subsistence use
12 areas. Such regulations may include, but need not be limited to, the
13 following previously adopted criteria, which shall be in effect until
14 such time as the boards re-adopt, supplement or amend the following
15 criteria: ~~—~~ *weight of the evidence* ~~—~~

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

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

21

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

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

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

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

13 (7) a use pattern in which the hunting or fishing effort or
14 the products of that effort are distributed or shared among others
15 within a definable community of persons, including customary trade,
16 barter, sharing and gift-giving; customary trade does not include
17 significant commercial enterprises; a community may include specific
18 villages or towns, with a historical preponderance of subsistence
19 users, and encompasses individuals, families, or groups who in fact
20 meet the criteria described in this subsection; and
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1 (8) a use pattern which includes reliance for subsistence
2 purposes upon a wide diversity of the fish and game resources of an
3 area, and in which that pattern of subsistence uses provides
4 substantial economic, cultural, social, and nutritional elements of
5 the subsistence user's life.

~~substantive~~

6 (f) Each board may adopt regulations, pursuant to the
7 Administrative Procedure Act (AS 44.62), which in the board's
8 discretion allow or prohibit new entrants into being eligible for
9 subsistence uses. [Dependent children of subsistence users shall be
10 qualified so long as their parents are qualified.] The boards shall
11 evaluate whether or not recipients of a [state] land disposals shall be
12 qualified for subsistence; provided that the boards may, in their
13 discretion, permit, revoke or deny the availability of the subsistence
14 preference to such recipients.]

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15 * Sec. 12. AS 16.05.330 is amended by adding the following
16 subsection:

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17 (c)(1) The Board of Fisheries and the Board of Game may adopt
18 regulations, in accordance with the Administration Procedure Act (AS
19 44.62), providing for the issuance of subsistence fishing permits,
20 subsistence hunting permits, and combination subsistence fishing and
21 hunting permits as necessary for authorizing, regulating and

1 monitoring subsistence harvest of fish and game. This authority shall
2 be implemented when significant competition for fish stocks and game
3 populations, resource shortage, or other management or biological
4 considerations make such a program of permits a useful tool of fish
5 and game management. This authority shall not be construed as
6 [automatically] requiring such a permit program in any particular area
7 of the state or upon any particular stock of fish or game population
8 unless circumstances of significant competition, shortage, or other
9 management or biological considerations exist which warrant such a
10 program. For purposes of this subsection, "significant competition"
11 or "shortage" occurs whenever the preference for subsistence uses
12 requires a reduction in the harvest of a fish stock or game population
13 by non-subsistence users or whenever special seasons, bag limits or
14 other provisions are necessary to provide a reasonable opportunity for
15 subsistence.

16 (2) In determining an appropriate method of permitting each
17 board in its discretion, may adopt subsistence ^{permits} [licensing] programs that
18 permit individuals, identifiable groups of individuals, residents of a
19 community or village, or residents of an area to engage in authorized
20 subsistence uses. Nothing in this subsection shall be construed as
21 altering any other requirements of state or federal law for licenses,

1 permits, stamps, tags, or seals that are otherwise required even if
2 the boards do not adopt regulations requiring subsistence permits.

3 (3) With the assistance of the department, the boards shall
4 notify or otherwise make available to subsistence users -

5 (A) the terms of any applicable permit issued;

6 (B) the types of licenses or permits available;

7 (C) the fish stocks and game populations for which
8 subsistence uses are authorized;

9 (D) subsistence use areas covered by such permits;

10 (E) other regulations governing subsistence and
11 non-subsistence uses, such as harvest limits, seasons, and
12 methods and means restrictions.

13 Regardless of whether or not a permit program is in effect pertaining
14 to a particular area, fish stock, or game population, the boards shall
15 seek to notify or otherwise make available to subsistence users the
16 information described in this subsection. In notifying or making
17 available such information the boards may utilize village and regional
18 corporations formed under the Alaska Native Claims Settlement Act (43
19 U.S.C. 1601 et seq.) and community, postal, media or other services
20 appropriate for providing notice to subsistence users.

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1 (4) The Department of Fish and Game shall administer any
 2 subsistence permit program through its own staff and may also enter
 3 into agreements to utilize the services of native village or regional
 4 corporations, local officials, or others to assist in administering a
 5 subsistence permit program; provided that no agreement for such
 6 assistance shall obligate the state to pay for such services unless
 7 paid for by prior authorization by the legislature.

8 (5) No person who holds a limited entry commercial fishing
 9 permit may participate in subsistence fishing for the same specie or
 10 species of fish authorized under the limited entry permit unless such
 11 person shows:

12 (A) that he did not take fish of the same species under
 13 the commercial permit for personal or family consumption, or

14 (B) that he did not utilize his commercial permit, or

15 (C) that if he did take commercially caught fish for
 16 personal or family consumption he needs to subsistence fish for
 17 the same species for reasons acceptable to the department.

18 * Sec. 13. AS 16.05.930(e) is amended to read:

19 *(b) must not be*
 (e) ~~This~~ chapter does not prevent the traditional trade and
 20 barter of fish and game taken by subsistence hunting or fishing,
 21 except that the commissioner may prohibit the trade and barter of

1 subsistence-taken fish and game by regulation, emergency order or
2 otherwise, if a determination on the record is made that the ^{trade or} barter is
3 resulting in a waste of the resource, damage to fish stocks or game
4 populations, or circumvention of fish or game management programs.

5 * Sec. 14. AS 16.05.940(22) is amended to read:

6 (22) "subsistence fishing" means the taking, fishing for,
7 or possession of fish, shellfish, or other fisheries resource, by a
8 rural Alaska resident qualified for nonwasteful, customary and
9 traditional subsistence uses with gill net, seine, fish wheel, long
10 line, or other methods and means defined by the Board of Fisheries; *

11 * Sec. 15. AS 16.05.940(23) is amended to read:

12 (23) "subsistence uses" means the customary and traditional
13 uses [IN] by rural residents of Alaska of wild, renewable resources
14 for direct personal or family consumption as food, shelter, fuel,
15 clothing, tools, or transportation, for the making and selling of
16 handicraft articles out of nonedible byproducts of such fish and
17 wildlife resources taken for personal or family consumption, and for
18 the customary trade, barter, or sharing for personal or family
19 consumption; for the purposes of this paragraph, "family" means all
20 persons related by blood, marriage, or adoption, and any person living
21 within the household on a permanent basis;

1 * Sec. 16. DEFINITIONS. For purposes of this Act,

2 (1) "fish stock" means a species, subspecies, geographic grouping
3 or other category of fish capable of management as a unit which at any
4 time during any season of the year may be found in waters subject to
5 the jurisdiction of the State of Alaska.

6 (2) "game population" means a group of game animals of the same
7 species or smaller sub-group whose members in whole or in part use or
8 may be found at any time or during any season of the year upon land,
9 in the air or on water subject to the jurisdiction of the State of
10 Alaska.

11 (3) "the maintenance of healthy [and natural] populations" means
12 that for some species, stocks, or populations of fish and game the
13 application of sustained-yield principles may not alone provide
14 sufficient guidance in terms of sound management to assure wise
15 conservation, use and development of those species, stocks or
16 populations. Sustained yield principles are appropriate for wildlife
17 of which all or most of the harvested animals are of the same or
18 similar age class, size, reproductive value, and biological
19 significance. Use of phrase "maintenance of healthy [and natural]
20 populations" is intended to clarify, rather than replace, sustained
21 yield principles in appropriate circumstances, including but not

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1 limited to circumstances where maintenance of age classes within the
2 population is either a biological consideration or where such
3 maintenance is important to the sound conservation, development and
4 utilization of the resource. [Use of the word "natural" is not
5 intended to mean that the resource may not be harvested, unless
6 otherwise prohibited.]

7 (4) "non-wasteful" means harvests, and use of fish and game that
8 results from harvests, that are primarily oriented toward consumption
9 as opposed to harvest and use that does not reasonably utilize the
10 harvested animal or most parts thereof.

11 (5) "rural Alaska resident" in the context of subsistence hunting
12 and subsistence fishing means an Alaska resident engaged in customary
13 and traditional subsistence as a way of life. ✓ in a subs area

who resides in a subs. area and is

14 (6) "subsistence preference" describes the concept that
15 regulatory actions necessary to provide a reasonable opportunity for
16 subsistence fishing and hunting should vary, should be graduated, and
17 should be balanced against the degree of economic and traditional
18 dependence for subsistence purposes on the resource in question.

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19 Where dependence on the resource in question is high, the preference
20 should provide a full opportunity for satisfaction of subsistence
21 needs, including potentially exclusive subsistence use when resource

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1 shortage occurs. However, where dependence on the resource in
 2 question is low, the preference should be less and need not be
 3 potentially exclusive. As the degree of dependence varies, the degree
 4 of the preference should vary accordingly.

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Eff. date June 1

11 Active duty military personnel assigned
 12 to Alaska, ~~who were assigned to~~ Alaska for
 13 more than 30 days, ~~shall~~ have the
 14 right to fully participate on an equal
 15 basis with all other ^{eligible} Alaska residents
 16 in all hunts (and fisheries) authorized
 17 on military ~~land~~ installations and facilities.
 18 This right shall not be diminished by
 19 ~~limitations~~ ~~restrictions~~ on the taking of ~~fish~~ game
 20 ~~fish~~ ~~and game~~ ~~caused~~ ~~implementable~~
 21 at subsistence preferences.

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 controversy 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-consumptive 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 simpler 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 establish 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 arguably 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 resources for sport and non-consumptive 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 undesirable 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 biological 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 "targeting 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 plaintiff 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 competition. 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 adopt 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.

ANNOTATION

CONSTITUTIONALITY OF STATE LAWS WHICH DISCRIMINATE
AGAINST NONRESIDENTS OR ALIENS AS TO FISHING AND
HUNTING RIGHTS

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 - [a] Scope
 - [b] Related matters
- § 2. Summary and comment

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- § 3. "State ownership" theory as supportive of discriminatory regulation
- § 4. Constitutional bases for adjudication of claims of discrimination
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III. VALIDITY OF PARTICULAR LEGISLATION

- § 7. Fishing laws; discrimination against nonresidents of state:
 - [a] Law held valid
 - [b] Law held invalid

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

- 3 Am Jur 2d, Aliens and Citizens §§ 10, 37; 35 Am Jur 2d, Fish and Game § 35; 51 Am Jur 2d, Licenses and Permits § 31
- 12 Am Jur Pl & Pr Forms (Rev Ed), Fish and Game, Forms 7, 8, 28
- 8 Am Jur Legal Forms 2d, Fish and Game §§ 118:61 et seq.
- USCS, Constitution, Art I, § 8, cl 3; Art IV, § 2, cl 1; Art VI, cl 2; Amendment 14; 46 USCS §§ 251, 263
- US L Ed Digest, Constitutional Law §§ 338, 351, 355, 364, 461; Fish and Fisheries § 3
- ALR Digests, Fish and Fisheries § 17
- L Ed Index to Annos, Aliens; Equal Protection of the Laws; Fish; Game; Licenses and Licensing Taxes; Nonresidents; States; Wildlife
- ALR Quick Index, Aliens; Discrimination; Equal Protection of Laws; Fish and Fisheries; Game and Gaming Laws; Hunting; Licenses and Permits; Nonresidents
- Federal Quick Index, Discrimination; Fish and Game; Licenses and Permits; Pre-emption; Supremacy Clause

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I. Prefatory matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the federal cases involving the validity,

under the United States Constitution, of state or territorial¹ enactments² which are alleged to discriminate, with respect to hunting or fishing rights,³ against nonresidents of the state or against aliens.⁴

State constitutional, statutory, and

1. Although the annotation includes cases decided under the supremacy clause (Article VI) of the Constitution involving possible conflict between federal and state statutes, it does not include cases dealing solely with the question whether the legislature of a United States Territory has exceeded the powers conferred upon it by Congress.

2. In the cases discussed herein these are generally statutes, but they may be state constitutional provisions or agency regulations in some instances.

3. It is a restriction on the actual killing or capturing of animals or fish that is the focus of this annotation; thus, for example, cases dealing solely with the right to transport out of the state animals already killed are outside the present scope.

For the purposes of this annotation, the harvesting of species such as oysters is treated as a type of fishing.

4. Cases are not included herein to the extent that they deal solely with any alleged infringement of treaty rights.

regulatory provisions affecting the matters dealt with herein are considered only insofar as they are reflected in the cases discussed, and no attempt has been made to set forth the present law of any state.

[b] Related matters

Supreme Court's application of Fourteenth Amendment's equal protection clause to foreign corporations. 49 L Ed 2d 1296.

Validity of state laws denying aliens living in United States rights enjoyed by citizens. 47 L Ed 2d 876.

Validity of alien land laws. 92 L Ed 2d 281.

Validity and construction of statutes or rules conditioning right to practice law upon residence or citizenship. 53 ALR3d 1163.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works. 38 ALR3d 1213.

Rights of fishing, boating, bathing, or the like in inland lakes. 57 ALR2d 560.

Validity of prohibition or regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply. 56 ALR2d 790.

Right created by private grant or reservation to hunt or fish on another's land. 49 ALR2d 1395.

§ 2. Summary and comment

The perceived role of state government with respect to the state's natural resources has varied through the years according to economic conditions and according to the nature of the particular resources involved. Despite prevailing attitudes of *laissez faire* in many other contexts, with respect to fish and game the nineteenth-century legal view of the state's role was that the state was the "owner" of animals *ferae naturae*, in trust for its people, and had more or less complete authority to regulate fish and game as it saw fit (§ 3, *infra*). Whether out of a desire to conserve the food

supply or to protect the state's own hunters and fishermen from outside competition, states occasionally adopted the expedient of forbidding aliens or nonresidents, or both, from hunting or fishing within the state's borders, or of discouraging such activities on the outsiders' parts by imposing higher licensing fees upon them than upon others. The enactment of such legislation did not end in the nineteenth century, but as will be seen below, the courts' attitudes toward it have altered somewhat since then.

Legislation of the type under consideration has most frequently dealt with commercial hunting and fishing, as opposed to hunting and fishing purely for sport, which latter type would normally involve the killing or capture of smaller numbers of animals on a given expedition. Also, nonresidents rather than aliens have usually been the targets of such statutes, although discrimination against aliens has been involved in a number of the cases discussed in this annotation.

Although, as mentioned, the early prevailing view was that the state government was the "owner" of the state's wildlife, the more recent view has been that referring to state "ownership" is merely a way of emphasizing the state's duty to preserve its wildlife from depletion and regulate its exploitation; in reaching this conclusion the courts have reasoned that free-swimming and free-roaming animals cannot realistically be said to be "owned" by anyone prior to capture (§ 3, *infra*).⁵

Challenges to legislation said to discriminate against aliens or nonresidents as to hunting or fishing rights have been brought under numerous provisions of the United States Constitution. The provision most frequently relied upon has been the privileges and immunities clause of Article IV, but successful challenges have been brought as well under the equal protection clause (Fourteenth Amendment), the commerce clause (Arti-

5. Inasmuch as some of the early cases expounding the "state ownership" theory dealt with the rather limited situation involving animals—such as oysters—which are not constantly moving from

place to place, there may still be some limited scope for the "ownership" theory, such cases never having actually been overruled (§ 3, *infra*).

cle I, § 8), and (Article VI). Regulative provisions given case, modified, instead of state ownership analysis of the particular legislation for determining whether adopted are required to fulfill the assertion of the above suggestion case with respect to sport, or with swimming sea animals from recent cases fishing for free-seeking to justify crimines against must do more ownership of the conserve natural from Supreme with *Toomer v* 385, 92 L Ed 146 335 US 837, 93 there must be some are valid independent the mere factor (dependence) for the case and that the mere degree of discrimination close relationship evidently considered whether the connection alleged is with the ties clause of Article protection clause of the ment, or the supreme VI via pre-empting, ing to licensing a sels (§ 4, *infra*).

Recognizing that equal state treatment aliens is necessary the courts have considered factors said to justify ment of nonresidents *fra*). The Supreme

6. In a number in this annotation, claim that the state conservation measure substance, in view statute placed little

cle I, § 8), and the supremacy clause (Article VI). Regardless of which constitutional provision has been involved in a given case, modern courts have emphasized, instead of some blanket theory of state ownership of wildlife, the need for analysis of the factors said to support the particular legislation in question and for determining whether the measures adopted are reasonably appropriate to fulfill the asserted needs (§ 4, *infra*). As the above suggests, whatever may be the case with respect to hunting or fishing for sport, or with respect to non-free-swimming sea animals, it would appear from recent cases that as to commercial fishing for free-swimming fish, a state seeking to justify legislation which discriminates against aliens or nonresidents must do more than merely allege its ownership of the fish or its desire to conserve natural resources;⁶ to judge from Supreme Court cases beginning with *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, there must be some showing that there are valid independent reasons (beyond the mere factor of alienage or nonresidence) for the disparity in treatment, and that the measures adopted and the degree of discrimination involved bear a close relationship to such factors. This is evidently considered to be the case whether the constitutional conflict alleged is with the privileges and immunities clause of Article IV, the equal protection clause of the Fourteenth Amendment, or the supremacy clause of Article VI via pre-empting federal statutes relating to licensing and enrollment of vessels (§ 4, *infra*).

Recognizing that not all facially unequal state treatment of nonresidents or aliens is necessarily unconstitutional, the courts have considered a number of factors said to justify disparate treatment of nonresidents or aliens (§ 5, *infra*). The Supreme Court has acknowl-

edged, for example (*Toomer v Witsell*, *supra*), that a somewhat higher fishing license fee may be applied to nonresidents than to residents to the extent that such a higher fee merely compensates the state for the added financial burdens involved in its enforcement of the fishing laws against nonresidents or eliminates a disparity between residents and nonresidents as to their tax contributions to the enforcement programs.⁷ And although there is very little case law on the subject, it has been suggested that hunting or fishing for sport may not be entitled to the same degree of constitutional protection as is hunting or fishing pursued as a livelihood (§ 5, *infra*). Also, there may be a wider scope for the operation of state legislation in waters wholly within the state or with respect to fish or animals that do not habitually migrate from state to state (§ 5, *infra*).

From the few cases in point, it would appear that the governments of Federal Territories are normally subject to the same constitutional restrictions with respect to aliens' and nonresidents' fishing rights as are states, whether by operation of law or by congressional decree (§ 6, *infra*).

With respect to fishing rights, legislation which appeared to discriminate against nonresidents was upheld in a number of cases—most of them rather old—either in reliance on the state ownership rationale or on the basis that the disparity in treatment was justifiable under the circumstances (§ 7(a), *infra*). On the other hand, in a number of cases in which courts found insufficient justification for legislation discriminating against nonresidents as to fishing rights, such legislation was held to violate various provisions of the Constitution (§ 7(b), *infra*). The courts also invalidated various statutes which forbade or severely restricted aliens (or certain categories of aliens) from engaging in commercial fishing, although in one early case the

6. In a number of the cases discussed in this annotation, courts have found the claim that the statute in question was a conservation measure to be lacking in substance, in view of the fact that the statute placed little or no restriction on

the amount of fish or game that could be taken by the state's own citizens.

7. Presumably this justification would rarely support an outright ban on non-resident (or alien) fishing.

court refused to disturb a statute of this type (§ 8, *infra*). In one recent case of potentially wide application, the Supreme Court held that a legislative scheme which placed severe limitations on commercial fishing by both nonresidents and aliens was of a type preempted by federal law dealing with the licensing of vessels and was thus invalid under the supremacy clause (*Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, *infra* § 8).

Among the comparatively few cases involving discrimination as to hunting privileges, legislation imposing higher sport-hunting license fees on nonresidents than on residents was upheld in two instances (§ 9[a], *infra*), while statutes restricting the right of nonresidents to trap alligators were held to deny equal protection of the laws where they would have prevented a nonresident who owned land within the state from authorizing trapping operations on his land (§ 9[b], *infra*). The Supreme Court in an early case upheld a state statute forbidding resident aliens from killing wildlife, indicating that it thought the legislature had had a sufficient basis for concluding that the class in question represented a particular threat to the state's wildlife resources (§ 10, *infra*).

II. General considerations

§ 3. "State ownership" theory as supportive of discriminatory regulation

In the early decisions in which the courts upheld a state's right to discriminate between residents and nonresidents (or between American citizens and aliens), they did so most frequently on the basis that the state was the "owner" of the fish and wildlife within its jurisdiction and that it consequently had the power (or even obligation) to maintain them for the benefit of its own citizens. As will be seen, this theory has been given little scope in recent years, but a brief tracing of its development, with emphasis on Supreme Court cases, may give some indication of its applicability to various situations today.

Although earlier decisions not involving discriminatory legislation had recognized the view that the state owns the game and wildlife within its jurisdiction and may regulate them for the benefit of its citizens,⁸ the first Supreme Court case within the scope of this annotation in which such theory was recognized was *McCready v Virginia* (1877) 94 US 391, 24 L Ed 248, where the court upheld a state law prohibiting citizens of other states from raising oysters in the tidewater beds of a river within the state. Saying that the state owns the tidewater beds and the animal life in them "so far as the latter are capable of ownership while running," the court expressed the view that the citizens of one state are not invested by the privileges and immunities clause of Article IV or other provisions of the Constitution with any interest in such common property of the citizens of another state. In this connection the court deemed the planting of oysters to be no different in principle than the planting of corn on dry land owned by the state.

The possibly limited scope of the *McCready* decision was illustrated by *Manchester v Massachusetts* (1891) 139 US 240, 35 L Ed 159, 11 S Ct 559, where the court was dealing with a statute regulating fishing in a bay located wholly within a state. Noting that the statute in question made no discrimination between that state's citizens and others, the court specifically mentioned that it expressed no opinion on whether there is a liberty of fishing for swimming fish in navigable waters common to inhabitants or citizens of the United States.

The state's right to control the taking of game within its borders was recognized in *Geer v Connecticut* (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, where the court answered in the affirmative the question whether the state had the power to regulate the killing of game within its borders so as to confine its use to the limits of the state and to forbid its transportation outside the state. The statute involved in the *Geer* Case, how-

8. For example, see *Smith v Maryland* (1855) 59 US 71, 15 L Ed 269.

ever, made residents and aliens

In *Patsone v Michigan* (1892) 132 US 130, 58 L Ed 130, involving a statute excluding aliens from hunting, the court similar to *McCready*, upheld the statute that the state had been totally unopposed that resident aliens had assumed local citizenship as a source of the state's power desired to prevent

Prior to *Toomer v Waisell* (1948) 385 US 92 L Ed 130, 82 S Ct 634, *infra*, several cases heavily on the court upholding legislation against aliens with respect to *Corfield v Coryell* (1823) No 3230 (gathered shells in inland waters) *Eberle* (1899), and fishing gear *Lock* (1925, DC) *Smith* (1934, (hunting-licenses)

In declining the theory to a swimming fish court in *Toomer* (385, 92 L Ed 130, 82 S Ct 634, 92 S Ct 837, 9 S Ct 837, 9 S Ct 837) stated that the theory is now generation expressive importance to have power to exploitation of the court's view conflict between generation and the that the state of its other power state without re other states. The cases were not distinguished, the fo

ever, made no distinction between residents and nonresidents or between citizens and aliens.

In *Patsone v Pennsylvania* (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, a case involving a statute forbidding resident aliens from hunting within the state, the court similarly recognized the "lawful object, the protection of wild life," but it upheld the statute primarily on the basis that the state could not be said to have been totally unwarranted in concluding that resident aliens were (under presumed local circumstances) the peculiar source of the evil that the legislature desired to prevent.

Prior to *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, *infra*, several lower federal courts relied heavily on the "ownership" theory in upholding legislation apparently discriminating against nonresidents or aliens with respect to hunting or fishing rights: *Corfield v Coryell* (1823, CC Pa) F Cas No 3230 (gathering of clams, oysters, and shells in inland or coastal waters); *Re Eberle* (1899, CC Ill) 98 F 295 (hunting and fishing generally); *Lubetich v Pollock* (1925, DC Wash) 6 F2d 237 (commercial fishing generally); *Anderson v Smith* (1934, CA9 Alaska) 71 F2d 493 (hunting-license fees).

In declining to extend the "ownership" theory to a situation involving free-swimming fish in the marginal sea, the court in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, stated that the whole ownership theory is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. In the court's view, there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power—like its other powers—so as not to discriminate without reason against citizens of other states. The *McCready* and *Patsone* cases were not overruled but were distinguished, the former because it involved

fish which would remain in the state until removed by man and because the earlier case dealt with inland waters. In distinguishing *Patsone* the court relied on that decision's conclusion that there was a substantial reason for the discrimination beyond the mere fact of alienage.

Similarly, in *Takahashi v Fish & Game Com.* (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, involving a statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship, the court agreed with the view that in the present type of situation, "to put the claim of the State upon title is to lean upon a slender reed."⁹ The court said that to whatever extent the fish in the 3-mile belt off California's coast might be capable of ownership by that state, such "ownership" was inadequate to justify California in excluding any or all aliens who were lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so.

And in *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, the court declared that a state does not stand in the same position as the owner of a private game preserve and that it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the states nor the Federal Government, said the court, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture.

☆ COMMENT: While clearly the "ownership" theory is no longer to be relied on as a sole basis for upholding legislation discriminating against aliens or nonresidents in many situations, the failure of the Supreme Court to actually overrule its early decisions on the subject may suggest that the theory still has some vitality in at least the types of situations involved in the *McCready* Case: regulation of non-free-swimming species and regulation of inland waters. It would be difficult,

9. *Missouri v Holland* (1920) 252 US 416, 64 L Ed 641, 40 S Ct 382, 11 ALR 984.

however, to argue that the Patson Case, supra, has any continuing vitality, in view of the rationale used in cases such as Douglas v Seacoast Products, Inc., supra, to the effect that a state does not really "own" wild animals or birds; in response to a Fourteenth Amendment challenge, the Patson court appeared to assume that the legislature in that case had a good reason for discriminating against aliens—on assumption that the court today might no longer be willing to make, as demonstrated by cases such as Takahashi, supra.

§ 4. Constitutional bases for adjudication of claims of discrimination

One striking feature of most of the case law dealing with the subject matter of this annotation is that the courts' analyses have been largely the same whether the statute in question was alleged to violate the privileges and immunities clause of Article IV, the equal protection clause of the Fourteenth Amendment, or some other provision. Thus, while the particular constitutional provision involved in the particular case must always be kept in mind, points made by some courts with respect to, for instance, the privileges and immunities clause may be involved in equal protection analysis as well.¹⁰

☆ NOTE: Although the courts in the cases within the scope of this annotation have almost never stated that their rationales would be applicable only with respect to the particular constitutional provision under discussion therein, there is clearly at least one situation in which persons who could not take advantage of one provision might be able to make use of others. The privileges and immunities clause referred to above is clearly of no use to aliens in and of itself, since by its terms it protects only citizens of a state of the Union; see 16 Am Jur 2d, Constitutional

10. The courts' treatment of the "ownership theory," discussed in § 3, supra, is one example.

Law §§ 471, 472, for discussion. As to the view that hunting or fishing for sport should be considered wholly outside the privileges and immunities clause, see § 5, infra.

Thus, the court in *Edwards v Leaver* (1952, DC RI) 102 F Supp 698, in invalidating a discriminatory state fishing law, relied on the privileges and immunities clause with respect to the individual plaintiffs in the case, but relied on the equal protection clause with respect to the corporate plaintiffs, stating that the latter were not "citizens" under the privileges and immunities clause, but were "persons" for equal protection purposes.

The following general discussion under the privileges and immunities clause, emphasizing the need for analysis of the particular factors said by the state to justify the disparity in treatment, is illustrative of the general approach followed in many of the cases in later sections of this annotation.

In discussing the privileges and immunities clause of Article 4 of the Constitution, the court, in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, said that this provision, while barring discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, does not preclude disparity of treatment where there are perfectly valid independent reasons for it. The inquiry in each case, stated the court, must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The court cautioned that the inquiry must also be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures. Using this analysis, the court held that the privileges and immunities clause was violated by a state statute requiring payment of a much higher license fee by nonresident shrimpers than that required of residents, the practical effect of which

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scheme was to virtually exclude nonresidents from the shrimping trade in the state's coastal waters.

Although striking down a discriminatory fishing law under the privileges and immunities clause, the court in *Russo v Reed* (1950, DC Me) 93 F Supp 554, observed, citing the *Toomer* case, *supra*, that the privileges and immunities clause does not always require complete equality. The court also endorsed the view that states should have considerable leeway in analyzing local evils.

☆ NOTE: In considering the validity of a state law which discriminated against nonresident fishermen, the court in *Brown v Anderson* (1962, DC Alaska) 202 F Supp 96, declared that there is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any state. If such were the case, the court pointed out, it would be possible to couch a legislative act in such words as to regulate almost all types of endeavor on the sole basis of welfare. The court said it specifically could not agree with the contention that there was authority to avoid the effect of the privileges and immunities clause of Article IV solely under the guise of avoiding economic losses to residents.

The cases which have involved constitutional challenges to legislation allegedly discriminating against aliens or nonresidents as to hunting or fishing rights are discussed in detail in the succeeding sections of the annotation with respect to their particular factual situations. However, in order to provide an overview of the variety of constitutional provisions which have been involved, the following summary lists such cases in which a challenge was successful, together with the particular provision(s) of the Constitution relied on by the court.

Sup Ct—*Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12,

infra, § 7[b] (privileges and immunities);¹¹ *Takahashi v Fish & Game Com.* (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, *infra* § 8 (apparently Fourteenth Amendment); *Mullaney v Anderson* (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, *infra* § 7[b] (apparently privileges and immunities); *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, *infra* § 8 (supremacy clause).¹²

First Circuit—*Russo v Reed* (1950, DC Me) 93 F Supp 554, *infra* § 7[b] (privileges and immunities); *Edwards v Leaver* (1952, DC RI) 102 F Supp 698, *infra* § 7[b] (equal protection,¹³ privileges and immunities).

Fifth Circuit—*Pavel v Pattison* (1938, DC La) 24 F Supp 915, *infra* § 9[b] (equal protection); *Pavel v Richard* (1938, DC La) 28 F Supp 992, *infra* § 9[b] (equal protection); *Steed v Dodgen* (1949, DC Tex) 85 F Supp 956, *infra* § 7[b] (privileges and immunities); *Gospodonovich v Clements* (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, *infra* § 7[b] (privileges and immunities).

Ninth Circuit—*Re Ah Chong* (1880, CC Cal) 2 F 733, *infra* § 8 (equal protection); *Brown v Anderson* (1962, DC Alaska) 202 F Supp 96, *infra* § 7[b] (privileges and immunities; commerce clause).¹⁴

In *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, *infra* § 8, the court struck down a statute which restricted certain fishing rights of aliens and nonresidents, finding that the statute in question was preempted by the Enrollment & Licensing Act (46 USCS §§ 251 et seq.) relating to commercial vessels. The court relied in part on some of its earlier cases which did not involve supremacy clause contentions.

In the following cases, also discussed in more detail in succeeding sections of the annotation, challenges to allegedly discriminatory hunting and fishing laws were unsuccessful, the courts rejecting

11. Article IV, § 2.

12. Article VI.

13. Fourteenth Amendment.

14. Article I, § 8.

contentions raised under the particular constitutional provisions noted.

Sup Ct—McCready v Virginia (1877) 94 US 391, 24 L Ed 248, *infra* § 7[a] (privileges and immunities; commerce clause); **Patson v Pennsylvania (1914)** 232 US 138, 58 L Ed 539, 34 S Ct 281, *infra* § 10 (equal protection; due process);¹⁵ **Haavik v Alaska Packers Asso. (1924)** 263 US 510, 68 L Ed 414, 44 S Ct 177, *infra* § 7[a] (privileges and immunities).

Second Circuit—American Commuters Asso. v Levitt (1969, CA2 NY) 405 F2d 1148, *infra* § 7[a] (apparently equal protection).

Third Circuit—Corfield v Coryell (1823, CC Pa) F Cas No. 3230, *infra* § 7[a] (commerce clause; privileges and immunities; and admiralty cases clause).¹⁶

Seventh Circuit—Re Eberle (1899, CC Ill) 98 F 295, *infra* § 9[a] (privileges and immunities; Fourteenth Amendment).

Ninth Circuit—Lubetich v Pollock (1925, DC Wash) 6 F2d 237, *infra* §§ 7[a], 8 (Fourteenth Amendment); **Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont)** 417 F Supp 1005, *jur* noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, *infra* § 9[a] (privileges and immunities; equal protection; due process).

In **Montana Outfitters Action Group v Fish & Game Com. (1976, DC Mont)** 417 F Supp 1005, *jur* noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, *infra* § 9[a], the court rejected challenges under three constitutional provisions in holding that hunting elk for sport was not a constitutionally protected right of a nature which should require the state to show more than a rational basis for prescribing a higher license fee for hunting as to nonresidents than to residents.

§ 5. Factors affecting validity of challenged legislation

A number of factors have been suggested as possibly affecting the question whether legislation which apparently discriminates against aliens or nonresi-

dents as to fishing or hunting rights is invalid. One such factor that has been recognized—although it was apparently not decisive with regard to any of the state statutes discussed in this annotation—is the added cost that may be involved in enforcing hunting and fishing laws in the case of persons other than citizens or residents of the state, such cost arguably justifying an appropriate license fee differential.

In rejecting the contention that the allegedly greater cost of enforcing the South Carolina fishing laws against nonresidents justified the imposition of an arbitrarily high boat license fee against them, the court in **Toomer v Witsell (1948)** 334 US 385, 92 L Ed 1460, 68 S Ct 1156, *reh den* 335 US 837, 93 L Ed 389, 69 S Ct 12, said that the state was not without power to charge nonresidents a differential which would merely compensate the state for any added enforcement burden nonresidents may cause or for any conservation expenditures from taxes which only residents pay. In the instant case, the court concluded that it would be closing its eyes to reality if it were to determine that there was a reasonable relationship between the danger represented by noncitizens and the severe discrimination practiced upon them here.¹⁷

In **Mullaney v Anderson (1952)** 342 US 415, 96 L Ed 458, 72 S Ct 428, the court struck down a territorial fishing law which discriminated against nonresidents, noting, *inter alia*, that the law's prescribed fee differential was not shown to merely compensate for an added enforcement burden with respect to nonresidents or for any conservation expenditures which only residents paid. The court said that it did not mean to suggest that the state or territory actually has the burden of proof to establish the validity of a license tax, but it emphasized that a tax's validity is not to be deemed established by the mere fact of its imposition.

See **American Commuters Asso. v Levitt (1969, CA2 NY)** 405 F2d 1148, where

tion, the fee was \$25 for residents and \$2,500 for nonresidents.

15. Fourteenth Amendment.

16. Article III, § 2.

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the court observed that tax burdens are not always equal as between residents and nonresidents, and that nonresidents of New York could not demand the same low fishing-license fees in that state that New York residents paid, since it would be "administratively infeasible and probably impossible" to determine what a fair share of the state's largesse would be for every one of the nonresidents involved in the case.

Note may be taken of *Gospodonovich v Clements* (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, where, in striking down a commercial license fee scheme which charged nonresidents substantially more than residents, the court made particular note of the fact that there was nothing in the record to support a conclusion that the cost of enforcing the fishing laws against nonresidents was greater than for residents.

The propriety of charging nonresidents more for hunting and fishing privileges than residents where residents would otherwise bear a disproportionately high burden of enforcement costs was also recognized in *Montana Outfitters Action Group v Fish & Game Com.* (1976, DC Mont) 417 F Supp 1005, *jur noted* 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, but the court in that case held, on the factual evidence before it, that a fee ratio of 7.5 to 1 could not be justified on any theory of cost allocation.



With respect to fishing legislation, two closely related factors which may affect the validity of regulations which differentiate between residents and nonresidents (or between citizens and aliens) are the type of fish involved and the location of the waters in question:

Having held, in *McCready v Virginia* (1877) 94 US 391, 24 L Ed 248, that a state could prohibit citizens of other states from raising oysters in the tidewater beds of a river, the Supreme Court, as early as *Manchester v Massachusetts* (1891) 139 US 240, 35 L Ed 159, 11 S Ct 559, reserved judgment on the question whether there is a liberty of fishing for swimming fish in navigable waters common to inhabitants or citizens of the United States.

In distinguishing the *McCready Case* and striking down under the privileges and immunities clause of Article IV of the Constitution legislation which discriminated against nonresidents as to commercial shrimp-fishing rights in coastal waters, the court in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, *reh den* 335 US 837, 93 L Ed 389, 69 S Ct 12, relied to some extent on the factual distinctions between the two cases: the facts that the instant case involved free-swimming rather than stationary species, and that coastal rather than inland waters were involved.

And in *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, the court, construing the scope of the Enrollment and Licensing Act (46 USCS §§ 251 et seq.) for supremacy clause purposes, placed considerable emphasis on the migratory nature of the fish there involved.

Apparently the only other case in which these factors were discussed was *Edwards v Leaver* (1952, DC RI) 102 F Supp 698, involving the regulation of menhaden fishing.

Invalidating a law which prohibited nonresident fishing during part of the year when such fishing by residents was permitted, the court said that it did not regard as important the fact that the areas designated by the statute might be regarded as inland waters. The important fact, the court said, was that menhaden were migratory fish. The court's decision was based on the privileges and immunities clause of Article IV and the equal protection clause of the Fourteenth Amendment.

☆ COMMENT: Whatever importance the type of fish or the locale may have with respect to the validity of allegedly discriminatory fishing legislation would not necessarily be limited to its effect on the "state ownership" theory discussed in § 3, supra. As illustrated by the *Douglas Case*, supra, these factors may bear on the application of a federal statute under the supremacy clause, or they might in some cases affect a determination as to whether interstate commerce is involved within

the meaning of Article I, § 8, of the Constitution.

☆ NOTE: Obviously, not all free-swimming fish are migratory. Arguably a somewhat stronger case for state regulation could be made in the case of free-swimming but non-migratory fish than with respect to migratory species.

The court in the following case held valid an apparently discriminatory elk-hunting license fee system on the basis that the hunting in question was purely for sport and thus not subject to the full measure of constitutional protection.

Hunting for sport was distinguished from hunting for a livelihood in *Montana Outfitters Action Group v Fish and Game Com.* (1976, DC Mont) 417 F Supp 1005, *jur noted* 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, where the court upheld a legislative scheme involving a substantial disparity in elk-hunting license fees as between residents of the state and nonresidents. Noting that practically all of the earlier cases invalidating discriminatory hunting and fishing laws had involved commercial pursuits, the court declared that there is no nexus between hunting elk for sport and any fundamental right such as pursuing a common calling. This being so, said the court, all that was required to sustain a program such as that in question under the privileges and immunities clause of Article IV and the equal protection and due process clauses of the Fourteenth Amendment was a rational basis for the scheme, which the court found present as to the scheme in question.

Hunting laws involving disparities of treatment with respect to aliens or nonresidents were upheld with respect to sport hunting in *Patson v Pennsylvania* (1914) 232 US 138, 58 L Ed 539, 34 S Ct

281, (aliens; statute also covered commercial hunting); and *Re Eberle* (1899, CC Ill) 98 F 295 (nonresidents), but the courts devoted no discussion to any distinction between sport and commercial hunting.

☆ COMMENT: It may be observed from the cases discussed in this annotation that the vast majority of them involved commercial fishing or hunting, as opposed to hunting or fishing carried out purely for sport; in fact, no cases have been noted subsequent to *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, *reh den* 335 US 837, 93 L Ed 389, 69 S Ct 12, in which courts have devoted any substantial discussion to the problem of discrimination against aliens or nonresidents with respect to sport fishing rights.¹⁸ It is probably unsafe, therefore, to assume that the rationale of cases wherein discriminatory commercial hunting or fishing laws were invalidated would apply with equal force to sport hunting or fishing. Such an assumption might be particularly unsafe with respect to the privileges and immunities clause, on the basis that sport hunting or fishing, perhaps unlike commercial hunting and fishing, may not fall within the scope of "privileges and immunities." On the other hand, sport hunting or fishing may actually stand on a better footing in some respects than do commercial hunting and fishing, since frequently the former pose less of a threat to the state's supply of natural resources.

§ 6. Powers of territorial governments under Federal Constitution

Actions of territorial governments of United States Territories stand on a

18. The court in *American Commuters Asso. v Levitt* (1969, CA2 NY) 405 F2d 1148, rejected the contention that the plaintiff nonresident commuters were entitled to obtain fishing licenses (presumably for sport) for exactly the same fee as that paid by residents, but in the very narrow context of the court's decision it is not clear that the court relied on the

apparently sporting nature of the activity in question.

Sport fishing was apparently involved in *Re Eberle* (1899, CC Ill) 98 F 295, but the court's decision in this pre-*Toomer* case clearly did not rest on any distinction between sport and commercial fishing.

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somewhat different footing than actions of state governments, since the territorial governments possess only those powers which Congress confers on them.¹⁹ However, constitutional provisions are generally deemed applicable to incorporated Territories, whether by the Constitution's own force or by acts of Congress which have usually extended the Constitution's application to such Territories.²⁰ Accordingly, in the following case the Supreme Court ruled that an act of a territorial legislature establishing different commercial fishing-license fees for residents and nonresidents was in violation of the Constitution and therefore invalid, notwithstanding that it was a Territory, not a state, which was involved.

In *Mullaney v Anderson* (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, the court held that the privileges and immunities clause of the Constitution was applicable to an act of the Alaska territorial legislature setting a \$50 commercial fishing-license fee for nonresidents and a fee of only \$5 for residents. The court stated that it had no occasion to reconsider the holding of *Haavik v Alaska Packers Asso.* (1924) 263 US 510, 68 L Ed 414, 44 S Ct 177, that it was within the power of Congress to relieve the Territory of some of the restrictions applicable to states with respect to fishing licenses, but it disagreed with the assumption of the *Haavik* court that the Organic Act of Alaska (48 USCS §§ 21 et seq.) had so relieved the Territory. The court pointed out that two sections of the Act had provided that "the Constitution should have the same force in Alaska as elsewhere and that the legislative power of the Territory was extended to "all rightful subjects of legislation not inconsistent with the Constitution . . ." The Court said that in light of such provisions, it could not presume that Congress authorized the territorial legislature to treat citizens of states differently from the way states must treat citizens of sister states. Only the clearest expression of congressional intent could induce

such a result, the court said, adding that, if anything, congressional pronouncements since *Haavik* concerning the very subject matter here in issue fortified the conclusion that Alaska was granted no greater power over citizens of other states in the regulation of fisheries than a state legislature would have.

☆ NOTE: In the *Haavik* Case, referred to in *Mullaney v Anderson*, supra, the court had upheld a similar act of the Alaska legislature partly on the basis that such provision was implicitly authorized by the Organic Act; the *Haavik* court, in fact, emphasized, "We are not here concerned with taxation by a state." While the court's assumption as to congressional authorization was rejected in the *Mullaney* Case, the *Haavik* Case may still stand for the proposition that Congress has the power to authorize a Territory to enact fishing or hunting license statutes which discriminate against nonresidents. Of course, the question is now moot as to Alaska itself, that jurisdiction having attained statehood subsequent to the Supreme Court's decision in *Mullaney v Anderson*.

III. Validity of particular legislation

§ 7. Fishing laws; discrimination against nonresidents of state

[a] Law held valid

In the following decisions involving various types of fishing, the courts upheld legislation which disadvantaged nonresidents of the state or Territory as against residents, rejecting challenges based on various provisions of the Federal Constitution.

The Commonwealth of Virginia was held to have the power to prohibit citizens of other states from raising oysters in the tidewater beds of a river in Virginia, in *McCready v Virginia* (1877) 94 US 391, 24 L Ed 248. The court pro-

19. See 72 Am Jur 2d, States, Territories, and Dependencies § 154 for discussion.

20. See 72 Am Jur 2d, States, Territories, and Dependencies § 146 for discussion.

ceeded on the theory that each state owns the beds of all tidewaters within its jurisdiction and the animal life in them insofar as the latter are capable of ownership while running, and that the citizens of one state are not invested by the privileges and immunities clause of Article 4 of the Constitution with any interest in the common property of the citizens of another state. The court deemed the planting of oysters in soil covered by water owned in common by the people of a state to be no different in principle than the planting of corn on dry land held in the same way, as to which the court thought it clear that the state might reserve to its citizens the exclusive use of state property. The court also held the commerce clause not to be offended by the state action in question, on the basis that there was no question of transportation or exchange of commodities but only of cultivation and production.

In *Haavik v Alaska Packers Asso.* (1924) 263 US 510, 68 L Ed 414, 44 S Ct 177, the court upheld the imposition by the Territory of Alaska of a \$5 license tax for nonresident commercial fishermen, the view being taken that there was nothing in the Constitution (particularly Article IV, § 2) prohibiting Congress from favoring those who had acquired local residence and upon whose efforts the future development of the Territory would largely depend.²¹

In *American Commuters Asso. v Levitt* (1969, CA2 NY) 405 F2d 1148, the court held that the "novel" argument that there should be an indiscriminatory interrelationship between taxes and benefits, and that if certain challenged tax statutes were upheld the appellant nonresidents should be entitled to receive various benefits—including the

lower fishing-license fees that New York residents paid—commensurate with such residents' entitlement to them, presented no substantial issue under the Federal Constitution. The court observed that tax burdens were not always equal as between residents and nonresidents and that it would be administratively infeasible and probably impossible to determine what a fair share of New York's largesse would be for every one of the commuting nonresidents.

An early decision upholding the validity of a statute restricting the use of a state's oyster beds was *Corfield v Coryell* (1823, CC Pa) F Cas No. 3230, involving a statute which made it unlawful for any person who was not at the time an actual inhabitant and resident of the state to gather clams, oysters, or shells in any of the inland or coastal waters of the state on board any vessel not wholly owned by an inhabitant and resident. The court held the statute not violative of the commerce clause, the privileges and immunities clause, or the provision of the Constitution giving the federal courts control over cases in admiralty, the court using much of the same reasoning later used in *McCready v Virginia*, supra.

For an early Seventh Circuit case wherein the court upheld a statute imposing a fishing-license fee on nonresidents of the state but not on residents, see *Re Eberle* (1899, CC Ill) 98 F 295, infra § 9[a].

Also following the "state ownership" rationale in upholding under the Fourteenth Amendment a discriminatory fishing law is *Lubetich v Pollock* (1925, DC Wash) 6 F2d 237, where the statute restricted the right to fish (other than with hook and line) to persons who were both citizens of the United States and

21. Even though the proposition that Congress could authorize a statutory provision such as that involved here may itself still be good law, the authority of the *Haavik* Case as to the validity of a scheme such as that involved therein has been eroded by *Mullaney v Anderson* (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428 (invalidating a scheme levying a \$5 fee on resident commercial fishermen

and a \$50 fee on nonresidents), both because that case rejected the assumption that Congress had actually intended to authorize the licensing provision which was actually enacted by the Alaska territorial legislature, and because the analysis of the scheme itself followed a much different course in *Mullaney* from the one adopted in *Haavik*.

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residents "of this state or an adjoining state" for the preceding 12 months.

[b] Law held invalid

Relying primarily on the privileges and immunities clause of Article IV, but in some instances on other provisions, the courts in the following cases held that provisions of state fishing legislation improperly discriminated against nonresidents of the state and therefore violated the United States Constitution.

A South Carolina statute requiring payment of a license fee by commercial shrimp fishermen of \$25 for each boat owned by a resident and of \$2,500 for each boat owned by a nonresident, the practical effect of which was to virtually exclude nonresidents, was held to violate the privileges and immunities clause of Article 4, in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, even where the difference in license fees was supposedly justified because it was based on the assumptions that (as alleged by the state) nonresidents used larger boats or different fishing methods than residents, that the cost of enforcing the laws against them was appreciably greater, and that the state conservation program for shrimp required expenditure of funds beyond those collected in license fees. Recognizing that the privileges and immunities clause, while barring discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, does not preclude disparity of treatment in many situations where there are sufficient independent reasons for it, the court took the position that the reasons relied on by the state in this instance did not support a remedy so drastic as to practically effect a total exclusion of nonresidents. The court observed that the state was not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-

residents a differential which would merely compensate the state for any added enforcement burden nonresidents may impose or for any conservation expenditures paid from taxes levied only upon residents.²² It was contended, on the authority of *McCready v Virginia* (1877) 94 US 391, 24 L Ed 248, that the present case was an exception to the above analysis because the state was the owner of the fish for the benefit of its citizens; however, the court declined to extend to the present situation the rationale of *McCready*, which case it noted involved oysters rather than free-swimming fish and involved inland tidewaters rather than coastal waters. The court accordingly held that commercial shrimping in the marginal sea, "like other common callings," was within the purview of the privileges and immunities clause of Article 4 of the Constitution.

The conclusion reached in the above case was reaffirmed in *Kleppe v New Mexico* (1976) 426 US 529, 49 L Ed 2d 34, 96 S Ct 2285, reh den 429 US 873, 50 L Ed 2d 154, 97 S Ct 189.

In *Mullaney v Anderson* (1952) 342 US 415, 96 L Ed 458, 72 S Ct 428, the court held that a territorial law requiring commercial fishing license fees of \$5 in the case of residents and \$50 in the case of nonresidents violated the Constitution. In sustaining the attack on the statute, the court relied on *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, supra, as holding that Article IV, § 2, would bar any state from imposing the license fee here contested. The court emphasized that the fee differential was not designed merely to compensate the state for an added enforcement burden with respect to nonresidents or for any conservation expenditures which only residents paid. The plaintiffs' burden to establish the unconstitutionality of the statute was held to have been met since their attempts to elicit, by interrogatories and cross-examination, the facts as to higher enforcement costs had been without avail and because they had

22. The court also thought it worthy of note that the statute imposed no limita-

tion on the number of resident boats which might be licensed.

negated other possible bases for the discrimination raised by the pleadings.²³

See *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, infra § 8, where a legislative scheme involving discrimination as to commercial fishing rights with respect to both nonresidents and aliens was invalidated.

Relying heavily on *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, supra, the court in *Russo v Reed* (1950, DC Me) 93 F Supp 554, held that a statute which allowed commercial fishing in the maritime belt by 3-year residents of the state year-round, but prohibited such fishing during the summer on the part of persons who had not been Maine residents for 3 years, to be in violation of the privileges and immunities clause of Article IV of the Constitution. The effect of the statutory scheme was, in effect, to exclude non-3-year residents altogether from fishing for certain species since these were only available in the summer months. The court held that the fact that the statute was expressed in terms of "residence" rather than "citizenship" was not determinative under the privileges and immunities clause, relying on dicta in *Toomer v Witsell* to the effect that such an argument would be without force. In addition to rejecting several of the same contentions which were unsuccessful in *Toomer v Witsell*, the court took the view that the statute in question was not a conservation measure, and noted that there was nothing in the record to indicate that nonresident commercial fishermen constituted a local evil of some sort when pursuing their occupation in the maritime belt during the period of the year in question.

Where a careful consideration of the record failed to disclose to the court any adequate explanation for the discrimination worked against nonresidents by a statute prohibiting them from fishing for menhaden while permitting residents to do so during a certain portion of the

year, it was held in *Edwards v Leaver* (1952, DC RI) 102 F Supp 698, that the statute violated the privileges and immunities clause of Article IV (with respect to the individual plaintiffs) and the equal protection clause of the Fourteenth Amendment (with respect to the corporate plaintiffs). The court noted that there was no evidence that any local evils caused by nonresidents would be eliminated by the statute, and that there could be no question of the necessity of preserving the food supply since menhaden are not food fish. The court stated that the evidence refuted the contention that the statute was validly aimed at preserving true game fish which would otherwise be caught in the menhaden fishermen's nets, observing that no restrictions were placed on the number of licenses which might be issued to Rhode Island residents and that in any event testimony in the case indicated that the amount of game fish caught in menhaden nets was usually negligible. In view of "the discriminatory character" of the statute, the court did not regard as important the fact that the area designated by the statute might be regarded as inland waters; the important fact, in the court's view, was that menhaden are migratory fish.

☆ NOTE: The court in the *Edwards Case* applied no separate analyses as between the privileges and immunities and equal protection clauses, except to indicate that the corporate plaintiffs were clearly not citizens within the meaning of the former, but were "persons" within the meaning of the latter (citing *Grosjean v American Press Co.* (1936) 297 US 233, 80 L Ed 660, 56 S Ct 444).

In *Steed v Dodgen* (1949, CA5 Tex) 85 F Supp 956, the court invalidated a Texas statute which imposed on a nonresident commercial fisherman an annual license tax of \$200 and upon a "nonresident commercial fishing boat" an annual tax of \$2,500, while requiring

23. The court also rejected the contention that the constitutional limitations laid down in *Toomer v Witsell* were not

applicable because Alaska was a territory and not a state; as to this point, see § 6, supra.

a resident commercial fisherman to pay a license tax of only \$3 and a fee of no more than \$15 for his boat. In holding this scheme violative of Article IV, § 2, of the Constitution, the court deemed it sufficient to observe that the facts of the case were in all material respects substantially the same as those involved in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, and that the instant case therefore controlled that decision.

The court held in *Gospodonovich v Clements* (1951, DC La) 108 F Supp 234, app dismd 344 US 911, 97 L Ed 702, 73 S Ct 334, that certain Louisiana statutes, insofar as they undertook to regulate and govern nonresident fishermen and fishing vessels owned by nonresidents, were violative of Article IV, § 2, of the Constitution. The statutes in question (applicable to both inland and coastal waters), at least as enforced, did not permit the licensing of fishing boats owned by nonresidents,²⁴ while allowing the licensing and use of boats owned by citizen-residents on the payment of small fees; the laws also allowed residents to fish commercially on the payment of fees for themselves ranging to no more than \$25 while requiring nonresidents to pay a fee of \$200. According to the court, the evidence disclosed that resident and nonresident fishermen used substantially the same means and methods and that there was no real distinction between the fishing vessels owned and operated by residents and those operated by nonresidents; the court noted particularly that there was nothing in the record to support a conclusion that the cost of enforcing the laws against nonresidents was greater. It was clear, said the court, that the distinction between the two sets of licensing requirements was based solely upon citizenship. They were not conservation measures, declared the court, but were intended to exclude nonresidents from pursuing a common calling of citizens of states bordering on the Gulf of Mexico. The court noted that the

statutes placed no limitation on the number of resident fishermen or resident fishing boats which might be licensed, and that apparently the supply of at least shrimp bore no relationship to the number of vessels harvesting the crop, provided that the fishing methods used were properly supervised. In these circumstances, the court deemed the case to be clearly within the holdings of *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12.

A law which granted state authorities power to prohibit, on a temporary basis, salmon fishing by nonresidents was held to be in violation of both the commerce clause and the privileges and immunities clause of Article IV of the Constitution, in *Brown v Anderson* (1962, DC Alaska) 202 F Supp 96. The statute recited that while the state was forbidden from creating an economic advantage for its residents under normal circumstances, it had both a practical and moral responsibility to provide for its citizens in situations where economic competition would create community destitution. The statute therefore gave authorities the power to establish, for each salmon registration area or district, an optimum number for the total run of salmon within that district, and to prohibit nonresident fishing whenever the authorities should determine that the yearly run would be less than the optimum number and that under anticipated conditions resident fishermen would not catch sufficient fish to sustain themselves. The fishermen licensed were about one-third residents and two-thirds nonresidents of the state; they fished side by side in the same manner without distinction as to method or technique. In the court's view, the law frankly discriminated against nonresidents upon the happening of certain events and there was no reasonable differentiation to take the situation outside the rationale of *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12. It was contended that the statute

24. An exception was made, with respect to certain categories of boats, for boats owned by residents of states which

had a reciprocal agreement with Louisiana.

was a reasonable regulation of fishing and provided a means to prevent or alleviate the possible destitution of the residents of the state, but the court held that this rationale was insufficient to save the statute. Stating that any discrimination must be reasonable to be sustained, the court found nothing that would in any way justify the application of the prohibition to nonresidents and not to residents, and it therefore concluded that the privileges and immunities clause was violated. As to the commerce clause, the court noted that while fishing itself may be a local activity, it is only one step in the whole process resulting in the shipment of the finished canned product. In the court's opinion, the statute's provisions did place a burden on the movement in interstate commerce of the nonresident fishermen.

§ 8. —Aliens

In the following decisions involving fishing legislation placing restrictions on commercial fishing by aliens, it was held that such provisions infringed the United States Constitution.

Reversing a state court's judgment dismissing a petition for a writ of mandamus to compel issuance of a commercial fisherman's license to the petitioner, the Supreme Court in *Takahashi v Fish & Game Com.* (1948) 334 US 410, 92 L Ed 1478, 68 S Ct 1138, held that a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship violated the United States Constitution. The court observed that the case would appear to be controlled by *Truax v Raich* (1915) 239 US 33, 60 L Ed 131, 36 S Ct 7, which decision embraced the general proposition that an alien legally admitted to the country has the right to work for a living in the common occupations of the community, unless (said the Takahashi court) California could show that the legislation here in question was necessary to protect special interests either of the state or of its citizens as such. The court rejected the state's contention that the statute's prohibition was based on a reasonable classification in that the state

merely followed the Federal Government's lead in adopting that classification from the naturalization laws. Pointing out that the Federal Government has broad constitutional powers over immigration and naturalization, but that the states were granted no such powers under the Constitution, the court said that this demonstrated the tenuousness of the state's claim that it had power to single out and ban its lawful alien inhabitants from following a vocation simply because Congress had put some such groups in special classifications in the exercise of its broad and wholly distinguishable powers over immigration and naturalization. The court was also unable to find sufficient "special public interest" for the legislation in the supposed collective public ownership of fish swimming within the 3-mile limit. Agreeing with earlier case law that "to put the claim of the State upon title is to lean upon a slender reed,"²⁵ the court was of the view that to whatever extent the fish in the 3-mile limit off California might be "capable of ownership" by the state, such "ownership" was inadequate to justify the exclusion of lawfully resident aliens from making a living by fishing in the ocean, while permitting all others to do so. The court also rejected the argument that the statute should be upheld on the authority of cases sustaining state laws barring aliens ineligible from citizenship from land ownership, pointing out that such cases rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property.

☆ COMMENT: The court in the Takahashi case did not explicitly state what provision(s) of the Federal Constitution it deemed to have been violated by the legislation in question, but to judge from the cases cited in the court's opinion, it was apparently relying primarily on the Fourteenth Amendment—either on

²⁵ See *Missouri v Holland* (1920) 252 US 416, 64 L Ed 641, 40 S Ct 392, 11 ALR 984.

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the equal protection clause alone or on that clause in combination with the due process clause. Compare *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, decided the same day, where (in a case involving discrimination against United States citizens who were nonresidents of the jurisdiction in question), in an opinion written by another Justice, the court relied on the privileges and immunities clause of Article IV in overturning the disputed legislation, and expressly disclaimed any reliance on the equal protection clause.

Virginia statutes which prohibited commercial fishing by aliens or by corporations controlled by aliens in the state's waters, and which also restricted menhaden fishing by nonresidents to certain waters, were struck down as violative of the supremacy clause of the Constitution (Article VI), in *Douglas v Seacoast Products, Inc.* (1977) 431 US 265, 52 L Ed 2d 304, 97 S Ct 1740, because in the court's view the state laws were pre-empted by federal enrollment and licensing laws for fishing vessels. The court acknowledged that pre-emption should not be found unless it was the clear and manifest purpose of Congress, but it found such intent in what it deemed Congress' tacit ratification of the courts' construction of the Enrollment and Licensing Act of 1793 (46 USCS §§ 251 et seq.). The court discussed and relied heavily on *Gibbons v Ogden* (1824) 22 US 1, 6 L Ed 23, where discriminatory state regulation of shipping was invalidated as to vessels federally licensed to engage in the coasting trade. In *Gibbons*, Chief Justice Marshall interpreted the Act, and particularly the section governing the granting of licenses,²⁶ as implying, unequivocally, a legislative authority to licensed vessels to carry on the trade in question, and not as merely conferring a national

character upon the ship. In the instant case the Commonwealth of Virginia argued that the challenged statutes in no way interfered with navigation of the vessels in question and that thus *Gibbons* was distinguishable; the court disagreed, emphasizing Chief Justice Marshall's language that a license transfers to the grantee all the right which the grantor can transfer, to do whatever is within the terms of the license, the court also noting that it was now established that Congress has the power to regulate the taking of fish from state waters. The court observed that while the *Gibbons* construction of the Act had received criticism, Congress had repeatedly re-enacted the statute in substantially the same form while undoubtedly fully aware of a case as renowned as *Gibbons*. The court also rejected the contention that the Submerged Lands Act (43 USCS §§ 1301 et seq.) effectively repealed the traditional understanding of the effect of the Licensing Act. While the Submerged Lands Act did give states "ownership" and control over natural resources within state territorial jurisdiction, it also reserved to the United States all constitutional powers of regulation for purposes of commerce. The court also considered its decision to be supported by the policy against Balkanization of interstate commercial activity which the Constitution was intended to prevent, but which would likely result if each state could prevent fishermen from following migrating menhaden (for example) across state lines. The court concluded that while the states were not prevented from imposing reasonable, nondiscriminatory conservation measures otherwise within their police power, Virginia had failed to do so here.²⁷

☆ OBSERVATION: Although presumably the Enrollment and Licensing Act would have been just as

26. 46 USCS § 263 mandates that the license is to provide that "license is hereby granted for the . . . [vessel] to be employed in carrying on the . . . [trade] for one year from the date hereof . . ."

27. The court noted, inter alia, that

while the Commonwealth claimed the statute to be a conservation measure, it made no restriction whatever on the quantity of menhaden which could be caught by Virginia residents.

applicable in at least some of the earlier commercial fishing cases (discussed *infra* and in § 7, *supra*) as it was held to be in the Douglas Case, that case was apparently the first within the present scope of this annotation in which the Act's pre-emptive effect under the supremacy clause was discussed.

Apparently the earliest decision invalidating a provision of state law which involved discrimination against aliens was *Re Ah Chong* (1880, CC Cal) 2 F 733, where, pursuant to an article of the state constitution headed "Chinese," the legislature passed a statute prohibiting "aliens incapable of becoming electors of this state" from fishing in state waters. Conceding, under the existing authority of *McCready v Virginia* (1877) 94 US 391, 24 L Ed 248, and other cases, that the state could exclude *all* aliens from fishing in its waters, the court said that to subject Chinese to imprisonment while aliens of all European nations under the same circumstances were exempt from any punishment whatever was to deny the former the equal protection of the laws guaranteed by the Fourteenth Amendment. It was also obvious, in the court's view, that the statute was not passed in pursuance of any public policy relating to the fisheries of the state, but was employed simply as a means of carrying out a policy of excluding the Chinese from the state. Further, the court noted that since the statute was actually couched in terms of aliens "incapable of becoming electors," it also would irrationally exclude many other groups from fishing rights—such as all alien women (including European), since women were ineligible (at that time) to vote in California.

◆
A statute restricting the right to fish (other than with hook and line) to persons who were both citizens of the United States and residents "of this state or an adjoining state" for the pre-

ceding 12 months was upheld in *Lubetich v Pollock* (1925, DC Wash) 6 F2d 237, the court relying on the "state ownership" theory discussed in § 3, *supra*.

§ 9. Hunting laws; discrimination against nonresidents of state

[a] Law held valid

In the following cases in which various state legislatures imposed higher hunting license fees for nonresidents of the state than for residents, the courts held that such enactments did not violate either the privileges and immunities clause of Article IV of the Constitution or the Fourteenth Amendment.

An early case, wherein the court upheld a statutory scheme imposing hunting and fishing license fees for nonresidents (\$10) but none for residents, was *Re Eberle* (1899, CC Ill) 98 F 295. The court, citing *Geer v Connecticut* (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, rested its decision on what it called the sovereign ownership of animals *ferae naturae* and the police power of the state to preserve for its people a valuable food supply. The court upheld the conviction of a nonresident individual who was hunting on premises belonging to a hunting club and corporation of which he was a member and stockholder; the court reserved the question whether a nonresident landowner would be relieved from the provision of the statute in question when shooting wild game on his own premises.

Distinguishing hunting for sport from hunting for a livelihood, the court in *Montana Outfitters Action Group v Fish & Game Com.* (1976, DC Mont) 417 F Supp 1005, *jur* noted 429 US 1089, 51 L Ed 2d 534, 97 S Ct 1096, held that a statute imposing a much higher elk-hunting fee for nonresidents than for residents was valid as a conservation measure. The court said preliminarily that elk are not hunted commercially but are much sought after for their trophy value, that elks do not really migrate,²⁸ and that there were many more

28. According to the court, "The movement of the elk is more a drifting than a true migration." The point was apparently made for the purpose of distin-

guishing the case from cases such as *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, *reh den* 335 US 837, 93 L Ed 389, 69 S Ct 12, which the

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nonresident than resident elk hunters. Agreeing with those challenging the statute that the nonresident-resident fee ratio²⁹ could not be justified on a relative cost allocation basis, the court nevertheless said that there must be some restriction on the number of individuals who could hunt elk since there were "not enough elk to go around." The court said that a scheme based on a pure lottery would be discrimination-free, but that a legislature might with some rationality conclude that such a lottery open to all potential elk hunters in the United States might (given the small percentage of those licensed who would be Montana residents) destroy the political motivation to Montana citizens to underwrite the elk management program without which the species would disappear. There being, in the court's view, no nexus between hunting elk for sport and any fundamental right (such as pursuing a common calling), such a rational basis was all that was required to sustain the program under the privileges and immunities clause of Article IV and the equal protection and due process clauses of the Fourteenth Amendment, the court said.

☆ NOTE: Although the case actually involved a prohibition of the transportation outside the state (by anyone) of game birds killed within the state—rather than the actual killing of the birds—note may be taken of *Geer v Connecticut* (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600, where the court acknowledged that the purpose of the law was to restrict the use of game to the people of the state. In that decision, which involved only the commerce clause, the court concluded that the police power of the state to preserve game birds as a valuable food supply for the people of the state justified the regulation in question, even if interstate commerce might be remotely and indirectly affected thereby.

[b] Law held invalid

In the following cases, the courts held that state statutes discriminating against nonresidents of the state with respect to alligator-trapping rights were violative of the equal protection clause of the Fourteenth Amendment, at least as applied to a nonresident landowner who wished to employ persons to hunt game on his lands.

In *Pavel v Pattison* (1938, DC La) 24 F Supp 915, the court invalidated, with respect to a nonresident Louisiana landowner who wished to trap alligators on his own land, a Louisiana law which denied the right to trap to anyone who had not resided within the state for at least one year. With respect to this statute, the court said that if the state could deny trapping privileges except to those who had resided in the state for one year, it could also make the term 10 or 20 years. Conceding that a state might, under proper conditions, confine the taking of fish and game to its own citizens, the court said that in the instant case no justification for the statute's provisions was proffered except that it was fair to exclude nonresidents, who were not taxpayers and thus did not contribute to the enforcement of the state's game laws; however, the court pointed out that the nonresident's land was subject to taxation like anyone else's. The court concluded that the statutory provision in question violated the equal protection clause of the Fourteenth Amendment in denying the landowner the right to use his property on the same footing with other landowners residing in the state. Where, after the decision in *Pavel v Pattison*, supra, the state legislature had amended its statute to permit nonresidents to obtain trapping licenses on the payment of a \$200 fee and the posting of a \$300 deposit (whereas for residents the fee was only \$2 and there was no deposit requirement), the court held, in *Pavel v Richard* (1938, DC La) 28 F Supp 992, without elaboration, that this statute also denied the landowner and his em-

District Court said were concerned with migrating fish and birds.

29. 28.2 to 1, in effect, for a license to

hunt elk alone, and 7.5 to 1 for a license to hunt elk and other specified animals.

employees or lessees equal protection of the law.

§ 10. —Aliens

In the following case, the Supreme Court held constitutional and valid a state statute prohibiting the killing of any wild bird or animal by an unnaturalized foreign-born resident, except in defense of person or property, and "to that end" making it unlawful for any such person to own or possess a shotgun or rifle.

Affirming the defendant alien's conviction for violation of a state statute prohibiting the killing of any wild bird or animal by any unnaturalized foreign-born resident, except in defense of person or property, and "to that end" making it unlawful for any such person to own or be possessed of a shotgun or rifle, the Supreme Court in *Patsone v Pennsylvania* (1914) 232 US 138, 58 L Ed 539, 34 S Ct 281, rejected the defendant's contention that the statute was contrary to the Fourteenth Amendment to the Federal Constitution because it unjustifiably deprived aliens of property and denied to them the equal protection of the laws. The court said that the legislative assumption that unnaturalized foreign-born residents were peculiarly a source of danger to wildlife, which the state sought to protect by the statute, was not so unwarranted as to invalidate the statute under the Fourteenth Amendment. The court explained that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably may be considered to define those from whom the evil mainly is to be feared, it may properly be singled out. In the court's

view, the question was one of local experience on which the court should be very hesitant to declare that the state legislature was wrong.

☆ OBSERVATION: In declining to apply the rationale of the *Patsone* case to a case involving licensing requirements for shrimp fishing in coastal waters, the court in *Toomer v Witsell* (1948) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, emphasized that in *Patsone* the theory of the case was that there was a substantial reason for the discrimination beyond the mere fact of alienage.

And in *Anderson v Smith* (1934, CA9 Alaska) 71 F2d 493, the court said that while states have no right to discriminate between their own citizens and those of other states in the transaction of business within the state's borders, they do have the right to exact higher license fees from nonresidents than from residents for the privilege of hunting game within the borders of the state, citing *Geer v Connecticut* (1896) 161 US 519, 40 L Ed 793, 16 S Ct 600.

☆ OBSERVATION: The continued validity of the proposition stated in the above case is now somewhat doubtful, in view of later cases such as *Toomer v Witsell* (1949) 334 US 385, 92 L Ed 1460, 68 S Ct 1156, reh den 335 US 837, 93 L Ed 389, 69 S Ct 12, although *Toomer* dealt with commercial fishing rather than hunting. It appears that somewhat higher fees may be justified for nonresidents in some circumstances, however; see § 5, supra.

Consult POCKET PART in this volume for later case service

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LATER CASE SERVICE

Supplementing the Annotations

52 L Ed 2d 779-798

§ 1. Introduction

[b] Related matters

Implication of private right of action from provision of United States constitution—federal cases. 64 L Ed 2d 872.

Relief under Federal Civil Rights Acts to state prisoners complaining of interference with access to courts. 23 ALR Fed 6.

Authority of United States District Court, under 28 USCS § 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim, 53 ALR Fed 651.

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§ 3. Prisoners' right of access to courts:

[a] Generally

State creates protected liberty interest for prisoner by placing substantive limitations on official discretion and inmate must show that particularized standard or criteria guides state's decisionmakers; if decisionmaker is not required to base his decision on objective and defined criteria but instead can deny requested relief for any constitutionally permissible reason or for no reason at all, state has not created constitutionally protected liberty interest. *Olim v Wakinekona* (1983, US) 75 L Ed 2d 813, 103 S Ct 1741.

[b] Due process basis

Transfer of prisoner from state prison in Hawaii to one in California does not implicate liberty interest within meaning of due process clause of Fourteenth Amendment, since (1) interstate prison transfer does not deprive inmate of any liberty interest protected by due process clause in and of itself, and (2) Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under due process clause where prison administrator's discretion to transfer inmate is completely unfettered under state law. *Olim v Wakinekona* (1983, US) 75 L Ed 2d 813, 103 S Ct 1741.

52 L Ed 2d 824-844

§ 1. Introduction

[b] Related matters

Federal pre-emption of state authority over domestic relations—federal cases. 70 L Ed 2d 895.

State regulation of land ownership by alien corporation. 21 ALR4th 1329.

Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations. 69 Calif L Rev 189, March, 1981.

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

§ 4. Constitutional bases for adjudication of claims of discrimination

For purposes of equal protection clause of Fourteenth Amendment, there is irrationality in differences state legislature draws in costs of its elk hunting licenses between resident and nonresident hunters, where legislative choice (1) is economic means not unreasonably related to preservation of finite resource and substantial regulatory interest of state, and (2) serves to limit number of hunter-days in state's elk country. *Baldwin v Fish & Game Com.*, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852.

See *Hughes v Oklahoma*, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727, on remand (*Okla Crim*) 595 P2d 1349, §§ 5, 7[b].

State statute attempting to deny nonresidents right to commercially harvest blue crabs in Virginia waters violated Privileges and Immunities Clause. *Tangier Sound Watermen's Assoc. v Douglas* (1982, ED Va) 541 F Supp 1287.

§ 5. Factors affecting validity of challenged legislation

With regard to challenges under the commerce clause of the United States Constitution (Art I, § 8, cl 3) to a state's statutory regulation of exports of natural resources, including wild animals and fish, the rule is that where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, the statute will be

upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits, and if a legitimate local purpose is found, the question becomes one of degree, the extent of the burden that will be tolerated being dependent on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Hughes v Oklahoma, 441 US 322, 60 L Ed 2d 250, 99 S Ct 1727, on remand (*Okla Crim*) 595 P2d 1349.

§ 7. Fishing laws; discrimination against nonresidents of state

[b] Law held invalid

A state law prohibiting the transporting or shipping for sale outside the state of minnows which are seined or procured within the state's waters violates the commerce clause of the United States Constitution (Art I, § 8, cl 3), since such law on its face discriminates against interstate commerce, and does not represent the least discriminatory alternative of the state to promote any legitimate local purpose in maintaining the ecological balance in state waters.

Hughes v Oklahoma, 441 US 332, 60 L Ed 2d 250, 99 S Ct 1727, on remand (*Okla Crim*) 595 P2d 1349.

Ordinance, which required one year of residency in town as condition to obtaining of shellfish license, had sufficient impact on right to travel to trigger strict scrutiny standard of equal protection review, and ordinance was unconstitutional where town's conservation interest, while important, was not sufficiently compelling to overcome strict scrutiny standard; court noted that, even if conservation interests were "compelling," durational residency requirement would still be unconstitutional if town could achieve its conservation goals by employing alternative measures that would cause little or no interference with constitutionally protected activity. *Hassan v East Hampton* (1980, ED NY) 500 F Supp 1034.

See *Tangier Sound Watermen's Assoc. v Douglas* (1982, ED Va) 541 F Supp 1287, § 4.

§ 9. Hunting laws; discrimination against nonresidents of state

[a] Law held valid

Neither statutory requirement of state that nonresident, but not resident hunters, purchase combination recreational hunting licenses in order to be able to obtain single elk, nor requirement that nonresident hunters pay much higher license fees violates equal protection, since state has no duty under Fourteenth Amendment to have its licensing structure parallel or identical for both resi-

dents and nonresidents, or to justify to penny every cost differential it imposes in purely recreational, noncommercial, nonlivelihood setting; rationality is standard, and where constitutional requirements have been met, protection of wildlife of state is peculiarly within its police power, and state has great latitude in determining what means are appropriate for its protection. *Baldwin v Fish & Game Com.*, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852.

State's statutory provisions imposing higher hunting license fees for nonresidents than for residents do not violate privileges and immunities clause of Federal Constitution (Article IV, § 2, cl 1) or Fourteenth Amendment. *Terk v Gordon*, 436 US 850, 56 L Ed 2d 751, 98 S Ct 3063.

52 L Ed 2d 863-877

New Sections and Subsections Added:

§ 13. Parking restrictions

§ 1. Introduction

[b] Related matters

Supreme court's views as to what constitutes "taking," within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation. 57 L Ed 2d 1254.

Validity of ordinance restricting number of unrelated persons who can live together in residential zone, 12 ALR4th 238.

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents. 18 ALR4th 568.

Validity of statutory classifications based on population—zoning, building, and land use statutes. 98 ALR3d 679.

Halfway Houses: housing facilities for former patients of mental hospital as violating zoning restrictions. 100 ALR3d 876.

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§ 3. General rule that zoning regulation is constitutional unless not substantially related to general welfare; Supreme Court's approval of comprehensive zoning

Neither free exercise clause of First Amendment nor due process clause of Fourteenth Amendment are violated by municipal zoning ordinance which prohibits construction of church buildings in virtually all residential districts in city, since ordinance neither pres-

Subsistence 5/7/85

1 IN THE SENATE

BY V.FISCHE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the taking of fish and game for
7 personal and family consumption and for subsistence
8 uses; and providing for an effective date."
9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 * Section 1. FINDINGS. The legislature finds that

12 (1) nonresidents visiting Alaska take fish and game primarily
13 for commercial, trophy, and recreational purposes; state residents who take
14 fish and game for noncommercial purposes use the stocks and populations for
15 personal and family consumption;

16 (2) because of its importance to their health, safety and
17 general well-being, the taking of fish and game by residents for personal
18 and family consumption is a priority use of the state's fish and game
19 resources;

20 (3) because of residents' proximity to fish stocks and game
21 populations, their dependence on fish and game as a mainstay of livelihood,
22 and the lack of alternative food resources, the taking of fish and game for
23 personal and family consumption is essential to the health, safety, and
24 general well-being of residents domiciled in communities and areas in which
25 the taking of fish and game for personal and family consumption in a cost-
26 effective manner constitutes a significant characteristic of the economy of
27 the community or area;

28 (4) the taking of fish and game for commercial, recreational,
29 and other uses by both residents and nonresidents is important to the
economy of the state and particularly to the economies of communities

1 dependent on commercial fishing.

2 * Sec. 2. AS 16.05.251(a) is amended to read:

3 (a) The Board of Fisheries may adopt regulations it considers
4 advisable in accordance with the Administrative Procedure Act (AS 44.-
5 62) for

6 (1) setting apart fish reserve areas, refuges and sanctu-
7 aries in the waters of the state over which it has jurisdiction,
8 subject to the approval of the legislature;

9 (2) establishing open and closed seasons and areas for the
10 taking of fish;

11 (3) setting quotas, bag limits, harvest levels, and sex and
12 size limitations on the taking of fish;

13 (4) establishing the means and methods employed in the
14 pursuit, capture and transport of fish;

15 (5) establishing marking and identification requirements
16 for means used in pursuit, capture and transport of fish;

17 (6) classifying as commercial fish, sport fish, resident
18 net-fish, or predators or other categories essential for regulatory
19 purposes;

20 (7) watershed and habitat improvement, and management,
21 conservation, protection, use, disposal, propagation and stocking of
22 fish;

23 (8) investigating and determining the extent and effect of
24 disease, predation, and competition among fish in the state, exercis-
25 ing control measures considered necessary to the resources of the
26 state;

27 (9) prohibiting and regulating the live capture, posses-
28 sion, transport, or release of native or exotic fish or their eggs;

29 (10) establishing seasons, areas, quotas and methods of

11 harvest for aquatic plants;

12 (11) establishing the times and dates during which the
13 issuance of fishing licenses, permits and registrations and the trans-
14 fer of permits and registrations between registration areas
15 allowed; however, this paragraph does not apply to permits issued
16 transferred under AS 16.43;

17 (12) resident net, sport, and commercial fishing.

18 * Sec. 3. AS 16.05.251(b) is amended to read:

19 (b) The Board of Fisheries shall adopt regulations in accordance
20 with the Administrative Procedure Act (AS 44.62) permitting the taking
21 of fish for subsistence uses unless the board determines, in accordance
22 with the Administrative Procedure Act, that adoption of the
23 regulations will jeopardize or interfere with the maintenance of fish
24 stocks on a sustained-yield basis. Subsistence fishing authorized
25 under this subsection shall be subject to reasonable regulation of
26 seasons, harvest levels, and methods and means of taking. Whenever it
27 is necessary to restrict the taking of fish to assure the maintenance
28 of fish stocks on a sustained-yield basis, or to assure the continuation
29 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.

* Sec. 4. AS 16.05.251 is amended by adding new subsections to read:

(d) Regulations adopted under (a) of this section shall provide
that, consistent with the provisions of (b) of this section, resident

1 net, sport, and commercial fishermen are provided a fair and reason
2 able opportunity to participate in the harvest of fish. The regula
3 tions shall provide that, regardless of the type of gear used in each
4 fishery, the taking of fish by residents for personal and family
5 consumption is a priority use of fish.

6 (e) In allocating access to fish among persons engaged in resi-
7 dent net, sport, and commercial fishing, the Board of Fisheries shall
8 consider the following factors:

9 (1) the history of each personal use, sport, and commercial
10 fishery;

11 (2) the number of residents and nonresidents who have
12 participated in each fishery in the past and the number of residents
13 and nonresidents who can reasonably be expected to participate in the
14 future;

15 (3) the importance of each fishery for providing residents
16 the opportunity to obtain fish for personal and family consumption;

17 (4) the availability of alternative fisheries resources;

18 (5) the importance of each fishery to the economy of the
19 State of Alaska;

20 (6) the importance of each fishery to the economy of the
21 local area in which the fishery is located;

22 (7) the importance of each fishery in providing recreation-
23 al opportunities for residents and nonresidents.

24 * Sec. 5. AS 16.05.255(b) is repealed and reenacted to read:

25 (b) Whenever it is necessary to restrict the taking of a game
26 population to assure the maintenance of the population on a sustained-
27 yield basis, the taking of game from the population by residents for
28 personal and family consumption shall be the priority use of the
29 harvestable surplus of the population and the Board of Game shall

1 adopt regulations authorizing the taking in accordance with the Admin
2 istrative Procedure Act (AS 44.62).

3 * Sec. 6. AS 16.05.255 is amended by adding a new subsection to read:

4 (d) If the harvestable surplus of a game population is not large
5 enough to provide a reasonable opportunity for the taking of game from
6 the population by residents in accordance with regulations adopted
7 under (a) and (b) of this section, the Board of Game shall adopt
8 regulations in accordance with the Administrative Procedure Act
9 (AS 44.62) that create a priority for the taking of game from the
10 population for subsistence uses over other consumptive uses of the
11 population. Takings authorized under this subsection shall be subject
12 to reasonable regulation of seasons, bag limits, and methods and
13 means. If the harvestable surplus of the population is not large
14 enough to provide a reasonable opportunity for the taking of game from
15 the population for subsistence uses, the board shall adopt regulations
16 that establish restrictions and limitations on the taking of game from
17 the population for subsistence uses on the basis of the following
18 criteria:

19 (1) customary and direct dependence upon the game resources
20 as the mainstay of one's livelihood;

21 (2) local residency; and

22 (3) availability of alternative game resources.

23 * Sec. 7. AS 16.05.940(21) is amended to read:

24 (21) "sport fishing" means the taking of or attempting to
25 take for personal use or for personal or family consumption, and not
26 for sale or barter, any fresh water, marine, or anadromous fish by
27 hook and line held in the hand, or by hook and line with the line
28 attached to a pole or rod which is held in the hand or closely attend
29

1
2 * Sec. 8. AS 16.05.940(23) is amended to read:

3 (23) "subsistence uses" means the customary and traditional
4 noncommercial uses [IN ALASKA] of wild, renewable resources by a
5 resident domiciled in a rural area of the state for direct personal or
6 family consumption as food, shelter, fuel, clothing, tools, or
7 transportation, for the making and selling of handicraft articles out
8 of nonedible by-products of fish and wildlife resources taken for
9 personal or family consumption, and for the customary trade, barter,
10 or sharing for personal or family consumption; in [FOR THE PURPOSES
11 OF] this paragraph [,]

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

15 (B) "rural area" means a community or area of the
16 state in which the taking of fish or wildlife for personal or
17 family consumption is a significant characteristic of the economy
18 of the community or area;

19 * Sec. 9. AS 16.05.940 is amended by adding a new paragraph to read:

20 (28) "resident net fishing" means the taking, fishing for,
21 or possession of finfish, shellfish, or other fishery resources, by a
22 resident for personal or family consumption and not for sale or bar-
23 ter, with gillnet, dipnet, seine, fish wheel, longline, or other
24 similar means defined by the Board of Fisheries.

25 * Sec. 10. This Act takes effect immediately in accordance with AS 01.-
26 10.070(c).

Introduced: 3/13/85
Referred: State Affairs, Resources,
Judiciary and Finance

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

1 IN THE SENATE

2

SENATE BILL NO. 231

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the taking of fish and game for
7 subsistence and personal use; and providing for an
8 effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. FINDINGS. The legislature finds that

11 (1) the taking of fish stocks and game populations for
12 personal and family consumption and related uses is essential to the
13 health, safety, and general welfare of Alaskans domiciled in rural
14 communities or rural areas in which the taking of fish and game for
15 such uses is a significant part of the economy of the community or
16 area; and

17 (2) the taking of fish stocks and game populations for
18 personal, sport, and commercial uses is also of economic and recre-
19 ational importance to Alaskans who reside anywhere in the state.

20 * Sec. 2. AS 16.05.251(a) is amended to read:

21 (a) The Board of Fisheries may adopt regulations it considers
22 advisable in accordance with the Administrative Procedure Act (AS 44:-
23 62) for

24 (1) setting apart fish reserve areas, refuges and sanctu-
25 aries in the waters of the state over which it has jurisdiction,
26 subject to the approval of the legislature;

27 (2) establishing open and closed seasons and areas for the
28 taking of fish;

29 (3) setting quotas, bag limits, harvest levels, and sex and

1 size limitations on the taking of fish;

2 (4) establishing the means and methods employed in the
3 pursuit, capture and transport of fish;

4 (5) establishing marking and identification requirements
5 for means used in pursuit, capture and transport of fish;

6 (6) classifying as commercial fish, sport fish, personal
7 use fish, or predators or other categories essential for regulatory
8 purposes;

9 (7) watershed and habitat improvement, and management,
10 conservation, protection, use, disposal, propagation and stocking of
11 fish;

12 (8) investigating and determining the extent and effect of
13 disease, predation, and competition among fish in the state, exercis-
14 ing control measures considered necessary to the resources of the
15 state;

16 (9) prohibiting and regulating the live capture, posses-
17 sion, transport, or release of native or exotic fish or their eggs;

18 (10) establishing seasons, areas, quotas and methods of
19 harvest for aquatic plants;

20 (11) establishing the times and dates during which the
21 issuance of fishing licenses, permits and registrations and the trans-
22 fer of permits and registrations between registration areas is al-
23 lowed; however, this paragraph does not apply to permits issued or
24 transferred under AS 16.43;

25 (12) personal use fishing.

26 * Sec. 3. AS 16.05.940(23) is amended to read:

27 (23) "subsistence uses" means the customary and traditional
28 uses by rural [IN] Alaska residents of wild, renewable resources for
29 direct personal or family consumption as food, shelter, fuel,

1 clothing, tools, or transportation, for the making and selling of
2 handicraft articles out of nonedible by-products of fish and wildlife
3 resources taken for personal or family consumption, and for the cus-
4 tomary trade, barter, or sharing for personal or family consumption;
5 for the purposes of this paragraph, "family" means all persons related
6 by blood, marriage, or adoption, and any person living within the
7 household on a permanent basis;

8 * Sec. 4. AS 16.05.940 is amended by adding a new paragraph to read:

9 (28) "personal use fishing" means the taking, fishing for,
10 or possession of finfish, shellfish, or other fishery resources, by
11 Alaska residents for personal use and not for sale or barter, with
12 gill or dip net, seine, fish wheel, long line, or other similar means
13 defined by the Board of Fisheries.

14 * Sec. 5. This Act takes effect immediately in accordance with AS 01.-
15 10.070(c).

16

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.

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

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,

ALASKA LEGAL SERVICES CORPORATION

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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

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

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(907) 852-2311

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 jeopardized 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. Use, 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 necessary 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 conservation 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

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

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: 3 June 1985

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

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Attorneys for Petitioners

APPENDIX D



United States Department

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 accommodate 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-B. 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 1992

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:

(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 restrictions 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~~ and respect local residency, and the availability of alternative resources.

(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.

~~A. 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.~~

A. 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__

8. HOW DIRECTLY DEPENDENT ARE YOU (Y HUNTING THIS GAME POPULATION AS A PRINCIPAL MEANS OF SUPPORT FOR YOURSELF 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 _____

9. 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 not 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

9/25/85

DISCUSSION DRAFT

1 IN THE SENATE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to fishing and hunting."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. FINDINGS AND INTENT. (a) The legislature finds that

9 (1) hunting and fishing are ^{economically and culturally} important to residents of many
10 small, remote communities in the state as a principal means of obtaining
11 food ^{and of sustaining a subsistence oriented} lifestyle and culture.

12 (2) the Congress, in enacting the Alaska National Interest Lands
13 Conservation Act, intended to ensure, in their words, "the continuation of
14 the opportunity for subsistence uses by rural residents of Alaska" who are
15 dependent on subsistence uses and for whom "no practical alternative means
16 are available to replace the food supplies and other items gathered from
17 fish and wildlife";

18 (3) even in communities in which there are practical alternative
19 means of obtaining food, many residents rely on fishing and hunting to
20 obtain a substantial portion of their food;

21 (4) the opportunity to fish and hunt is ^{equally} ~~equally~~ important to
22 many Alaskans throughout the state, not only for obtaining food, but also
23 for ~~the experience itself.~~ ^{recreational and commercial purposes equally related to their}
24 ^{lifestyle and culture}

25 (b) It is the intent of the legislature.

26 (1) to establish as a principle of resource management by the
27 Board of Fisheries and the Board of Game a preference for subsistence uses
28 of fish and game in those areas where no practical alternative means are
29 available to replace the food supplies and other items gathered from fish
and wildlife which supply rural residents dependent on subsistence uses;

by name (Alaska) -1- this would not comply w/ Tier I.
residents who engage in customary and traditional

To all fish stocks for sport, commercial and subsistence purposes and to ensure the maintenance of the natural diversity of such stocks for purposes of sport & subsistence.

meaning?

1 and

2 (2) that the Board of Fisheries and the Board of Game have broad
3 flexibility to manage the state's fish and game, and that they ^{should} use this
4 flexibility to ensure the sustained yield and best use of all fish stocks
5 and game populations.

6 * Sec. 2, AS 16.05.251(a) is amended to read:

7 (a) The Board of Fisheries may adopt regulations it considers
8 advisable in accordance with the Administrative Procedure Act
9 (AS 44.62) for

10 (1) setting apart fish reserve areas, refuges and sanctu-
11 aries in the waters of the state over which it has jurisdiction,
12 subject to the approval of the legislature;

13 (2) establishing open and closed seasons and areas for the
14 taking of fish;

15 (3) setting quotas, bag limits, harvest levels, and sex and
16 size limitations on the taking of fish;

17 (4) establishing the means and methods, ^{including gear, traps, boats, and other such items} employed in the
18 pursuit, capture and transport of fish;

19 (5) establishing marking and identification requirements
20 for means used in pursuit, capture and transport of fish;

21 (6) classifying as commercial fish, sport fish, personal
22 use fish, subsistence fish, or predators or other categories essential
23 for regulatory purposes;

24 (7) watershed and habitat improvement, and management,
25 conservation, protection, use, disposal, propagation and stocking of
26 fish;

27 (8) investigating and determining the extent and effect of
28 disease, predation, and competition among fish in the state, exercis-
29 ing control measures considered necessary to the resources of the

1 State;

2 (9) prohibiting and regulating the live capture, posses-
3 sion, transport, or release of native or exotic fish or their eggs;

4 (10) establishing seasons, areas, quotas and methods of
5 harvest for aquatic plants;

6 (11) establishing the times and dates during which the
7 issuance of fishing licenses, permits and registrations and the trans-
8 fer of permits and registrations between registration areas is
9 allowed; however, this paragraph does not apply to permits issued or
10 transferred under AS 16.43;

11 (12) regulating catch-and-release ^{or trophy management} sport fishing for selected
12 fish stocks;



(13)

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for establishing an administrative appeal of
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for appeal procedure. decisions by the
Board,*

13 (14) regulating commercial, sport, personal ~~use~~ and subsistence

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(14)

*as necessary for conservation, utilization & development
of fisheries.*

15 * Sec. 3. AS 16.05.251(b) is amended to read:

16 (b) The Board of Fisheries shall adopt regulations in accordance
17 with the Administrative Procedure Act (AS 44.62) for [PERMITTING] the
18 taking of fish for subsistence uses unless the board determines, in
19 accordance with the Administrative Procedure Act, that adoption of the
20 regulations will jeopardize or interfere with the maintenance of fish
21 stocks on a sustained-yield basis. Whenever it is necessary to re-
22 strict the taking of fish to assure the maintenance of fish stocks on
23 a sustained-yield basis, or to assure the continuation of subsistence
24 uses of such resources, subsistence use shall be the preferred [PRI-
25 ORITY] use. If further restriction is necessary, the board shall
26 establish restrictions and limitations on and priorities for these
27 consumptive uses on the basis of the following criteria:

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

(2) local residency; and

(3) availability of alternative resources.

* Sec. 4. AS 16.05.251 is amended by adding new subsections to read:

(d) Subsistence fishing authorized under this section is subject to reasonable regulation of seasons, catch limits, methods, and means.

(e) If the Board of Fisheries determines that (1) a particular fish stock is not a customary and traditional source or not a significant source of subsistence for rural subsistence area residents and (2) subsistence is not the best use of that fish stock, the board may provide that the fish stock may not be taken under subsistence regulations.

(f) The Board of Fisheries shall establish an appeal procedure for persons aggrieved by the adoption or repeal or enforcement of a subsistence fishing regulation. The aggrieved person must exhaust this administrative remedy before bringing a legal action challenging the regulation.

* Sec. 5. 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;

1 (5) classifying game as game birds, song birds, big game
2 animals, fur bearing animals, predators or other categories;

3 (6) methods, means, and harvest levels necessary to contro
4 predation and competition among game in the state;

5 (7) watershed and habitat improvement, and management,
6 conservation, protection, use, disposal, propagation and stocking of
7 game;

8 (8) prohibiting the live capture, possession, transport, or
9 release of native or exotic game or their eggs;

10 (9) establishing the times and dates during which the
11 issuance of game licenses, permits and registrations and the transfer
12 of permits and registrations between registration areas and game
13 management units or subunits is allowed;

14 (10) regulating sport hunts and subsistence hunts.

15 * Sec. 6. AS 16.05.255(b) is amended to read:

16 (b) The Board of Game shall adopt regulations in accordance with
17 the Administrative Procedure Act (AS 44.62) for [PERMITTING] the
18 taking of game for subsistence uses unless the board determines, in
19 accordance with the Administrative Procedure Act, that adoption of the
20 regulations will jeopardize or interfere with the maintenance of game
21 resources on a sustained-yield basis. Whenever it is necessary to
22 restrict the taking of game to assure the maintenance of game re-
23 sources on a sustained-yield basis, or to assure the continuation of
24 subsistence uses of such resources, subsistence use shall be the
25 preferred [PRIORITY] use. If further restriction is necessary, the
26 board shall establish restrictions and limitations on and priorities
27 for these consumptive uses on the basis of the following criteria:

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

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1 (2) local residency; and

2 (3) availability of alternative resources.

3 * Sec. 7. AS 16.05.255 is amended by adding new subsections to read:

4 (d) Subsistence hunting authorized under this section is subject
5 to reasonable regulation of seasons, bag limits, methods, and means.

6 (e) If the Board of Game determines that (1) a particular game
7 species is not a customary and traditional source or not a significant
8 source of subsistence for rural subsistence area residents and (2)
9 subsistence is not the best use of that game species, the board may
10 provide that the game species may not be taken under subsistence
11 regulations.

12 (f) The Board of Game shall establish an appeal procedure for
13 persons aggrieved by the adoption or repeal or enforcement of a sub-
14 sistence hunting regulation. The aggrieved person must exhaust this
15 administrative remedy before bringing a legal action challenging the
16 regulation.

17 * Sec. 8. AS 16.05.330 is amended to read:

18 Sec. 16.05.330. LICENSES AND TAGS REQUIRED. (a) Except as
19 otherwise permitted in this chapter, a person may not engage in
20 personal use fishing, subsistence fishing or sport fishing, including
21 the taking of razor clams; in ^{sport} hunting, subsistence hunting, trapping,
22 or fur dealing; in the farming of fish, fur, or game; or in taxidermy,
23 without having the appropriate license or tag in actual possession.

24 (b) When obtaining the appropriate license or tag in (a) of this
25 section, an applicant who asserts residency in the state or in a rural
26 subsistence area shall provide the license vendor with the proof of
27 residence that the department requires by regulation.

28 * Sec. 9. AS 16.05.340(a) is amended by adding new paragraphs to read:

29 (18) personal use fishing license \$10

1 (19) subsistence fishing license \$10

2 (20) subsistence hunting license \$12

3 However, the fee for a license under this paragraph or (18) or (19) c
4 this subsection is 25 cents for an applicant who is the head of
5 family or a dependent member of that family, or who is solely self
6 supporting, upon proof presented by the applicant that the applicant

7 (A) is obtaining or has obtained assistance during th
8 preceding six months under any state or federal welfare progra
9 to aid the indigent, or

10 (B) has an annual family gross income of less tha
11 \$5,600 for the year preceding application.

12 * Sec. 10. AS 16.05.940(23) is amended to read:

13 (23) "subsistence uses" means the customary and traditiona
14 uses [IN ALASKA] of wild, renewable resources by a resident of a rural
15 subsistence area of the state for direct personal or family noncommer
16 cial consumption as food, shelter, fuel, clothing, tools, or transpor
17 tation, for the making and selling of handicraft articles out o
18 inedible by-products of fish and wildlife resources taken for direc
19 personal or family noncommercial consumption, and for the customar
20 trade, barter, or sharing for direct personal or family noncommercial
21 consumption; for the purposes of this paragraph, "family" means all
22 persons related by blood, marriage, or adoption, and any person living
23 within the household on a permanent basis;

24 * Sec. 11. AS 16.05.940 is amended by adding new paragraphs to read:

25 (28) "personal use fishing" means the taking of, or the
26 attempt to take, finfish, shellfish, or other fishery resources in ar
27 area other than a rural subsistence area by a resident for direct
28 personal or family consumption, not for sale or barter, by means of
29 gill net, dip net, seine, pot, fishwheel, long line, or other similar

1 means defined by the Board of Fisheries; personal use fishing is
2 limited to areas which, in the judgment of the board, can support both
3 personal use fishing and sport fishing because of an abundance of
4 fishery resources in the area;

5 (29) "resident of a rural subsistence area" means

6 (A) a person who, for 12 consecutive months, has main-
7 tained in a single rural subsistence area a permanent place of
8 abode ~~and~~ a voting residence;

9 (B) a member of the military service who has been
10 stationed, or a dependent of the member who has been living, for
11 the preceding 12 consecutive months in a single rural subsistence
12 area is a resident of that area; or

13 (C) an alien who, for 12 consecutive months, has main-
14 tained in a single rural subsistence area a permanent place of
15 abode;

16 (30) "rural subsistence area" means a community or area of
17 the state in which there are no practical alternative means for re-
18 placing food supplies and other items that are gathered from fish and
19 game by rural residents who are dependent on subsistence resources, as
20 determined by the Board of Fisheries or the Board of Game after con-
21 sidering the following criteria:

22 (A) ^{the degree of dependency on} ~~lack of~~ cash economies, sources of employment, or
23 stores in the community; ^{low solution}

24 (B) customary and traditional community dependence for
25 sustenance on the consistent harvest and use, in a cost effective
26 manner, of fish or game that is near or reasonably accessible
27 from the community;

28 (C) remoteness of the community and lack of access by
28 road, regularly scheduled barge, ferry, railroad or airplane

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service; and

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(D) community population of less than 500 persons;

(31) "subsistence hunting" means the taking of a game animal by a resident of a rural subsistence area for subsistence uses by means defined by the Board of Game.

* Sec. 12. AS 16.05.257(h)(1) is repealed.

Additional Funding

Sec. 1(a)(5)

Subsistence use of fish and wildlife by those who are truly dependent on subsistence is threatened by ~~both~~ competing subsistence use ~~to~~ and eligibility by those who are not customarily and traditionally dependent, ~~particularly from the recent eligibility of~~ ~~urban Alaska~~ ^{competition}

This ~~threat~~ ^{competition} comes from two directions: first, the eligibility of all urban Alaskans for subsistence, and second, from the eligibility of all rural Alaskans regardless of customary and traditional dependence.

The Honorable William P. Horn
Assistant Secretary
Fish and Wildlife and Parks
Department of the Interior

Dear Secretary Horn:

We appreciated our meeting with you and your sending us copies of your September 23rd letter to Governor Sheffield on subsistence compliance. As chairmen, respectively, of the Senate State Affairs Committee, to which the various subsistence bills are currently assigned, and the Senate Resources Committee, which is the next committee of referral for subsistence legislation, we have reviewed your letter.

In that letter, you formally advise the Governor that the State of Alaska is no longer in compliance with the requirements of ANILCA as specified in Title VIII. You further advise that compliance will require that the subsistence preference be limited to those rural Alaska residents who customarily and traditionally make use of subsistence resources.

The letter also said that in '82 you noted to the Alaska Boards of Fish and Game that there are various ways to comply with the requirements of Section 805 of ANILCA. In order to understand all the options open to the state in dealing with this issue, we are trying to fully explore all the various ways to comply with Section 805. Your offer of the full cooperation and assistance of your department in our effort to find a solution is appreciated and we would like to take you up on it.

draft/2

The findings in Section 801(2) say, "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."

We realize that any full or final determination of compliance with Section 805 would require formal statutory language for you to review. However, we would be interested in your department's reaction to a proposal that would narrowly define rural as those communities or areas where the lack of practical alternatives referred to in Section 801(2) actually exists. The proposed language would provide a series of criteria that the Boards of Fish and Game could measure communities against in making this determination.

We realize that there are a number of Alaska communities that would no longer be considered rural under this proposal and that in these communities a number of residents eat large amounts of fish and game. In nonsubsistence areas the Boards would have wide flexibility to accommodate local needs and concerns while managing for sustained yield and best use.

In those areas and communities judged rural, subsistence would continue to be administered as outlined in ANILCA.

draft/3

We believe a state based on these principals could be fair, constitutional, enforceable, comply with ANILCA, and meet the needs of all Alaska residents throughout the state, as our state continues to grow and change.



What's Been Written About Subsistence in Alaska?

There are three distinct categories of literature on Alaska subsistence.

The first is found in the actual language of Federal and State laws and regulations plus commentaries and judicial findings on the definitions and meanings embedded in those documents.

The second consists of recorded testimony taken at public meetings and position papers produced by special interest groups and organizations.

The third category is represented by formal subsistence studies prepared by anthropologists or other social scientists who have attempted quasi-scientific descriptions of subsistence "systems" in rural Alaska.

Categories one and two are obviously the most closely related since they form the major components of the continuing public policy debate. For that same reason it is unrealistic to expect that a universally agreed upon core definition of subsistence can be found in them. They represent the whole spectrum of positions staked out in the wildlife allocation controversy. In this instance how subsistence is defined naturally goes a long way in determining who gets what; a consensus definition is inherently impossible to achieve on scientific or technical grounds. The best one can do here is to carefully chart the history of the legislation and the evidence which special interests groups have produced in support of their claims against other, contrary ones.

Category three, formal subsistence studies by social scientists, have emerged from a number of different sources. Anthropological scholars have long been intrigued with "traditional" Alaskan hunting-fishing-gathering groups. However, their attention has largely been fixed on painting pictures of how things were in the pre-contact past rather than on how things are now. Exceptions exist, such as the work of Richard Nelson on both Eskimo and Athabascan hunting societies, but for the most part they aren't very helpful in answering the big question of what contemporary subsistence activities have become in the 1980s, statewide.

The studies which have tried to address that question are mostly produced by the Subsistence Division of ADF&G (which has a particular interest in identifying specific areas and the use of specific fish and wildlife populations within them); the Socio-economic Studies Program of the Minerals Management Service (whose special interest is in trying to measure impacts on subsistence user groups who may be affected by OCS petroleum activities); and Federal agencies--NPS, NFWS, etc.--(who require the studies to meet the regulatory needs demanded in ANILCA legislation).

Since almost all these studies are commissioned ones whose sponsors want some kind of hard answers that will help them draft regulations to protect the subsistence priority mandated by State and Federal law, they are applied--or policy oriented--anthropology rather than objective scientific inquiry. Even so, such studies have produced the best body of information presently available on the who, where, and how questions of contemporary Alaska rural subsistence. A thorough listing of them current through November 1982 may be found in Patricia O'Brien McMillan's Alaska Subsistence Bibliography, available from the Arctic Environmental Information and Data Center (AEIDC) in Anchorage.

What Have Applied Anthropologists Concluded About Contemporary Alaskan Subsistence "Systems"?

It is patently obvious that the residents of nearly all rural Alaska towns and villages spend a great deal of time hunting and fishing. It can also be demonstrated that a significant proportion of the rural diet in many places consists of game and fish which are caught. The present problem is, however, that hunting and fishing here have become activities which require considerable cash capital if they are to be effective (that is, money to purchase hunting and fishing gear, ATV's, boats and motors, motor fuel, air charter's to distant hunting grounds, and so on). For this reason the term subsistence can not be taken to mean that fishermen and hunters are wholly dependent upon what they can catch to support themselves and their families: they are equally dependent on obtaining the money which is essential to underwrite those pursuits. (Contrast this situation with those to be found in much of Africa, Asia, and parts of Latin America where farmers who make up over a third of the world's population are totally dependent on their personal efforts, with little or no cash income, for their very survival. This is the classical meaning of subsistence, and it is to be found rarely, if at all, in Alaska).

In order to overcome these very great differences in meaning, the applied anthropologists speak of "subsistence systems" in Alaska by which they mean socio-economic units where hunting and fishing for domestic consumption are very important features of what people actually do, but where cash incomes are critically important to the success of those activities. They call these systems "mixed economies" where the old, traditional pursuits based on family hunting and fishing units are equally supported by wage-earners or recipients of government checks to support them. But, since no one would argue that these systems could long survive without cash, then where does the dependency question or test enter?

Here is where the whole problem gets sticky. The anthropologists (and the people themselves) forcefully argue that they have a cultural and psychological dependency on preferential access to hunting and fishing areas which, if they were deprived of such access, would spell the death of their subsistence systems. The anthropological studies go to great lengths to gather evidence to support this assertion by demonstrating how Eskimo and Indian societies are family-based cooperative work units that share (without cash transaction) what they catch. The term which they apply to this is drawn from anthropological theory and is labeled "the domestic mode of production." At this point the subsistence issue gets all tangled up with the land protection, game management, and Native sovereignty issues.

In any event, what is outlined in the above paragraph is treated in fuller detail in my own essay entitled "The Subsistence Lifestyle Issue in Alaska" (copy attached) written last year. It therefore does not take up the most recent developments in the subsistence controversy which erupted earlier this year.

One final point, non-Native rural dwellers of Alaska are not seriously considered in the anthropological studies since it is assumed that they, rightly or wrongly, are not culturally and psychologically dependent on priority access to fish and game resources. In effect, defense of modern subsistence systems (or lifestyles) in Alaska by anthropologists is based on a public policy position that speaks of culture, psychological welfare, Native rights and the like rather than an historically defined situation of folks being dependent for their livelihoods on the ability to continue hunting and fishing.

Robert R. Griffeth
Anchorage - September 1985

THE SUBSISTENCE LIFESTYLE ISSUE IN ALASKA

Summary

The word subsistence has two distinct meanings in the Alaska political vocabulary. The basic meaning refers to the capture and consumption of fish and game by rural folk, mostly Native. The second meaning is commonly expressed by the term subsistence lifestyle which includes the cultures, values, politics, psychological comforts, social organization, and economic behaviors of those same rural folk.

The subsistence issue (that is, the legal and political debate over who should receive highest priority in the allocation of scarce wild resources) turns on the question of whether or not rural Alaskans are entitled to special protection of their hunting and fishing enterprises. Both federal and state law have decreed that they are so entitled.

Over the past decade professional social scientists have been called on to provide federal and state agencies with proper answers to the question of who qualifies for subsistence privileges. Their studies and analyses have produced a definition popularly described as the subsistence lifestyle.

This paper attempts to examine, analyze, and, where appropriate, criticize the conclusions which they have reached. In part, this is an academic exercise in testing the validity of social science theory and findings as these relate to subsistence lifestyles in Alaska. However, there is a practical side to this exercise. Anthropologists, economists, social planners and others of the professional social science establishment play key roles in drafting federal, state, and local land use plans which become law. As they are charged with defining and describing subsistence lifestyles so that these might be effectively protected in such land use plans, their conclusions must be taken seriously by all parties whose interests are touched by the formal land use planning process.

What most subsistence lifestyle studies have concluded are that rural Alaskans continue to capture and to consume large quantities of wild game and fish; that as their cash incomes grow they invest heavily in subsistence technology and transportation which results in dramatically increased takes; that these takes are shared through domestic kinship networks on a non-commercial basis; and that so much is all this the case that the subsistence lifestyles presently lived by rural Alaskans are now vitally dependent on substantial cash incomes (from commercial fishing, wage and salary employment, and government entitlements of various kinds) for their survival. Many field studies have convincingly described this interplay between cash incomes and the utter dependence of subsistence activities on them in recent years.

On the other hand, these studies have been much less successful in demonstrating that cash based subsistence lifestyles are threatened with extinction by population growth, an enlarging 'modern' urban-industrial

Summary

economy, changing social mores, or increased political participation beyond the rural village community. To the contrary, the evidence shows that subsistence lifestyles as currently practiced owe their continuing existence and vitality to those very same factors.

Finally, the theoretical premises against which subsistence lifestyles are analyzed may, on occasion, distort the description of the cultures, values, economies, and political institutions which law and land use planning seek to protect. Politically or socially sensitive issues are often omitted (e.g. ethnic and race relations, social cleavages based on wealth or political position, the quality of individual leadership in a community, and so forth). The highly theoretical exercise of studying sociocultural or socioeconomic 'systems' is the usual way by which social scientists get round these sticky but crucially important problems of description and analysis.

Following a brief summary of the public policy debate on subsistence in Alaska, the bulk of this paper is devoted to an examination of the theoretical and sensitive problems and issues posed by formal subsistence lifestyle studies.

Robert R. Griffeth
Anchorage - September 1984

THE SUBSISTENCE LIFESTYLE ISSUE IN ALASKA

The subsistence lifestyle issue in Alaska has a remarkably brief history despite the fact that it has now become one of the most vexatious and contentious matters affecting public policy and private development. It involves two key questions. One, is there presently a rural subsistence lifestyle here which can be clearly defined? Two, should the formal protection of that lifestyle constitute a very high priority in state and Federal law, management policies, and land use planning efforts?

In the history of the issue as it has evolved since the mid 1970s these questions were addressed in reverse order. Legal protection was extended to the preservation of rural subsistence by Alaska statute (1976), Federal legislation, and a growing body of regulations at the state and local levels.¹ It figures prominently in stipulations embodied in everything from mineral lease sales, including those set forth in OCS lease offerings, to fish and game management practices applicable to Federal, state, and privately owned lands.

Once the protective apparatus was in place, it was thought necessary to study and define what it was that should be protected. A veritable bureaucratic industry was created to study the rural subsistence lifestyle in order to provide answers to this question. A huge literature of monographic studies written by applied anthropologists and economists, position papers by legislative researchers, and a blizzard of published material from special

¹ A good review of the legislative history of the subsistence law(s), both State and Federal, may be found in Dennis D. Kelso, "Technical Overview of the State's Subsistence Program," Technical Paper No. 64, Alaska Department of Fish and Game (December, 1981). The current detailed description of what constitutes a legitimate claim to subsistence use may be read from Alaska's Game Regulations, No. 25 (1984-1985), 66-67.

interest groups has been the result to date. The immense and growing popularity of the public hearing process has both raised the temperature and clouded the clarity of argument on the part of various agencies, groups, and individuals who have vital stakes in assuring that their particular definitions of the subsistence lifestyle become the on-going basis of law and regulation.

In what follows I hope to chart the recent history and present circumstances which surround the debate about preservation of the subsistence lifestyle with the specific intention of providing those whose duties necessarily involve some knowledge of the subject a condensed guide to the issue.

Before doing so, however, note must be taken of one critical dimension of the issue which literally defies clean and clear definition. This is the use of the term "lifestyle" as the significant qualifier of rural Alaskan subsistence. Native groups assert that the very survival of their cultures depends upon preferential access to fish and game whether or not they require these resources for food, shelter, clothing, or tool-making. That is, they argue that it is an ancient, indigenous, and endangered lifestyle which must be preserved even if the economic basis of cultural preservation has shifted away from exclusive dependence on wild resources. In this sense lifestyle is meant to be an ideal or goal as well as the way life is actually lived in the bush. Though their cultures may not be as old, rural subsisters who are not, by legal definition, Native make precisely the same argument. Anthropologists, economists, and others drawn from the community of professional social science have generally accepted without serious qualification that there is indeed a definable and measurable rural subsistence lifestyle and have staked their careers (and scientific conclusions) on telling the rest of us just exactly what it is. Law and rule-makers have also accepted that there is a

subsistence lifestyle and without further ado have fashioned their laws and rules accordingly.

The dissenters--those who for their individual reasons seek to challenge the general and idealized description of the lifestyle--are usually dismissed as either uncomprehending (won't listen to the Natives and social scientists) or unfeelingly exploitative (don't give a damn if there is such a lifestyle--let's get on with the business of developing Alaska as a modern place).

It is thus easy to see why something called lifestyle has become not so much a descriptive feature of contemporary Alaska as it has a profoundly divisive political issue.

It may be possible to tackle a number of the problems raised by the term lifestyle apart from the political uses to which the term is put. Thus, for the purpose of this background paper, I will confine my description and analysis to the basically historical problem of how the issue surfaced and has developed; and to the largely analytical problem of what the industry of subsistence studies has produced and concluded to date.

Brief History of the Subsistence Lifestyle Issue In Alaska

Living from and forging cultures respectful of wild resources is unquestionably the central theme in the history of Alaska's rural societies. Many regard that theme as central today, despite the sea changes which have occurred in the character of the state's population, economy, and links to the Outside.

Before the era of statehood there were certainly many important transformations and modifications which helped to reshape life in the rural

villages and encampments where most people still depended on subsistence harvests: the introduction and use of more efficient hunting and fishing technologies; opportunities or coercive pressures to trap and sell fur and fish; recasting traditional religious values in the new institutions of mission churches; and the not so gentle requirements that wrenched the education of children from their families and neighbors by placing them in schools that taught a different cultural ethic in a language not their own. Even so, subsistence under such circumstances was not a lifestyle. It was the main ingredient of physical survival, social communion, and how to value what one's world had to offer.²

About a generation ago it became apparent that changes initiated long before had finally created a drastically altered set of circumstances for subsistence societies. A growing immigrant population began to compete seriously for the wild resources. New roads and more efficient air transport encouraged to-and-fro-ing of unheard of scale between bush and town. Some of the old mining camps, cannery sites, and trading posts assumed the shape of regional hubs which, among other things, began to focus attention on town and city life. And then, of course, Prudhoe and the pipeline.

The sum of all these changes, and more, did not wholly replace subsistence as the principal means by which rural people fed themselves and

² Thomas D. Lonner, "Subsistence As an Economic System in Alaska. Theoretical and Policy Implications," Technical Paper No. 67, Alaska Department of Fish and Game (November, 1980), 28, who states that "The use of the term 'lifestyle' is demeaning to the economic roles (hunting-fishing-gathering) as if subsistence activities were similar to beachcombing or recreational trapping." The author speaks of the situation in 1980, a point at which 'lifestyle' had already permanently attached itself to 'subsistence' in both popular and technical usage.

remained gainfully employed. For many rural Alaskans, that replacement still has not occurred.³

But in the eyes of Native, sourdough pioneer, and urban Alaskan alike the old cultural unities that were thought to have been so much a part of subsistence life had become something new: a lifestyle. The new rural culture seemed to be as dependent upon the modern cash economy of town and industry as it was upon success in the hunt. Despite this perceived economic shift, subsisters continued to venerate both the social institutions and the values of the earlier traditions: family cohesion, sharing the spoils of the hunt, celebrating success or mourning life's tragedies through ceremony, ritual, and an unshakeable belief in the harmony of human society and wild nature. Lifestyle became the preferred term used to express this new cultural synthesis.

From time to time through the 1960s and 70s this emerging new meaning of subsistence was treated as an important issue of public policy. Notable occasions involved efforts by the recently created State of Alaska to have the Federal government amend international migratory bird treaties to include provision for subsistence hunting by residents of western coastal areas. To what extent gillnets, seines, and fishwheels might legitimately be employed in subsistence taking of fish was another old issue resurrected once the state assumed its managerial dominance over that resource.⁴

³ Though many critics have challenged the notion that wild foods are essential to the nutritional requirements of Alaska's rural people, it is demonstrably true that very substantial quantities of subsistence harvest products continue to be consumed. To cite a recent example from among literally scores of studies that effectively document the point, see "Subsistence-Based Economies in Coastal Communities of Southwest Alaska," Robert J. Wolfe, et al, Technical Report No. 95, Social and Economic Studies Program, Minerals Management Service/Alaska Outer Continental Shelf Region (Anchorage, 1984).

⁴ Kelso, "Technical Overview . . .", summarizes the situation from statehood (1959) through the mid 1970s.

Still, the state's rural population remained small and widely scattered through this decade and the number of wildlife enforcement agents were few. While generally respectful of laws and rules that limited the timing, areas, and amounts of the subsistence take, the practical situation was that subsisters often went about their business of hunting and fishing as need (and desire) dictated. "(I)n some interior Alaskan communities where regulatory measures have shown great inconsistencies with local practice, the regulations are considered to be applicable only to other (non-local) users . . ."5

This accommodation might well have persisted if left to itself. Tempers surely would have flared more frequently and prejudices become more thoroughly entrenched. But the new lifestyle might have been given time and space gradually to evolve. Instead, it quickly became vitally important to those who saw their new lifestyle threatened to seek protection. Dramatically increasing numbers of hunting and fishing competitors who were not rural residents, more vigorous enforcement of wildlife regulations, and explosive growth of Alaska's city populations and industrial activities raised the spectre that the subsistence lifestyle would be trampled under the boot of Progress and Development before it had a proper chance to take firm root. The division of the State's vast lands into three bounded estates--Federal, State, and Native--was the final element that raised consciousness of the issue from vitally important to critical and lifestyle-threatening.

The various new Native organizations born in the effort to acquire land rights and those created as corporations in the formal 1971 Settlement Act itself soon realized that neither subsistence "rights" nor the cultures which depended on them were fully taken into account. Typical of what followed from

⁵ Dennis D. Kelso, "Subsistence Use of Fish and Game Resources in Alaska: Considerations in Formulating Effective Management Policies," Technical Paper No. 65, Alaska Dept. of Fish and Game (March, 1982), 13.

this realization was a 1974 publication entitled "Does One Way of Life Have to Die So That Another Can Live?"⁶ In the forward to this document Harold Napoleon, a Yupik leader from the Yukon-Kuskokwim Region, wrote that

Subsistence is often thought of as a certain kind of hunting and fishing where people go out not for the sport of it but to get something to eat. But subsistence is really much more. It is not an isolated thing that can be set out and looked at by itself. It is interwoven into every aspect of our lives.

Subsistence is directly related to and affected by everything that is happening within this region in the way of education, land use, economic development, wildlife management and other areas of public policy. Subsistence is really an entire way of life.

From formulations such as this one and many, many others similar to it in tone and substance, the subsistence issue was transformed in the public policy arena from a concern with wildlife management and conservation to that of a major organizing principle for Alaska's rural future. Before long this was duly noted by the Boards of Fish and Game which proclaimed in a 1976 Policy Statement that

The existing variety of cultures and life styles in Alaska are of great value and should be preserved. While limitations on the productivity of fish and game must discourage continued increases in the number of subsistence type resource users, domestic utilization is still of fundamental importance to many Alaskans, and accordingly it is assigned the highest priority among beneficial uses.⁷

⁶ Subtitled A Report on Subsistence and the Conservation of the Yupik Lifestyle, by Yupiktak Bista (Bethel, 1974). This 80 page document argues in detail that the Yupik subsistence lifestyle should properly consist of a blending of the old culture with modern life. Therefore, the claim for protection is directly linked to the demand for a voice in planning for change.

⁷ "Policy Statement on Subsistence Utilization of Fish and Game," Alaska Board of Fish and Game and the Commissioner of Fish and Game (1976), quoted in Kelso, "Technical Overview . . .", 4. While this statement was intended to speak to subsistence uses of wild resources by rural residents, the official note taken of "cultures and lifestyles" as the determining factor in policy made a comfortable fit with the particular interests of Native groups which were claiming preservation of their lifestyles as the highest priority in all areas of public policy.

The enactment of the popularly named Alaska Subsistence Law⁸ in 1978 did not directly state that the preservation of rural subsistence lifestyles was its central purpose. Rather, it first upheld the principle of sustained yield and then went on to focus on issues involving the fair allocation of wild resources among various user groups decreeing that rural subsisters should be granted first and highest priority if any particular resource should become scarce or threatened. Beyond that the law also made provision for a systematic and institutionalized method for obtaining adequate information, for the first time, about the social and economic character and resource use patterns of the subsisters themselves. This task was assigned to the Department of Fish and Game and thus was born, in August 1978, a Subsistence Task Force. The Task Force mainly addressed what was at the time the most divisive issue, fair allocation between all groups; but its recommendations foreshadowed the shift of emphasis that was soon to follow on defining who might legitimately qualify as a "subsistence user".

A Subsistence Section of the agency was created to begin providing information and advice on just that problem.⁹ This new governmental unit also had another important duty which was to insure that whatever it discovered by research and proposed in the way of developing a better regulatory system conformed to Federal law which touched subsistence uses on the national

⁸ The law was proposed as House Bill 960 (by which it also became popularly known), and was enacted as Chapter 151 of the 1978 Alaska Session Laws taking effect as of October 10, 1978.

⁹ The Subsistence Section became a full-fledged Division of the Department of Fish and Game in December, 1980. A brief account of how it was put together and what it did in this early period is given in Kelso, "Technical Overview . . .", 5-14.

lands.¹⁰ While the language of the D-2 Bill varied in significant ways from that used in the Alaska Subsistence Law, it, too, contained bits and pieces which indicated that persons who remained "dependent" upon the consumption of wild resources found on Federal lands should enjoy first priority in their capture. Significantly, the D-2 legislation did not specifically indicate that native subsistence users had some better claim than other rural dwellers, and did not make much of the culture and lifestyle issues.

Clearly, the history of the first five years of the Subsistence Issue as a major public debate in Alaska homed in on the problem of fair allocation of permits to hunt and fish on State, Federal, and private lands. Cries of outrage by potential users who were from time to time denied permits; the general argument that preference conferred on rural dwellers violated basic rights of equity for those who happened to live in towns and cities; and the growing alarm among Native groups (who constituted the majority of the rural dwelling population of the State) that their wild resources would soon disappear altogether if everyone were to be allowed free access to them--these are the components of the Subsistence Issue as it has recently been fought in the public arena. Ballot Initiative Measure No. 7 sought repeal of the preference subsistence priority provision of the state law, but was defeated by a nearly two thirds majority of voters in the 1982 general election.¹¹

¹⁰ See Dennis D. Kelso, "Implementation Issues Posed By Title VIII of the Senate-Passed D-2 Bill," Technical Paper No. 62, Alaska Department of Fish and Game (October, 1980).

¹¹ The Initiative sought to replace portions of the Subsistence Law with an Alaska Anti-Discrimination Hunting, Fishing and Trapping Rights Act. See State of Alaska Official Election Pamphlet (October, 1982) for details including pro and con arguments. A major fear expressed by opponents was that the Federal Government would usurp State fish and game management on Alaska Federal lands should the initiative pass.

Temporarily, at any rate, the results of this initiative campaign laid to rest the allocation and preference issues of subsistence use in favor of those who, largely from fears of resource depletion and Federal meddling in the State's game management practices, voted to keep intact the 1978 law.

Throughout the public controversy that briefly raged over the repeal initiative, very little was said by spokesmen on either side about preservation of the subsistence lifestyle. Even Native conferences and meetings convened for the express purpose of defending subsistence hunting and fishing rights steered clear of the lifestyle defense for this particular purpose.¹² This was a tactical decision to target on the specific Ballot Initiative and the effort to defeat it. However, the bigger issue for Native groups involved far, far more than priority access to fish and game.

These broader concerns had been aired at the very moment the original state law had taken effect.¹³ They continue to dominate discussion, planning efforts, rule-making, social and economic researches, and specific political attitudes about what the future of the state will be. Simply put, the most influential impact of the controversy over subsistence will result from how subsistence lifestyle is defined and then written into law, regulation, and planning "guidelines." For these reasons, among others, it is important to review what has taken place so far, and by whom, in that definitional effort.

¹² See, for example, "AFN Maps Strategy to Counter Anti-Subsistence Initiative," Anchorage Daily News (November 26, 1981).

¹³ An excellent summary of these concerns appeared in the report of A Special Conference on Subsistence (Juneau, December, 1978), "What Happens Next?" Most conferees agreed that neither the new Subsistence Law nor protections built into Federal D-2 legislation addressed the central concern--threats to the subsistence lifestyle.

Official and Other Attempts to Define the Alaskan Rural Subsistence Lifestyle.

It would be possible to chart the history of efforts to define what constitutes subsistence in the lawyerly fashion of combing statute, case law, and government regulation. Indeed, a great deal of such combing has been done.¹⁴ But the most dedicated efforts have appeared from two other sources: various Native organizations and social science research programs mandated by State and Federal law. A truly impressive volume of studies of varying quality have issued from both sources.

Among Native organizations, certainly the most prolific producers have been Yukon-Kuskokwim's Nunam Kitlutsisti (Protectors of the Environment), the Arctic Region's Alaska Eskimo Whaling Commission, and the Interior Region's International Porcupine Caribou Commission delegation. And there have been many others including the statewide Alaska Federation of Natives, the regional corporations, and groups which represent Native interests in the many coastal zone management and planning boards. A particularly interesting chunk of the material produced from these sources comes in the form of testimony and statement by rural subsisters themselves as they have sought to articulate the personal, nitty-gritty depth of feeling they express for the preservation of their lifestyles. While some of this testimony fails to escape the distortion that attends translation from Native tongues to clear English, much of it possesses the stark and determined eloquence of its speakers. A legally workable definition of the subsistence lifestyle would be difficult to extract from such testimony. But here is where one can discover the Native fears and hopes which surround the subject.

¹⁴ Kelso's three Technical Papers. Nos. 62, 63 and 64 prepared for the Alaska Department of Fish and Game in 1980 and 1981 are essentially of this character.

Social science research programs were first established to find out in as much detail as possible what legitimate subsistence use consisted of--that is, who qualified, based on what criteria, and where. In the case of non-Native rural subsisters, making those definitions wasn't too difficult: an individual had to demonstrate a long-time, consistent pattern of use employing "traditional" harvest methods and food preparation techniques in ways that made him, his family or his neighbors dependent on fish and game for their livelihoods. Confined as this working definition was to a relatively small number of persons, "traditional" criteria could be liberally interpreted without the need to embark on deep sociological inquiry. Length of rural residence served as the main test.

But for Native societies of Alaska who constitute the majority of the rural population, the "traditional and customary" tests posed a much thornier problem. Since they were descendants of the State's aboriginal inhabitants, even if they had moved to town or city, neither time nor place of residence could be used to determine eligibility in the same way these criteria were applied to non-Natives. Besides, nearly all Natives held ownership claims to rural lands through membership (directly or through family connections) in the various regional and village corporations. An additional twist was that race and ethnicity were ruled out as bases for passing laws and enforcing regulations governing resource use. If the problem were to be solved, some method had to be found that would establish the uniquely valued character on social, cultural and economic grounds of what were, patently, ethnic groups. This became one of the two rationales for creating subsistence studies units within both State and Federal agencies.¹⁵

¹⁵ The other was, of course, some effective means of limiting hunting and fishing pressures on the resources.

Even at the time there was no lack of ethnographic, demographic, and cultural evidence about Alaska's Natives. This was particularly true of the Eskimo cultures which, for nearly two centuries, had served travelers, missionaries, and anthropologists as the most exquisitely well adapted model of all the earth's "primitive" peoples to the extraordinary demands of a harsh environment. But the difficulty with all this kind of information was that it focused on what the observers thought was the old, pre-contact way of life. It said very little about Native cultures in the here and now.¹⁶ That subject, to the extent that it was surveyed, rested in the domain of the social engineers from the Bureau of Indian Affairs or in the laps of agency officials whose duties were to ameliorate the appalling conditions of rural poverty and social dislocation caused by the clash of modern with traditional Native institutions. Neither of these sources was very helpful on the subject of who, and what, was to be protected. The question which those pioneer social scientists in the Subsistence Section thus faced was how to explain in real, hard terms what a "modern" subsistence society was like.¹⁷

The first steps--commissioning field studies in particular subsistence areas--got underway very quickly, and by 1981 over thirty of them had been published as Technical Papers. Department of Interior agencies, especially the

¹⁶ As with all sweeping generalizations, this one requires tempering. There have been a number of excellent studies of Native subsistence done from the classical ethnographic, field approach. Among the very best are the works of Richard K. Nelson on both Eskimo and Athabaskan societies. His are studies of specific places done up in rich detail, and purposely avoid either grand generalization or high level theorizing.

¹⁷ A listing of what the Subsistence Section was charged to do appears in Kelso's "Technical Overview . . .", 9-11. It was asked to compile data on nutrition derived from subsistence products, how these products were shared or traded, the amount of "dependence" people actually had on them and so forth. This information was to be published for public circulation as well as for the use of the Fish and Games Boards in writing regulations.

National Park Service and Bureau of Land Management, were also keeping pace with the State by contracting for similar subsistence use studies on Federal lands.¹⁸ The not terribly surprising conclusion gained from this first great batch of field studies was that as rural people acquired larger cash incomes (from wage paying jobs, commercial fishing, or what most economists have euphemistically termed "transfer payments"--social security and welfare checks, etc.) they invested the money in ways that increased the efficiency of their subsistence harvests: chartered aircraft to remote hunting areas, snow machines and outboard powered boats, all terrain vehicles, better rifles, and so on. All this meant that more, rather than less use was being made of Alaska's "naturally recurring wild fish and game resources." This conclusion posed an additional, and rather more vexing dilemma for the students of subsistence as a lifestyle. City and town dwellers, as their incomes rose, were also choosing to invest heavily in the items and opportunities related to hunting and fishing. The lifestyles of these urban folk were no less keyed to the values associated with pursuing the wild harvest than were those of the rural dwellers. And between the two of them they were placing one hell of a lot of pressure on the animals and fish. Since it would be difficult for social scientists to argue that the values associated with one lifestyle (rural) were superior to those which formed a significant component of others (urban),¹⁹ they sought an explanation that would validate the plea for

¹⁸ There are numerous subsistence bibliographies. The studies themselves are widely available in Alaska libraries.

¹⁹ Which is not to say that some didn't try. Thomas D. Lonner, the first head of the Subsistence Section (Division), wrote a very testy Technical Paper No. 68 entitled "Perceptions of Subsistence and Public Policy Formation," Alaska Department of Fish and Game (n.d., 1981?), in which he made the curious observation that "It has been my experience that findings of fact, if not attached to a sympathetic (italics mine) world view, will be rejected if they run counter to more general values and vested interest." 11-12. In other words, we are told, rural subsistence is more to be valued than sports hunting and fishing, the facts be damned.

"preserving the rural subsistence lifestyle."

All of which brings us to the current guiding idea which underlies the subsistence studies industry. That is, to employ very high level theory from a specialty identified as Anthropological Economics to demonstrate that Native subsistence in Alaska is the manifestation of an economic and cultural system that is both different and separate from that of our modern "urban-industrial" society and economy while, paradoxically, linked to and hugely dependent on the latter. If all this seems too much a mouthful for easy digestion, it is not for want of trying on the part of anthropological economists to reduce their guiding idea into bite-sized pieces. I do not propose here to summarize the history of theorizing and its multiple schools of thought. That job has been ably done by Steve Langdon, among others.²⁰ However, it is important to see how a rather simply modeled theory that initiated this effort has grown into something that purports to actually and fully describe Alaska's subsistence lifestyle.

Many have tried to reduce the idea into a few straight-forward sentences as, for example

Subsistence economies in modern Alaska may be understood as non-codified systems of production, distribution and consumption which facilitate the harvest, use, and exchange of renewable resources. These systems have some cash flow, but the cash sector is generally limited. It has been suggested that the 'commercial' and 'subsistence' sectors of the economy are complementary and mutually supportive in many rural Alaskan communities.²¹

While this definition might seem to touch all bases, it remains both

²⁰ Co-authored with Rosita Worl, "Distribution and Exchange of Subsistence Resources in Alaska," Technical Paper No. 55, Alaska Department of Fish and Game (April, 1981), Part I, 1-53.

²¹ Dennis D. Kelso, Technical Paper No. 65, "Subsistence Use of Fish and Game Resources in Alaska: Consideration in Formulating Effective Management Policies," Alaska Department of Fish and Game (March, 1982), quote from the Abstract.

incomplete and confusing. For example what is meant by non-codified? How can an economy with 'sectors' lack minimal codification? Beyond that, the definition depends heavily on oblique references using terms employed to describe integrated market economies. Since all these theoretical formulations strongly assert that subsistence economies are neither 'primitive' nor fully market-integrated, greater refinement in the definition is required. It may be argued whether the following represents refinement, but it does reflect a number of features which lend force to later theorists' efforts to define lifestyle.

Internationally 'subsistence' refers to those economic activities... which are relatively self-contained within a community or region, which are not conducted primarily for profit-maximization, which aim primarily for present consumption, and which are governed by traditional patterns rather than market conditions or immediate needs. . . The objective, then, of a subsistence system is to provide material and psychological security and self-sufficiency in the face of uncertainty in extra-regional economic systems by conserving energy through the reduction of capital dependency, labor intensity, ²²material and energy importation, transportation, costs and waste.

One can see right away that this expanded definition headed away from the guiding idea being sought. Others argued that the most successful adaptations of Alaskan subsistence economies to present day circumstances were the results of doing all the things which the energy conservation principle suggests they should not. The novel element here, and the one which so influences the lifestyle argument, involves subsistence as the effort to provide "material and psychological security and self-sufficiency." Here, clearly, is a theme that non-scientific practitioners of subsistence living stress over and again in defense of their lifestyle. "The only time I really feel I am myself is when I am hunting. Every year I must return to the tundra if only a few days.

²² Thomas D. Lonner, "Subsistence As an Economic System . . . ", 2-5. The author's definitional efforts are a great deal more long-winded than the bits presented here for illustrative purposes.

I have to do this."²³

But such sentiments, psychologically important as they are, can be devilishly hard to incorporate into a workable definition of either an economic or cultural system.²⁴ To crack this nut recent definitional efforts have attempted two things. First, by delving deeply into case examples they have tried to demonstrate just what earnings individual subsistence communities acquire from both the cash economy and hunting and fishing activities.

Second, they attempt to show how the infusion of cash shores up the values and social organization of the traditional economy and culture (as well as increasing the efficiency of its subsistence harvest).²⁵ When the pieces are put together one is allowed to see something called "a mixed, subsistence-based socioeconomic system" which, in its Alaskan manifestation, has six prominent features: 1. A community-wide seasonal round of hunting and fishing; 2. High production outputs; 3. A domestic mode of production; 4. Non-commercial distribution and exchange networks; 5. Traditional systems of land use and occupancy (influenced by non-codified customary laws defining rights of access); 6. And is a mixed economy since subsistence earnings and money incomes are co-mingled.²⁶

²³ A Chevak resident quoted in "Does One Way of Life Have to Die . . .", 6.

²⁴ Again, some anthropological economists have tried. See Langdon and Worl, "Distribution and Exchange . . .", 10-14, who survey theories of this sort.

²⁵ Wolfe, et al, "Subsistence-Based Economics . . .", 55-75 and 438-522. This excellent recent study examined four Bristol Bay and Lower Kuskokwim Villages each deeply involved in the Bering Sea commercial fishery. Its theoretical slabs are well done; its presentation of the empirical evidence thorough and convincing. Critics might argue that they have chosen especially well suited places for this sort of integrative study and that many other subsistence villages are denied the opportunities which commercial fishing confers on the new lifestyle. Even so, were this an engineering study, I'd be tempted to call it "state of the art."

²⁶ Wolfe, et al, "Subsistence-Based Economies . . .", 50-51.

The two key elements which touch the lifestyle issue in this definition are encompassed within the notion of a 'domestic ^omode of production' and 'traditional systems of land use and occupancy.' The first instance defines production relations as a function of "socially defined kinship relations," where surplus value in production is collectively appropriated and consumed within the kinship-based household or network of local households. Meaning, subsistence activities are the necessary and essential economic props of the subsistence lifestyle which greatly values the maintenance of extended families and villages as communities of related people. Restricting access to hunting and fishing grounds by virtue of traditional systems of land use and occupancy is the main political prop of the lifestyle.

The definition briefly summarized here thus achieves the intended purpose. It confers the mantle of scientific respectability on something which has so far managed to escape being nailed down. In all fairness one should also point out that this social science perspective is not oblivious to the fact that the lifestyle it defines stands to become changed beyond recognition from the forces and pressures of modern life and that its viability will be primarily determined in the sociopolitical arena.²⁷ It takes no specific position on whether this is a good or bad development, as is only proper for a theoretic^eally based empirical study. On the other hand, it does take us a fair way along the road of understanding what the Native lifestyle of subsistence actually represents today despite the thicket of social science jargon in which that understanding is enclosed.

Calling something by its proper name (or as close as is possible in the rarified atmosphere of theoretical social science) still does not fully impart the flavor or subtleties possessed by the institution (or system, to use a

²⁷ Ibid., 501

vog sh terminological substitution). Certain attributes of the subsistence lifestyle which are discussed at length in the formal analytical studies are: networks of distribution and exchange, identified as systems of "sharing" because the networks are not founded on market principles and are thought to be animated by cultural and social values instead of economic ones²⁸; barter, often identified as a pre-capitalist economic phenomenon²⁹; social standing and prestige, which attach to the successful subsister; historical appreciation, which follows from the instruction of the young by their elders in the ways, means, events, and personalities of the old tradition; ceremonial and ritual functions both of the hunt itself and the uses to which the provender is put, as for example in potlatches. The list could be extended, but these are the main entries on the lifestyle menu which have attracted attention.

A final point has proved to be especially troublesome in the description of both old and modern subsistence societies: the degree of social stratification (classes) in them. The Tlingit and Aleut of yore both had chiefs, Big Men, and slaves. Yet they were considered societies of subsisters despite the status cleavages represented by these social "classes". Eskimo and Athabaskan societies were described as egalitarian (social standing was earned through achievement, such as that conferred on the successful whaling captain or hunter) with only the Elders raised to positions of social prominence above all others, and that only because their wisdom was venerated and sought. Traders, missionaries, civil and military administrators saw to

²⁸ See, for example, Langdon and Worl, "Distribution and Exchange . . ."

²⁹ At the time the original Subsistence Law was promulgated, barter and trade of articles thought destined exclusively for "domestic" consumption" became a big issue. It was ironed out in subsequent amendments which tried to set appropriate limits for this quasi-commercial dimension of subsistence activities. See Kelso, "Implementation Issues Posed by Title VIII of the Senate-Passed D-2 Bill," Technical Paper No. 62, Alaska Department of Fish and Games (October, 1980).

it that Tlingit and Aleut society was effectively leveled by making the people of each a common subject class in the new colonial order. From one perspective theirs became an egalitarianism of shared oppression rather than a hallmark of their precolonial society and economy. The Eskimo and Athabaskans, despite the many contacts they had with outsiders, had never reached the stage of significant social stratification so long as they lived by nomadism or in very dispersed villages.

So, what is happening today? Are the institutions of modern Native life (corporate officialdom, educational levels in Western terms, earned wealth by enterprising individuals) creating social classes among Eskimo and Athabaskans where none previously existed while restoring them in new forms to Tlingit and Aleut? If so, doesn't this fact substantially alter the meaning of the subsistence lifestyle if some are far more equal than others in cultures where egalitarianism is achieved through sharing wealth?

These are tough questions and it is hard to take a convincing measure of them. But most observers, no matter what their particular views are regarding the subsistence "issue" (and who have some direct knowledge of rural Alaska today), would be unlikely to say that no social class distinctions based on wealth, education or community position have emerged. To the chagrin of many rural individuals and families, there is a noticeable generation gap created by opportunities for Western education; a clear perception that not all accumulated wealth is being shared by the more successful money-earners; and, a core of Native leaders who are as much a part of the urban-industrial society and economy as they are mediators to their people of what modern life is all about.

The question which few wish to address in public is, then, at what point does an individual cease to live even the "modern" subsistence lifestyle by virtue of sharing the blessings (or, as often, the desperate failings) of

urban-industrial life? Emotional, laden with racial or ethnic prejudice, or cynically treated as this question has become, social scientists have generally shied away from it. Or, they have clouded the matter with so many qualifications as to render the answers neutral of meaning.³⁰ But that academic privilege hardly erases the issue of social stratification from the serious consideration it deserves if we are ever to reach minimal understanding and agreement on what the subsistence lifestyle has become. It just makes it a whole lot more difficult.

What's So Important About How Subsistence Lifestyle is Defined?

Whether or not one is convinced by the analyses of the anthropological economists that they have unlocked the mysteries which explain and define the rural subsistence lifestyle in Alaska, the weight and influence of their work is very likely to determine many contours of the public policy debate about how it should be protected. Native groups might find themselves astonished and baffled if they look in the mirror of high theory held up to them by the social science establishment. Others approaching the matter from the commonsensical perspective of deep personal acquaintance with life as it is lived in rural Alaska might also find a great deal to quibble with in such abstruse formulations as 'domestic mode of production' or 'non-codified systems of consumption'.

Sportsmen question whether one lifestyle in a democracy deserves special privilege as compared to their own, no matter how it came into being or is

³⁰ Wolfe, et al, "Subsistence-Based Economies . . . ", 502-522, do not shy away from the issue of "emergent social stratification." However, they treat the subject in such a way as to leave unanswered whether or not it plays a major role in the alteration of the social structures of the communities they studied. Understandably, for this sensitive issue to be treated at all in the present political climate is noteworthy.

defined. And still others may concede that such a lifestyle may presently exist, but go on to ask whether or not new developments might not be agreeably blended into it.

The fact remains, however, that social scientists have been directly charged with the task of providing that basic information and analysis upon which far-reaching planning decisions are likely to be made. This, at least, is not an abstract or negotiable matter: the charge comes directly from Federal and State law. And just as they have contributed mightily to the regulatory process which governs the management and use allocation of wild resources, the commissioned technical studies of subsistence lifestyle will in all probability carry decisive weight in land use plans and the permitting process as it applies to vast regions (not just Federal or State or Native lands within their exclusive domains). Indeed, it already has.³¹

So, what's anyone to make of all this slippery stuff?

First, one should challenge the guiding idea that there is an adequate general definition of a unique subsistence lifestyle in Alaska. Much of the best empirical work on the subject has been done in the Bristol Bay/Lower Kuskokwim regions where cash income from commercial fishing is the single most important contribution to the subsistence lifestyle as defined by those who closely studied it.

Their focus was upon the presumed integration of the subsistence and cash economies, but their conclusions strongly support the concept that the two economies are really inseparable. In the Arctic Slope region wage earnings

³¹ The most recent situation in which the subsistence lifestyle factor played a significant role in shaping a major land use plan involved the "Proposed Bristol Bay Cooperative Management Plan and Revised Draft Environmental Impact Statement," Bristol Bay Study Group-Alaska Land Use Council (April, 1984). Specific references dot the whole document, but see II, 17-19, in particular. Many feel that this plan, if finally officially adopted, will become the model for similar regional plans throughout Alaska. If so, the subsistence lifestyle issue is bound to be around for quite a while to come.

from seasonal and year-long jobs are the major underwriters of subsistence activities. By contrast, Native groups occupying areas less well placed to infuse their "traditional socioeconomic systems" with cash may very well have greater dependence on the harvest of wild resources (even though the lack of cash usually makes them less successful in acquiring them). Here we confront the "subsistence", as opposed to the "subsistence lifestyle", issue. The two should be distinguished from one another, but God forbid that any additional layers of theory be added which would typologize differences in lifestyles (which would, of course, call for a whole new round of studies). At the same time, challenging the applicability of the all-encompassing definition to specific cases would at least sort out the political from the descriptive elements of socioeconomic and sociocultural studies. And that, I think, is vitally important to do.

Second, there is a fundamental illogic to the idea that subsistence lifestyles can be "preserved". If they have done nothing else, the anthropological economists have clearly demonstrated that subsistence lifestyles are the products of very recent and profound social, political, and economic change. Much of the definitional as well as policy argument turns on the pace and direction of changes currently taking place. To cite Bristol Bay once again, Natives have entered the commercial fishery only recently, and yet their lifestyles are now virtually dependent on that income source. Therefore, preservation of their stake in the commercial fishery is the sine qua non of the lifestyle itself, not vice versa.

The quality and character of family and village life, the maintenance of cherished traditional values, cooperation and sharing of goods (including wild harvest) are considered by the anthropological economists to be features of a separate, non-commercial economic system. However, it can be argued with equal force that these are vital social and cultural supports to the new,

fisheries-based lifestyle. Certainly that is how most of the subjects of the study would see it and accounts for why many spend so much energy promoting programs of cultural revival, family and religious values, Native arts, and the like. I repeat, preservation is not the central purpose here. Besides, responsible society at large lends great support to the best social, cultural, and economic aims of Native groups including, prominently, strong support from the petroleum industry.

Third, try as they might, social scientists have not succeeded in marrying their conclusions to those provided by environmental scientists (wildlife biologists and such).³² If cultures were so fragile that the loss of one or even all locally available wild foods also tolled the cultural death-knell, there wouldn't be many cultures of any kind left on this earth. Among the many ironies embedded in this issue is that social scientists in general and anthropologists in particular have proved the tenacity of culture in face of incredible dislocation, dramatic environmental disruption, and human predators such as conquering warriors.

Stated in local terms, would the loss of the Bowhead as a subsistence resource doom contemporary Eskimo whaling culture? Or has the whaling lifestyle already undergone such profound change that its core no longer depends on actually capturing whales? Obviously, whalers assert the former position--no whales, no whaling culture. Students of culture--some of them at any rate--might support the second contention.³³ It would require a fool or a

³² This may account, in part, for why activist environmentalist and conservation organizations have generally stayed well clear of the debate over subsistence, except in those few cases where their interests may temporarily converge--i. e., severely restricting access to hunters on Federal parklands and wildlife preserves.

³³ I will admit that this, like so many other theoretical controversies, is the subject of hot dispute between various schools of thought.

knave to maintain that the actual capture of Bowheads is irrelevant to present day coastal Eskimo culture. But--and this is the important question where lifestyle is concerned--environmental scientists are not positioned to say much more than, if someone puts too much pressure on wild animal populations the subsisters might be forced to change the way they do things or move elsewhere. About the material or psychological damage that might result to the lifestyle they must of necessity remain mute.

One way round all this inconclusive style of debate has been to view human populations as essential functioning parts of what might otherwise be called wilderness ecosystems. The direct application to subsistence systems is obvious. The links to culture--to language, social organization, economy, customs, values, politics, religion and the arts--are far from being obvious or direct.

Individual historical experience must be consulted to discover how a culture has adapted or failed to adapt to novel circumstances. In Alaska most native cultures have persisted in face of very big changes of all sorts, including environmental ones. The emergence of modern subsistence lifestyles provides clear proof of this assertion.

On the very practical and timely level, however, social scientists have attempted to link culture (somewhat fuzzily defined) to potential culturally destructive 'impacts' that might result from the loss of a given species or its habitat. They wish to measure the loss partly in terms of damage to normal food supplies, partly in terms of specific cultural values, and mostly in psychological distress. They do this as part of a general effort to predict the impact of oil and gas activities on a subsistence lifestyle. As can be seen, they feel they need the reinforcing comfort of hard biological science to support their notions of what cultural damage is likely to take

place. In at least one instance with which I am personally familiar³⁴ their efforts failed. But I strongly suspect that this was not the last time this sort of quasi-science will rear its head in the subsistence studies programs.

Fourth, one major analytical feature is entirely missing from nearly all subsistence lifestyle studies: ethnicity, or race, if you prefer. Undeniably, what social scientists generally call inter-ethnic relations is a main theme of all American social history. For most of the country, white-Black, white-Hispanic, white-Asian, etc. relations are the focal points. In Alaska, white-Native relations form the key set. Most subsistence lifestyle studies do little more than allude to this rather significant fact.

The reasons for the omission are not hard to find. Race relations raise politically and socially sensitive issues to the extent that many schools of social science thought feel that politics and racial bias overshadow the structural/functional analysis of the groups to be analyzed.³⁵ This accounts for the almost incessant use of neutral terms like sociocultural or socioeconomic systems in place of the usual race or ethnic terminology characteristic of an older sort of sociological inquiry. Beyond that, subsistence itself has been identified in law as a way of life in rural Alaska where it is forbidden to use ethnic or racial distinctions in the identification process. Using this prohibition as justification, many social scientists appear to say something like "we're prohibited from saying anything on this matter owing to an official position of non-discrimination and so we won't--even if matters of race and ethnicity are central to the groups we're studying."

³⁴ At the Norton Sound Synthesis Meeting (June, 1984).

³⁵ This reflects one of the hottest disputes in comparative sociological theory. For a rip-snorting good treatment of it see Pierre L. Van den Berghe, The Ethnic Phenomenon (Elsevier: New York, 1981).

The result is that two huge gaps appear in subsistence lifestyle studies when ethnic relations are not taken seriously. First, ethnic consciousness is one of the strongest forces promoting social cohesion within a group. When it functions best, this consciousness may be termed ethnic pride (among speakers of the same non-English language, possessors of a special historical tradition, or, the locally famous one, the Eskimo identification of themselves by referring to "The Men Preeminently"). At its most contentious, ethnic consciousness fosters feelings and acts of strong hostility toward strangers (defined as those who do not belong to the ethnic group). Who can deny that both these features of ethnic consciousness are present and live forces in the rural Alaska situation to the extent that one or the other may even dominate the perceptions of subsistence lifestyle in a given locale. By focusing on something called a sociocultural system all this can be side-stepped.

The second gap occurs when non-Native social groups in a subsistence locale are either left out of the analysis or treated as minor actors. Here once again the Bristol Bay/Lower Kuskokwim study³⁶ comes to mind. In this otherwise admirable, empirically detailed analysis of four Native communities relations between them and the huge seasonal population of non-Native fishermen, cannery workers and the like are treated as secondary in anything touching subsistence lifestyle. Yet we have already learned that native participation in the commercial fishery is the central prop of the lifestyle. How then is it possible to leave out inter-ethnic relations between these clearly identified groups without doing serious damage to overall analysis? I suggest that that isn't possible, and this may be the single worst defect of even the best studies. At the same time, one sympathizes with the authors of subsistence lifestyle studies for it is difficult to introduce this key

³⁶ Wolfe, et al, "Subsistence-Based Economies . . .".

element without running the risk of being tarred and feathered by everyone else involved. Not surprisingly, the heart of most disputed issues is what gets least talked about.

Finally, land use planning and management create the most visible disputes in which the lifestyle issue plays a leading role. How much land should be restrictively set aside to support the capricious or regular habits of migratory wildlife? Will industrial development (prominently, petroleum and mining), new settlement, sport hunting and fishing, growth of regional town centers, roads and so on undermine subsistence resources and therefore the subsistence lifestyle? Who needs what, with what justifications, from the enormous Federal land holding in the State? These and a dozen more allied questions are asked where the students of subsistence lifestyle are called upon to supply answers anchored to the 'data base' they have so meticulously accumulated and analyzed with the help of high level social science theory and sophisticated research methodologies.

The most popular form in which their answers are given is to predict outcomes of hypothetical 'scenarios'. At this point it is often not the anthropological economist, but the rather formalist econometricians who are trundled in to lay out a sideboard buffet of 'alternative outcomes' (economists being universally unwilling to pit their science and reputations on telling us what they think will really happen). Students of subsistence lifestyles are often not so cautiously modest. Since their tendency frequently is to identify with the groups, and lifestyles, of those whom they have studied (some call this secondary ethnocentrism while they normally speak of a field method described as 'participant observation'), their recommendations reflect an enthusiasm to protect that which the folks from whom they have acquired their data say they want protected.

Translated to land planning and management issues, this noteworthy tendency is perhaps the most challengeable of all the contributions made by the subsistence studies industry to the political, social, and economic debates that will so affect not only the future of present rural lifestyles, but Alaska's future as well.

Robert R. Griffeth
Anchorage, Alaska
September, 1984

Dear Sportsfisher,

The public hearings on subsistence law changes that we have demanded have been scheduled for August 14, 1985, in Anchorage. Senator Abood will be presiding on the State Affairs Committee for these hearings. Whether they will be delayed because of the impeachment proceedings remains to be seen. Watch the paper for public notices.

The following five points were sent to us by the statewide Alaska Outdoors Council of which we are a member. We have changed some wording, but the ASA Board of Directors concurs and feel that any change to the subsistence law must contain these five points.

Six additional position statements that your Board of Directors feel must be included in the law follow the AOC points. If you have any comments on additions, please contact Bob Hunter at 276-8134 (home). All points will be subject to change to enable a consensus with hunting needs, and to consolidate a position with Fairbanks, Juneau, Wasilla, etc. A united front is imperative. Your attendance and input at the committee hearings is important to successfully demonstrate that we are greatly concerned about the existing law.

GENERAL POINTS FOR CONSIDERATION AND CONCURRENCE - SUBSISTENCE

(FROM THE ALASKA OUTDOOR COUNCIL)

1. Licensing: A permit will be required for subsistence preference use. Licensing will be based on personal or household qualifications. No fee will be charged for this permit.
2. Limiting Qualifications: Qualifications for the permit will be very restrictive, requiring that (1) the wild resource taken be used for personal and household consumptive use only; and (2) the applicant must assert and establish that he needs the subsistence because it is reasonably necessary for his survival or the survival of his dependent household. The Board may initially qualify an area, then restrict further to a community, then groups, then families and individuals, as the situation and need arises...or otherwise pass a needs test as specified by the Boards.
3. Subsistence Seasons and Bag Limits: The permit holders will be subject to specific subsistence regulations on seasons, quotas, bag limits, etc. The opportunity to harvest will be given a preference, but no guarantee of harvest is intended.
4. Preference Not Priority: The preference will not be an absolute priority over sport, commercial, or recreational use. These latter uses need not necessarily be eliminated before subsistence preference use is restricted or regulated.
5. Trade and Barter: Trade provisions will be similar to those in current state law. Subsistence use may include trade, barter, or sharing for personal or family consumption of wild renewable resources and must be limited to the first exchange. No cash exchanges shall be included in subsistence use.

ALASKA SPORTFISHING ASSOCIATION INPUT - SUBSISTENCE

(1) POSITION STATEMENT

Subsistence harvests should be based on meeting the protein needs and, in some cases, significant cultural needs of the harvesters. One species should be substitutable for another comparable species, and harvest should occur on those species that are most abundant and best able to withstand the harvest.

BACKGROUND

The need for the Board of Fisheries to be able to shift subsistence harvests to the most abundant species is statewide in application. However, it is most clearly demonstrated by the existing Cook Inlet situation. Current law stipulates that subsistence harvests are based on "customary and traditional" harvest patterns. The courts, as in the Tyonek case in Cook Inlet, ruled that harvests originally were a spring fishery on King Salmon, and thus the Board of Fisheries could not shift to a more abundant species of salmon for the Tyonek fishery.

The history of modern subsistence in Cook Inlet is that it was chiefly conducted by commercial fishermen who already owned gill nets. These people fished for subsistence early in the season until sufficient salmon were available to harvest commercially. They then fished commercially until the late fall, when they again subsistence fished for their winter food supply. In recent years the Board of Fisheries allocated early and late runs to sport fishermen and the large mid-season runs to commercial interests. The result, at least in Cook Inlet, was that subsistence fisheries are directed upon the small runs given to sport fishermen rather than the huge mid-season runs which have a commercial priority.

A classic example is the fall Kenai Silver run, which has a long-term average harvest of 13,200 fish. Currently, the subsistence allocation from this run is 13,000 Silvers...essentially the entire run.

(2) POSITION STATEMENT

Certain areas exist where the fishery resources are so sensitive that the efficient harvest methods associated with subsistence fishing (gill nets?) would destroy those resources. The Board of Fisheries must continue to have the authority, upon a formal finding of fact, to close such areas to subsistence fishing while still allowing less efficient methods, such as pole and line.

BACKGROUND

An example of this problem is the trophy Rainbow trout streams of the Iliamna Lake Drainage. Trout in these streams grow very slowly with some

large trout being over 10 years of age. These trout also occur in limited numbers. Counts by Alaska Department of Fish and Game personnel have, during some years and in some streams, found less than 1,000 adult trout. About 1975 one gill net, set illegally during one night, caught nearly ten percent of the adult Rainbow trout in Lower Talaric Creek. The Board of Fisheries has recognized the fragile state of the Rainbow trout resource in that area, and current regulations allow only one Rainbow trout to be taken per day; no bait or treble hooks are allowed to reduce incidental hooking mortality. Gill nets have been banned in and near these streams for approximately 10 years. However, since subsistence fisheries were allowed in these areas at one time, the Madison decision appears to grant priority to the use of subsistence gill nets over pole and line angling.

(3) POSITION STATEMENT

That the definition of subsistence gear in AS 16.05.940(22) is proper and should not be amended. That definition does not normally allow pole and line to be used as subsistence gear.

BACKGROUND

We strongly believe that pole and line should not be included for subsistence use for several reasons:

- (1) The present problem with subsistence is principally that one Alaskan has been given priority over another Alaskan based solely on where he lives. We disagree with that concept. Including pole and line users in subsistence would simply increase the problem by giving more people a priority. We call for a major reduction in the number of people having a priority or preference. We have, since 1978, disagreed with the concept of giving priority to one person over another. Adding pole and line would be nothing more than giving sport fishermen a priority over commercial users. We reject that premise.
- (2) Pole and line subsistence users would create an enforcement nightmare. How would we distinguish between subsistence harvesters and sport (non-resident?) fishermen?

(4) POSITION STATEMENT

That a set of personal-use fishing regulations is needed to allow the harvest of fish, when they occur in numbers excess to escapement and commercial/consumptive needs.

BACKGROUND

In many areas of the state, large numbers of fish (commonly salmon) occur which are excess to spawning needs and are not harvested by commercial, subsistence, or sport fishermen. Personal-use regulations may be an ideal tool for the Board of Fisheries to allow the harvest of the fish on an equal

priority basis with other user groups. Personal-use regulations were created by the Board of Fisheries for exactly this purpose. However, the Madison decision vastly expanded subsistence qualifications, and personal-use harvesters have now been included in subsistence with a priority over other users. The legislature should enact personal-use regulations, by statute, to permit harvest of fisheries resources on an equal priority basis.

(5) POSITION STATEMENT

Rainbow/Steelhead trout shall not be subject a subsistence priority. The Board of Fisheries shall continue to have the authority to allocate the harvest of this species to any user group without priority on a case by case basis.

BACKGROUND

Despite Alaska's reputation as having some of the world's best Rainbow fishing, Rainbow trout in this state are limited both in number and location. Only in Bristol Bay and Cook Inlet do major numbers of Rainbow trout occur. For 1983, the latest year for which complete catch data exist, the entire statewide Rainbow harvest was less than 175,000 fish. Approximately 125,000 of these fish were from Cook Inlet waters, and over half of the statewide total were small stocked trout from lakes adjacent to urban centers.

Rainbow trout in Alaska are not only limited in number, they are slow-growing, and stocks are very easily damaged. In recognition of these facts, the Board of Fisheries regulates wild Rainbow stocks with very stringent bag limits, in many cases allowing only one trout per day.

(6) POSITION STATEMENT

Subsistence fishing in Cook Inlet waters should be limited to the areas adjacent to English Bay, Port Graham, and Tyonek, as previously designated by the Board of Fisheries. All other non-commercial net fishing in Cook Inlet should be conducted under personal-use regulations.

BACKGROUND

This is the only recommendation of the Alaska Sportfishing Association relating to a specific area of the state. We must face the fact that Cook Inlet is unique. Over half the state's population resides in this drainage. Most of these people have access only to Cook Inlet fishery stocks. According to Fish and Game data, approximately 140,000 sport fishermen and several thousand commercial fishermen utilize Cook Inlet fisheries, in addition to persons wishing subsistence fishing privileges.

Regulations promulgated by the Board of Fisheries, after passage of the 1978 subsistence law, restricted gill net subsistence fishing to remote villages of Cook Inlet. These regulations successfully avoided the intense conflict which resulted when priority mandated subsistence gill netting was opened in high-use waters accessible to the Cook Inlet highway systems.

We have no objection to continued subsistence harvests by any Alaskan in the three communities noted above. However, in basic fairness to all Alaskans living in Cook Inlet and to avoid the inevitable future chaotic controversy associated with priority mandated gill net fisheries, in the remainder of Cook Inlet subsistence fisheries should not be permitted. We wish to make clear that we believe that gill net, or dip net fisheries, may be desirable in certain times and for sites in Cook Inlet waters. However, it is critical that these fisheries be permitted on a non-priority basis by the Board of Fisheries under personal-use regulations.

ALASKA OUTDOOR COUNCIL
SUBSISTENCE CONSENSUS POINTS

AUGUST 21, 1985

1. Permitting: A permit will be required for subsistence preference use. Permitting will be based on personal or family qualifications--not on the locality in which one lives nor upon racial, cultural or ethnic considerations.
2. Limiting Qualifications: Qualifications for the permit will be very restrictive, requiring that: (1) the wild resource taken be used for personal and family consumptive use only; (2) the applicant must assert and establish that he needs the subsistence because it is reasonably necessary for his survival or the survival of his dependent family; and (3) the permit should be limited to a family unit with income from all sources at or below Federal poverty levels with no more than one subsistence license per family unit.
3. Subsistence Seasons and Bag Limits: The permit holders will be subject to specific subsistence regulations regarding applicable or substituted species by area, seasons, quotas, bag limits and methods and means as authorized by the Boards of Fish or Game. The opportunity to harvest will be given a preference but no guarantee of harvest is intended.
4. Preference Not Priority: The preference will not be an absolute priority over sport, commercial or recreational use. These latter uses need not necessarily be eliminated before subsistence preference use is restricted or regulated.
5. Trade and Barter: Trade provisions will be similar to those in current state law. Subsistence use may include trade, barter or sharing for personal or family consumption of wild renewable resources and must be limited to the first exchange. No cash exchanges or commercial sale shall be included in subsistence use.

~~At this time~~ I realize that
any full or partial debarment
of ~~subsystems~~ components
will ~~be~~ sector jobs and
require ^{significant} language
for you to review. ^{However,} we
would be interested
in your ~~dept's~~ dept's
reaction to ^{a proposal} ~~the proposal~~
that would define
~~subsystems~~ ^{key} now only as
~~the~~ those components,
or areas where the
lack of practical alternative.

returned to in section
801(2) actually exists.

The ~~text~~ proposed
language would
provide a series
of criteria that
the Board of Fish
& Game could
measure communities
against in making this
determination of ~~whether~~
or ~~not~~ ~~the~~ ~~were~~ ~~good~~.

In those areas that
were judged detrimental
subsistence uses would

provision for local
concerns.

We realize that
there are ~~at least~~
~~in~~ ~~some~~ ~~ways~~ a number of
Akashan communities
~~that~~ ^{that} would no longer
be considered
and under this
proposal ~~of this~~
in these ~~proposed~~
communities the number
of residents eat
in large amounts of
food & give. In

non subsistence areas
the Bonds would have
wide flexibility to ~~any~~
accommodate local
needs and concerns
while ensuring fair
sustained yield and best
use.

In those areas
and communities
where rural subsistence
and hunting

to be administered
as outlined in ANICCA

We believe a
statute based on
these proposals
could be fair,
constitutional, enforceable
comply with ANILCA,
and meet the
needs of all Alaskan
residents throughout
the state. as
our state continues
to grow and change

Honorable William P. Horn
Assistant Secretary
Fish and Wildlife and Parks
Department of the Interior

Dear Secretary Horn:

We appreciated our meeting with you and your sending us copies of your September 23rd letter to Governor Sheffield on subsistence compliance. As chairmen, respectively, of the Senate State Affairs Committee, to which the various subsistence bills are currently assigned, and the Senate Resources Committee, which is the next committee of referral for subsistence legislation, we have reviewed your letter.

In that letter, you formally advise the Governor that the State of Alaska is no longer in compliance with the requirements of ANILCA as specified in Title VIII. You further advise that compliance will require that the subsistence preference be limited to those rural Alaska residents who customarily and traditionally make use of subsistence resources.

The letter also said that in 1982, you noted to the Alaska Boards of Fish and Game that there are various ways to comply with the requirements of Section 805 of ANILCA. In order to understand all the options open to the state in dealing with this issue, we are trying to fully explore all the various ways to comply with Section 805. Your offer of the full cooperation and assistance of your department in our effort to find a solution to this problem is appreciated and we would like to take you up on it.

The findings in Section 801 (2) says "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."

~~Anthony Jones~~