

***Subsistence
Meeting
4-11-90
(With Sec. of
Interior, Lujan
in Anchorage)***

Alaska State Legislature

Senate Resources Committee

Senator Bettye Fahrenkamp, Chairman
Senator Jay Kertula, Vice Chairman
Senator Dick Eliason
Senator Steve Frank
Senator Rick Hallford
Senator Ariss Stankowski
Senator Fred Zbaroff

PO Box A
Juneau, Alaska 99811
(907) 465-1907

M E M O R A N D U M

To: Members, Senate Resources Committee
From: Senator Bettye Fahrenkamp, Chairman *Bettye*
Re: Committee Meeting on Subsistence
Date: April 4, 1990

As you may know, the Alaska Federation of Natives is holding a conference at the Egan Convention Center on Tuesday, April 10, and Wednesday, April 11, on the issue of subsistence.

Wed
In conjunction with the conference, I have scheduled a joint hearing with the House Resources Committee from 5:30 p.m. to 9:00 p.m., to be held at the Egan Convention Center, in the Summit Room, for the purpose of taking public testimony on subsistence. I have made arrangements for the meeting to be teleconferenced to Juneau (Butrovich Room), for those of you who are unable to attend.

It is my understanding that Secretary of the Interior Manuel Lujan will speak before the Anchorage Chamber of Commerce on Wednesday morning. Although he has been invited to participate at the conference, and at our hearing, confirmation has not yet been received.

As per session policy, travel authorizations must be approved by the Senate President.

I am enclosing a copy of the conference schedule for your information. The issue of subsistence is vitally important to all of us and I urge your participation.

SUBSISTENCE: A STRATEGY FOR OUR FUTURE
DRAFT AGENDA

Wednesday, April 11

9:00am WELCOME - Julie Kitka, AFN

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INVOCATION - Rev. Anna Frank, Athabascan, Episcopal
Diocese of Alaska

9:45 INTRODUCTION & PURPOSES - Ralph Eluska, AFN
PRESENTATION - Walter Charley, Athabascan Elder

9:00 REVIEW OF AGENDA - Co-moderators Perry Eaton &
Marlene Johnson
"CHALLENGES FACING ALASKA NATIVES - SUBSISTENCE"

ISSUE #1: (Assuring there is not resolution by July 11)
Federal Pre-emption & Dual Management of Fish & Game

9:30 Speaker: To Be Announced, "The Federal Government's
Responsibilities to Alaska Natives"

9:50 FEDERAL/STATE PANEL: "How Would It Work?"
Panel Moderator: Johnny Hawk
Glenn Elison, USF&S Steve Behnke, ADF&G
Tom Kooster, Dept. of Law Stan Leaphardt, CACFA
WRITTEN QUESTIONS FROM THE FLOOR

10:45 Break

11:00 SPEAKER: To Be Announced, "Dual Federal/State
Management"

11:20 PANEL: "How Will It Affect Us?"
Panel Moderator: Chris McNeil
Trofon Angasan, "Unanswered Questions & Continuing
Litigation"
Ken Johns, "Impacts on Villages Surrounded by State
Land"
Myron Naneng, "Impacts on Y-K Delta"
Clare Swan, "Kenaitze Lawsuit"
Ed Thomas, "Co-management Under '638'"
Walter Sampson, "Living with Federal Management"
WRITTEN QUESTIONS FROM THE FLOOR

12:30pm Break for lunch

2:00 REMARKS BY CO-MODERATORS (AGENDA/PROEDURES)
ISSUE #2: CONGRESS & ANILCA

2:05 PANEL: "Opening ANILCA"
Panel Moderator: Edgar Blatchford
TBA, Rural CAP Sheryl Sutton, KPFA
Willie Kasayulie, ANC Robert Willard, SENSC
Mitch Demientieff, TCC TBA, Sierra Club
TBA, Alaska Outdoor Council
WRITTEN QUESTIONS FROM THE FLOOR

4:00 PRESENTATION BY SENATOR TED STEVENS VIA TAPE
Staff Representative: Mario Matsuno Nash

4:20 CLOSING REMARKS, Eddie Hopson, Inupiat Elder

4:30 Recess

9:00am OPENING REMARKS, Rev. Billy Sheldon, Sr., Inupiat Elder

9:10 REMARKS BY CO-MODERATORS (AGENDA/PROEDURES)
ISSUE #1: STATE CONSTITUTIONAL AMENDMENT

9:20 Mike Irwin, Office of the Governor

9:40 QUESTIONS & ANSWERS

10:15 Break

10:30 LEGISLATORS' PANEL: "The Next Four Weeks - Options
Available to the Alaska State Legislature"
Panel Moderator: Nels A. Anderson, Jr.
Sen. Al Adams Rep. Eileen MacLean
Rep. George Jacko Rep. Kay Wallis
Sen. Jack Coghill Others To Be Announced
WRITTEN QUESTIONS FROM THE FLOOR

12:00pm Break for lunch

1:30 REMARKS BY CO-MODERATORS (AGENDA/PROEDURES)
ISSUE #4: CONSTITUTIONAL AMENDMENT APPROACH

PANEL: Village Perspective
Will Mayo, Interior Tom Tildon, Bristol Bay
TBA, Southeast Gary Oskolkoff, Southcentral
TBA, Western Alaska TBA, North Slope

2:20 PANEL: Regional Perspectives
Myron Naneng, AVCP Bob Willard, SENSC
Mitch Demientieff, TCC Others To Be Announced
Trofon Angasan, Bristol Bay
Sam Demientieff, Fairbanks Native Association

3:10 Break

3:30 PANEL: Statewide Perspectives
Ralph Eluska, AFN Matthew Iya, RARA
TBA, Rural CAP Sen. Al Adams
Willie Kasayulie, ANC Rep. Eileen MacLean
Others To Be Announced

4:20 CLOSING REMARKS Dr. Walter Soboleff, Tlingit Elder

4:30 BENEDICTION Bishop Jacob Nelson, Moravian Mission
CONFERENCE CLOSING

6-9:00pm JOINT HOUSE/SENATE RESOURCES HEARING

SUBSISTENCE: A Strategy for Our Future

THE PURPOSE OF THE SUBSISTENCE SUMMIT CONFERENCE IS:

- * To provide Alaska Native leaders with the best available **INFORMATION** on the current political and legal challenge to our subsistence way of life, and to present such information in ways which respect the diversity of interests within the Native community and empower Natives to act.
- * To provide the opportunity for Native leaders to express their **POSITIONS, OPINIONS AND FEELINGS** on the subsistence issue, on its present and future impacts on the well-being of our people, and on effective strategies for protecting our long-term interests.
- * To generate creative **IDEAS** on how the Alaska Native community can deal effectively with the political opposition on subsistence and related issues of public policy.
- * To develop an effective network of **COMMUNICATION** in the statewide Native community between individuals, communities and organizations as we confront the external challenge to our subsistence economies and cultures.
- * To encourage **TRUST AND COOPERATION** among all Alaska Natives and their organizations, while respecting the cultural, geographical and generational diversity of our people.

To Alaska Native People:

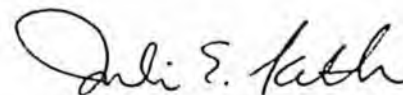
On behalf of the Alaska Federation of Natives, I invite you to attend an important statewide summit conference of the Alaska Native community on subsistence issues. The meeting will be held on April 10-11, 1990, at the Egan Convention Center in Anchorage. Its theme will be ***SUBSISTENCE: A Strategy for Our Future***.

At this conference we plan to provide the best possible information on the consequences of the recent Alaska Supreme Court decision (McDowell v. State) which declared the state subsistence law unconstitutional.

We will provide a broad framework for discussion of several different options available to Native people, and the implications of each. The conference will be an educational opportunity for all of us to say what we think and listen to each other. Representatives of villages and Native organizations will be able to return home carrying accurate information and a broad perspective on this complicated issue.

Protection of subsistence hunting and fishing is critically important to the future of Alaska Natives and to the survival of our villages. I urge you to attend the conference.

Sincerely,



Julie Kitka
President

PRE-REGISTRATION

Name: _____

Organization: _____

Address: _____

YES, I DO plan to attend.

NO, I DO NOT plan to attend.

ACCOMMODATIONS

The Anchorage Westward Hilton is offering special room rates during the Subsistence Summit Conference. Single- or double-occupancy room rates are \$70 per night. PLEASE MAKE YOUR TRAVEL AND HOTEL ARRANGEMENTS IN ADVANCE. You may call the Anchorage Westward Hilton toll-free at 1-800-478-3616.

PLEASE DETACH AND MAIL TO:
Alaska Federation of Natives, Inc.
411 West 4th Avenue - Suite 301
Anchorage, AK 99501

(907) 274-3611

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**SUBSISTENCE:
A Strategy for Our Future**

Egan Convention Center
Anchorage, Alaska
April 10-11, 1990



A Conference of the Native Community

SUBSISTENCE: A Strategy for Our Future

MEMORANDUM

TO: Senator Betty Fahrenkamp VIA TELECOPY

FROM: William P. Horn *WPH*

RE: Observations and Analysis of Subsistence Issues

DATE: March 22, 1990

The following memorandum is an effort to provide a comprehensive overview of the subsistence situation. It is divided into three primary sections discussing strategies and issues, consequences that may arise from federal takeover, and a conceptual proposal that emanates from the group meeting we had in Juneau last month.

I. ISSUES AND STRATEGIES

Two court rulings have totally unravelled the 1986 subsistence scheme devised by the state with the concurrence of the U.S. Department of the Interior. The 1986 plan (52 SIA 1986) represented an effort to retain control over fish and wildlife management by adopting a subsistence preference limited to rural residents as provided in Sections 803, 804 and 805 of ANILCA. The McDowell case (McDowell v. State of Alaska, _____ P.2d _____ (Ak. 1989)) is the immediate cause of concern as it held that any state effort to limit subsistence privileges to rural residents violates Art. VIII, Sections 3, 15, and 17 of the Alaska Constitution. The state now faces the prospect of federal takeover of fish and game management of federal lands as mandated in § 805 of ANILCA.

Resolution of the McDowell matter will merely shift the focus to the problems created by the Kenaitze decision (Kenaitze Indian Tribe v. State of Alaska 860 F.2d 312 (9th Cir. 1988)). That decision declared the actual definition of "rural" in the 1986 Statute to be too restrictive and inconsistent with ANILCA. In the absence of federal changes in case law or in ANILCA, the state must also pass a new law to conform with Kenaitze or face federal takeover.

In order to forestall federal takeover, both matters must be addressed. McDowell may be resolved by pursuing the following courses of action:

McDowell Option 1 -- Alaska amends its Constitution to authorize the creation of a subsistence class limited to "rural residents" (the actual definition of "rural" to be addressed

later). Attendant implementing legislation is also enacted. No amendments to ANILCA are enacted.

McDowell Option 2 -- A new Alaska subsistence program is crafted without regard to existing state or federal law. After the program is developed, amendments to state law and ANILCA are prepared to ensure that the law conforms to the new program. The new State program may or may not include a Constitutional amendment.

McDowell Conclusion -- I have no doubt that in the absence of any changes in ANILCA a constitutional amendment provides the only avenue for State compliance with the federal law. I cannot conceive of any legislative or regulatory fix that can reconcile the McDowell ruling and Sections 803, 804 and 805 of ANILCA. The State may take practical steps to provide a defacto preference to rural subsistence users but this is highly likely to be deemed inadequate as a matter of law.

Kenaitze follows the same option track. Arguing over the definition of "rural" makes sense only if the State amends its constitution to permit the creation of a rural subsistence class. On the other hand, if a program is negotiated per McDowell Option 2 that does not require any definition of "rural" and ANILCA is appropriately amended, Kenaitze becomes moot.

Kenaitze Option 1 -- Following adoption of McDowell Option 1, amend state law to conform with the Kenaitze ruling. That will require an expansive definition of "rural" and ensure that the subsistence class entitled to preferential fish and game allocation will be quite large. Under no circumstances can residents of Anchorage, Fairbanks, or Juneau be eligible. The effects of such an approach can be substantial. A very large subsistence class ensures a large number of users who must be satisfied before commercial and sport interests receive any allocation. A Kenaitze fix consistent with the 9th Circuit ruling is likely to have major effects on commercial fishing.

Kenaitze Option 2 -- Negotiate a new program and attendant statutory amendments that bypass the decision.

Observations -- I have a strong personal predilection for both Options 2. I am frustrated that the "tail keeps wagging the dog". Every time that the State has acted to conform with ANILCA, a state or federal court has changed the ground rules and triggered a new crisis. A constitutional amendment and a new statute may resolve McDowell and Kenaitze but that is no guarantee that another court will rule that the new regime is inconsistent with ANILCA. The State has acted three times to conform to ANILCA (the 1978 statute, the 1982 regulations and the 1986 statute) and each time a court has determined that the State missed the mark. In reality,

Title VIII has proven to be a moving target: the tail (ANILCA) keeps wagging the dog (the State and its citizens).

I am persuaded that continued attempts to react to courts makes no sense. Instead, initiating a new program that can secure the support of the major interests and then molding the state and federal law around the new program may offer a more permanent solution. It is foolhardy to have "subsistence crises" every two years.

This strategy contemplates and requires amending ANILCA. This is not an unachievable objective under the correct circumstances. ANILCA has been amended eight times since its enactment in 1980 and some of these changes have been significant (e.g. the Submerged Lands Amendment to Section 901). The key is to ensure that all of the major Alaska interests support the amendments. Under such circumstances, Sections 803, 804 and 805 could be amended without major political and substantive costs.

The following sequence of events is one means of achieving this goal. First, the major interests are convened to negotiate a new state subsistence program without regard to existing law. The negotiated program can resolve both the McDowell and Kenaitze problems simultaneously. This can be expected to take time and therefore plans for reacting to federal takeover must be made. Second, arrange with Interior a benign temporary takeover to cover the negotiation period. Third, have the State adopt the agreed to program which may or may not include a constitutional amendment. Fourth, secure passage of amendments to ANILCA that expressly sanction the new state program.

II. CONSEQUENCES OF FEDERAL TAKEOVER

The prospects of successful negotiation are not now strong. This is due largely to perceptions among various entities that their interests are served by the status quo. Some sportsmen think federal takeover is an empty threat. Some Natives see takeover as tantamount to "victory". Commercial fishermen have been slow to recognize the threat of federal preemption attendant to takeover. Until all of the interests understand the enormous risks each faces, good faith negotiation will not progress. This section briefly outlines the risks that various interests may face as a result of inaction and subsequent hostile federal takeover.

Sportsmen -- Sporting interests in Alaska face significant threats from federal takeover of subsistence management on federal lands. If Interior pursues an aggressive posture, it will assert authority to preempt state regulations on state and private land to ensure that harvestable surpluses of migrating fish and wildlife reach federal land areas. Interior could seek to preempt state fishery management on many rivers to ensure that

adequate fish get upstream to subsistence users on federal land. The same may apply to mobile game species like caribou or brown bear. Under these circumstances, regulation of sport fishing and hunting would effectively pass to Interior with unknown consequences. The prospect of the National Park Service (NPS) acquiring primacy over fish and wildlife management on the 50 million acres of NPS areas ought to scare most sportsmen.

A potentially greater threat involves closures. If Interior has inadequate resources (personnel and money) to manage fish and game on the 60% of Alaska that is federal land, the department can guard against suspected over-harvest by closing hunting and fishing on federal lands. If Interior is pressed to undertake an aggressive takeover, I think closures will become a genuine problem. Animal rights activists can be expected to pursue judicial intervention, most likely in Washington, D.C., on this front.

A more benign takeover raises a different, more insidious threat. If Interior defers heavily to the State, it is probable that animal rights activists or some tribal advocates will sue Interior to press it to become aggressive. A federal suit, which could be brought in Washington D.C., could press for a liberal reading of the takeover requirement in §805. A judge that agreed could take two courses. He would order Interior to act aggressively and specify what that means, the court would instruct the department on how to act. In the alternative, a judge, convinced that Interior was willfully avoiding its obligations under §805, could takeover the program. Federal courts have taken over administrative direction of school systems, prisons and fishing programs -- judicial takeover of subsistence management is a distinct possibility that must be reckoned with.

Natives -- Native interests face many of the same risks. Closures by Interior pose the same risks to Native interests that are posed to sportsmen. Similarly, the judicial takeover threat is by no means a benefit to Natives. Animal rights activists are as implacably opposed to Native taking as they are to non-Native hunting. The chance to get a federal judge -- probably in Washington, D.C. -- engaged in day-to-day wildlife management is an opportunity the anti-hunting activists will not let pass and Native interests could be severely harmed in the process.

Interior may confound the Natives and successfully pursue a very benign takeover. The Department's lawyers think the chance of successfully asserting preemption is less than 50%. If that outlook proves correct, takeover will be a paper tiger. The State would be free to run its fish and game programs on state and private lands, totally unencumbered by any subsistence preference requirement.

Lastly, please note that the Interior takeover -- if it does not seek preemption -- does not extend to Native corporation lands. Fish and game management on such lands would remain exclusively under State control. With no State subsistence law in place (since it has been struck down by McDowell), rural Natives would have to leave their land to obtain preferential treatment.

Commercial Fishermen -- Federal preemption poses its greatest risks to the fishing industry. Whether it is pursued administratively by Interior or as a result of judicial intervention is immaterial -- the prospects of federal tampering with anadromous fishery management are frightening.

The classical hypothetical involves a federal agency (NPS or the Fish and Wildlife Service (FWS) preempting offshore salmon harvest to ensure what the agencies deem to be sufficient escapement and provide appropriate subsistence harvest. Salmon runs in Bristol Bay, the Copper River, and the Yukon River may be most susceptible to federal intervention.

Conclusion -- Each of these interests is playing Russian roulette by acquiescing to stalemate that produces federal takeover pursuant to §805. No one can accurately predict what will transpire after the July 1st date when the State is officially in non-compliance with ANILCA. Suffice it to say, every one of the consequences noted above could occur. Since all of these interests face some substantial peril, that should work to facilitate negotiations and compromise.

III. CONCEPTUAL PROPOSAL

At our group meeting in Juneau the participants discussed different types of subsistence programs. Outlined below is a development of the ideas and concepts that emerged from those talks. It presumes that ANILCA will be amended as the proposal is inconsistent with existing federal law. Moreover, it does not include a constitutional amendment. I concur with your political judgment that amending the constitution ought to be avoided. This proposal may be worth pursuing in the context of a negotiated subsistence agreement that leads to amendment of state and federal law.

Purpose -- The purpose of the program (and new law) is to protect and maintain harvest opportunities for citizens that use and rely on fish and game resources as a primary means of sustenance.

The State Supreme Court has held this to be a legitimate state interest that may be pursued by constitutional means.

Findings -- The legislature would find that use of resources for subsistence purposes is a beneficial use under Article VIII, Section 4 of the Alaska Constitution.

The court has made clear that the Constitution does not prohibit differential treatment of user groups. Beneficial uses of fish and game resources may be subject to allocations. This ensures that subsistence qualifies as a beneficial use.

Subsistence Class I -- Establish a narrowly defined class of Alaska citizens to qualify for preferential treatment in terms of fish and game allocation. To qualify individuals must satisfy three requirements:

- (1) customary and traditional participation in subsistence activities (a) as an individual or (b) by their family;
- (2) use of fish and game resources proximate to where they live; and
- (3) subsistence activities constitute the primary means of securing sustenance.

The court made it clear that the class had to be reasonably open to new entrants. The law should indicate that newcomers can satisfy the first requirement by participation in subsistence activities during a period of time when the individual does not qualify for preference.

To reduce burdensome application and administrative requirements, it may be possible to authorize the State that it may presume that residents of small communities not connected to the road system will satisfy the criteria. This presumption would be for administrative convenience only and does not presumptively entitle residents of such areas entry into the class.

Class I users will be the beneficiaries of a "hard preference". This is the same kind of preference created in the 1986 state statute. Class I users must be satisfied before resources can be allocated to other users. When resources in a given area are inadequate to satisfy the reasonable requirements of eligible Class I members, allocation of resources within the class shall be based on (1) availability of alternative resources and (2) length of individual or family participation in subsistence activities.

Subsistence Class II -- The law would establish a broader class of subsistence users entitled Class II users. Eligibility would be determined by two criteria:

(1) Citizens must have customarily and traditionally taken fish and game resources for personal or family use; and

(2) These subsistence activities must constitute a significant means of securing personal or family sustenance.

This class of citizens will be entitled to a "soft preference". The Boards of Fish and Game would be required to afford this class reasonable opportunities to satisfy their reasonable needs. However, there would be no requirement to eliminate sport or commercial take before restricting Class II take. If resources are short, Class II harvest may be reduced concurrently with sport and commercial take. Moreover, Class II would be subject to a total out-off to provide for the needs of Subsistence Class I.

Graphically, the program would work as follows:



TIER 1 - Hard Preference

TIER 2 - Soft Preference

I am persuaded that this kind of program addresses the needs of the major interests, is workable, and is constitutionally sound (no amendment needed). However, ANILCA would have to be amended because the program would permit (albeit in limited cases) urban residents to qualify for Class I.

The program should have reasonable practical efforts. It defines a narrow class of genuine subsistence users -- those citizens who rely on fish and game resources and have few alternative means of support. Since the class entitled to a hard preference is restricted, adverse effects on commercial and sport interests should be minimal.

Class II subsistence should encompass a large group of citizens. Accommodating this broader group should help eliminate the "sting" of those who will find themselves ineligible for Class I. The soft preference ensures this group of an allocation without crippling other user interests.

IV. CONCLUSION

To summarize, the State has two basic courses of action. The first approach is to attempt to react to McDowell via a constitutional amendment and follow with a new statute that also reacts to and resolves Konaitze. The second is to negotiate a new program regardless of McDowell, Konaitze, and ANILCA. After a program is crafted, the State would seek new state law (including constitutional amendment if deemed appropriate) and conforming amendments to ANILCA. A benign takeover agreement with Interior will be an essential ingredient of the second approach.

Federal takeover puts all of the major interests at risk. The groups need to understand these risks so that they are prepared to negotiate in good faith to craft a mutually acceptable solution that will restore fish and game management to the State.

Finally, a new two-tiered system is offered for your consideration. It may provide the basis for discussions. However, it does not provide an immediate fix. To the contrary, the proposal seeks to reverse the order of things so that the law follows a political accommodation rather than have a political accord squeezed into this year's judicial rendering of ANILCA or state law.

I hope this is helpful. Please let me know if I can answer any questions or provide additional information. In addition, I will shortly provide an analysis of the other proposals you recently faxed to me.

BIRCH, HORTON, BITTNER AND CHEROT

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MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: William P. Horn *WPH* VIA TELECOPY

DATE: April 6, 1990

SUBJ: Interim Subsistence Law and Benign Takeover Concept

The following outlines in greater detail the concept we discussed yesterday. It does not forestall Federal takeover but provides for a benign, cooperative takeover effort. Ideally, this will buy time for the respective parties to negotiate a more permanent resolution.

1. The Alaska Legislature Enacts a New Subsistence Law Consistent with McDowell.

The new law would establish a subsistence class that could include some urban residents. Appropriate criteria would ensure that rural residents would constitute most of the class. Although I personally believe the subsistence class should be kept small, a larger class, in the interim, would facilitate the benign takeover as the larger class concept is consistent with Title VIII as construed by Kenaitze.

In addition, a key criterion is likely to be local residents taking resources proximate to where they live. This would prevent an urban subsistence class member from flying out to a remote area and getting preferential treatment to the detriment of the residents of the remote area. The program concept outlined in my March 22nd memorandum should fit nicely into this program.

2. The Boards of Fish and Game Promulgate Regulations to Provide Subsistence Opportunities Consistent with the New State Law.

Factually, the objective is to create a circumstance where rural residents, as defined by Title VIII of ANILCA, are provided

Senator Bettye Fahrenkamp
April 6, 1990
Page 2

appropriate opportunities to take subsistence resources. The need for a heavily interventionist, preemptive form of Federal takeover would be obviated if the class of citizens to be provided opportunities per Title VIII is in fact being provided for by the State. A situation where the State is in de facto compliance with the primary purpose of ANILCA even though it is in de jure noncompliance makes it possible for the U.S. Department of the Interior to cooperate with the State.

3. Interior Department Adopts Applicable State Regulations as Parallel Federal Regulations.

Interior's requirement under ANILCA is to ensure that rural residents who engage in subsistence on Federal lands are provided reasonable opportunities to take subsistence resources. State action, as outlined above, effectively satisfies this requirement in fact. Factual satisfaction, however, does not satisfy ANILCA which requires State enactment of consistent law.

Interior could adopt the State regulations as parallel Federal regulations if the Department were satisfied that the regulations would provide adequate opportunities to rural residents. The Federal regulations would control subsistence activities on Federal lands and constitute a demonstration that "takeover" has occurred.

4. Interior Contracts with State to Authorize the State to Carry Out the Parallel Federal Regulations.

Since Interior lacks the resources to run an on-the-ground fish and game operation, it could "hire" the State to do the job. The State would enforce the Federal subsistence regulations. Done properly, this should not create any legal difficulties for the State since the Federal regulations would be essentially the same as the State regulations. This arrangement should minimize disruption.

CONCLUSION

This kind of system would keep Federal costs low, ensure a high degree of deference to the State, guard against wholesale Federal land closures to hunting and fishing, and satisfy ANILCA. If done correctly, it should keep the lid on the controversy and permit the interests to pursue negotiations in a less rancorous atmosphere.

Rec'd 1:30 P
3/30/90

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

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MEMORANDUM

TO: Senator Bettye Fahrenkamp
FROM: William P. Horn *WPH*
DATE: March 30, 1990
SUBJ: Comments on Davidge and Lundahl Subsistence Proposals

VIA TELECOPIY

I have reviewed the subsistence proposals submitted to you by Mr. Ric Davidge and Mr. Richard W. Lundahl. Neither proposal offers a legal solution to the problems posed by the McDowell and Kenaitze rulings. Specific comments on each proposal are outlined below.

Davidge Proposal

The draft bill is essentially a reiteration of Title VIII of ANILCA. By enacting the measure, State law would be almost identical with the existing Federal statute. The apparent key to the proposal is that the subsistence preference established in State law would be limited to Federal lands.

The bill seeks to establish a subsistence priority based on rural residency. Consequently, the State would still have to amend its Constitution as the McDowell ruling proscribes the creation of a distinct rural classification.

The proposed definition of rural is not unreasonable. However, a similar regulatory definition triggered the Kenaitze decision. Unless ANILCA is amended, the Kenaitze opinion would invalidate any State provision limiting "rural" to communities of 2,500 people or less per Davidge.

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Senator Bettye Fahrenkamp
March 30, 1990
Page 2

The approach contained in the draft bill could work if (1) The Alaska Constitution is amended, and (2) ANILCA is amended. It is doubtful that a policy of limiting the subsistence program to Federal lands will secure substantial support.

Lundahl Proposal

Lundahl's proposal is interesting in that it establishes a comprehensive six-tier priority system. The thrust of his proposal is to establish a direct tie between commercial fishing and subsistence taking. The apparent purpose of this linkage is to grant commercial fishing a statutory priority over sport fishing.

His effort to equate commercial take with subsistence is the result of a misreading of the language and legislative history of ANILCA Title VIII. The commercial sale references in Title VIII were designed to permit small scale fur trapping to continue under the rubric of subsistence. It is legally untenable to seek to expand the references to include commercial fishermen operating with limited entry permits. Yet that is the apparent crux of Lundahl's plan.

Additionally, the proposal would, at the minimum, require a Constitutional amendment: it presupposes a rural/urban delineation inconsistent with McDowell. The plan may resolve Kenaitze as it appears that Lundahl contemplates a broad definition of rural.

WPH:jap
WPH231M.ASR

DRAFT PROPOSAL FOR A BILL FOR SUBSISTENCE

by Richard W. Lundahl

2/24/90

(revised 3/2/90, 3/6/90, 3/8/90 and again 3/12/90)

DISCUSSION OF TYPES OF ATTEMPTS MADE TO DATE TO COMPLY WITH ANILCA

All attempts to date by the State to comply with ANILCA have relied upon and have been built upon:

INDIVIDUAL HISTORY OF SUBSISTENCE USE DATA

COMMUNITY HISTORY OF SUBSISTENCE USE DATA

INDIVIDUAL HISTORY OF AREAS OF SUBSISTENCE USE DATA

COMMUNITY HISTORY OF AREAS OF SUBSISTENCE USE DATA

INDIVIDUAL HISTORY OF SPECIES OF SUBSISTENCE USE DATA

COMMUNITY HISTORY OF SPECIES OF SUBSISTENCE USE DATA

This type of data is extremely prejudicial, biased and discriminatory. Too much so. It is also too costly to collect and too subjective.

People throughout Alaska and especially in the rural areas truly do rely upon their renewable resources. This type of data does not allow for the real and/or changing needs of either individuals or their communities. It does not allow for changes in fish and wildlife populations, especially from area to area. It leaves no alternatives if a particular species suffers a severe population decline. It cannot react timely to changing populations. It involves too much litigation from individuals and communities. It is unacceptable.

DISCUSSION OF ATTEMPTS MADE BY THE STATE TO COMPLY
WITH THE SUBSISTENCE NEEDS OF ITS CITIZENS PRIOR TO ANILCA

Pelican ADF&G Advisory Committee has gone on record in 3/3/82 with its views of the subsistence issue. At its 3/3/90 meeting it again unanimously supported the exact same position. This position supports State control of its fish and game resources and requests the State to demand its right to do so. See Appendix I for that position paper.

DISCUSSION IN FAVOR OF A DIFFERENT TYPE OF APPROACH

DISCUSSION OF INTENT OF ANILCA (PLACE OF RESIDENCE - RURAL ALASKA)

ANILCA (as far as subsistence is concerned) obviously intends (or means) to protect the life-style, culture, and livelihoods of rural Alaskans from the urban Alaskans and from the residents of the south 48 and from foreigners. This is because the rural Alaskan has absolutely no (or almost) no alternative life-style, culture, or livelihoods to fall back on if their supply of fish and game is significantly diminished or wiped out. They absolutely depend on their wild renewable resources.

DISCUSSION OF INTENT OF ANILCA (NATIVE VERSUS NON-NATIVE)

ANILCA is basically an Act about Lands in Alaska which are of National Interest. Although ANILCA has large portions dealing with Native lands and the Alaska Native Claims Settlement Act, ANILCA very specifically and clearly states, in Section 801.(1) (see Appendix III), that, as far as subsistence is concerned, Natives and non-Natives are to be treated alike.

DISCUSSION OF INTENT OF ANILCA (CUSTOMARY TRADE VERSUS COMMERCIAL USE)

"Customary Trade" (as used in ANILCA Section 803) (see Appendix III) can be easily defended as meaning that for purposes of fish and game laws and regulations, "any and all commercial harvesting of fish and game as has been legally allowed, licensed and/or permitted by in the State of Alaska to this date".

Clearly, Alaska residents had the history of some 60 years of US Law and Regulation and Management before Statehood to decide what was acceptable commercial practice ("customary trade") in the harvesting of its wild renewable resources.

With Statehood (when Alaska residents received the right to make laws and regulations based on these decisions) many changes were implemented (i.e., elimination of fish traps). After a further 15 year history, Alaska amended its constitution to allow for the protection of its residents from non-Alaskan residents and entrepreneurs (i.e., Limited Entry in the commercial fisheries).

The enactment of Commercial Fisheries Entry Legislation brought about an almost immediate migration of permits (opportunities of livelihood) out of the rural areas of the State to the urban areas of the State and to an even greater extent out of the State entirely. This is probably the chief reason for the enactment of the Subsistence Section (Title VIII) of the ANILCA legislation. And it happened within 6 years of the (final) enactment of limited entry.

The past ten years of trial and error regulations designed to implement ANILCA subsistence have been very frustrating, unproductive, and extremely fear provoking. (ANILCA subsistence could very possibly destroy the very life-style, culture, and livelihoods it was designed to create).

It should be clear from a perusal of the history of the regulations designed for the protection of Alaskan residents, especially rural residents, who in many cases are commercial users, that ANILCA's clear intent is to protect the commercial user; and it can do so by defining customary trade as in the following bill proposal.

DISCUSSION OF INTENT OF ANILCA (PLACE OF RESIDENCE - URBAN ALASKA)

Further, this perusal of the history of Alaska law and regulations and ANILCA (as far as subsistence is concerned) can easily further be interpreted to intend (or mean) to protect the life-style, culture, and livelihoods of urban Alaskans from the residents of the south 48 and from foreigners (see ANILCA Section 804 in Appendix III). This is because the urban Alaskans have almost no (or very little) alternative life-style, culture, or livelihoods to fall back on if their supply of fish and game is significantly diminished or wiped out. They also very much depend on their wild renewable resources.

DISCUSSION OF INTENT OF ANILCA (SPORT VERSUS COMMERCIAL HARVESTING)

Sport hunting and fishing (and trapping?) as now separated from "Personal Use" hunting and fishing (and trapping?), can be viewed either as a direct use of the resource for recreation or an indirect use of the resource for livelihood (as in the case of sport fishing and hunting suppliers, outfitters, guides, and lodges).

Commercial fishing and trapping (and hunting?) can be viewed as a direct use of the resource for livelihood.

Study of ANILCA, then, in its Section 803 (see Appendix III) definition of subsistence uses, seems to give commercial fishing and trapping (and hunting?) a higher priority than sport fishing and hunting.

Study of ANILCA Sections 801.1 and 801.4 (see Appendix III) seems to give the same interpretation.

Study of ANILCA Sections 801.3 (see Appendix III) seems to allow for a use priority schedule such as is given in this proposal.

Following the actual proposal are two pages of additional discussions, which are more detailed and are best studied after the proposal itself is read.

The above two page discussion, together with the additional discussion, should show that the intent of the ANILCA subsistence sections can be acceptably implemented by the enactment of the following bill proposal.

INTENT OF PROPOSAL

PRIORITY LIST

1. Every resident of a rural Alaskan community (Pelican) should be able to eat wild fish and game before residents of an urban Alaskan city (Juneau) eat wild fish and game.
2. Every resident of an urban Alaskan city (Juneau) should be able to eat wild fish and game before other residents of USA eat wild fish and game.
3. Every resident of a rural Alaskan community (Pelican), who holds a valid Commercial Fisheries Entry Permit or some such Alaska commercial license, should be able to harvest wild fish and/or game before residents of an urban Alaskan city (Juneau), who hold a valid Commercial Fisheries Entry Permit or some such Alaska commercial license, should be able to harvest wild fish and/or game; and before nonresident sport fishermen, hunters and trappers harvest fish and game.
4. Every resident of an urban Alaskan city (Juneau), who holds a valid Commercial Fisheries Entry Permit or some such Alaska commercial license; and every nonresident sport fishermen, hunters and trappers should be able to harvest wild fish and game before non-Alaska residents, who hold a valid Commercial Fisheries Entry Permit or some such Alaska commercial license harvest fish and game.
5. Nonresidents of Alaska, who hold a valid Commercial Fisheries Entry Permit or some such Alaska commercial license should be able to harvest fish and game before any US commercial fisherman, hunter, or trapper, who does not hold a valid Commercial Fisheries Entry Permit or some such Alaska commercial license harvests fish or game.
6. Every US citizen should be able to harvest fish and game in a legal manner before any foreign person or enterprise harvests fish and/or game.

DRAFT PROPOSAL FOR A BILL FOR SUBSISTENCE

by Richard W. Lundahl

2/24/90

(revised 3/2/90, 3/6/90, 3/8/90 and again 3/12/90)

Be it hereby enacted:

1). That for purposes of fish and game laws regulations, the phrase "customary trade" as used in ANILCA Section 803 shall be defined as meaning "any and all commercial harvesting of fish and game as has been legally allowed, licensed and or permitted by in the State of Alaska to this date. And,

2. That for the purposes of fish and game laws and regulations the phrase "Alaskan resident" shall mean: any living, real US citizen who is currently living in the state of Alaska, and has lived within the state of Alaska for the preceding year, and who intends to remain living within the State for at least another year, and who is eligible for an Alaska Permanent Fund Dividend. And,

3. That further, for the purposes of fish and game laws and regulations the "residence" of an Alaskan resident shall mean, and shall be determined by: the address to which eligible Alaska Permanent Fund Dividends are sent. And,

4. That for the purposes of Subsistence as defined in ANILCA, the State of Alaska, hereby designates six Categories of Users of its fish and game resources.

Category 0 Users shall include:

- a). All Category 1 Users, and
- b). All rural Alaskan resident subsistence and personal use fishermen, hunters, and trappers.

Category 1 Users shall include:

- a). All Category 2 Users, and
- b). All non-rural Alaskan resident subsistence and personal use fisherman, hunters and trappers.

Category 2 Users shall include:

- a). All Category 3 Users, and
- b). All rural Alaskan resident commercial harvesters who hold valid Alaska resident licenses, and/or permits (such as: An Alaska resident trapping license, or an Alaskan resident Commercial Fisheries Entry Permit).

Category 3 Users shall include:

- a). All Category 4 Users, and
- b). All rural Alaskan resident sport harvesters who hold valid Alaska (rural?) resident licenses,
- c). All non-rural Alaskan resident commercial harvesters who hold valid Alaska resident licenses, and or permits (such as: An Alaska resident trapping license, or an Alaskan resident Commercial Fisheries Entry Permit).

Category 4 Users shall include:

- a). All Category 5 Users, and
- b). All (non-rural?) Alaskan resident sport harvesters who hold valid Alaska resident licenses, and all non-Alaskan nonresident US citizen sport harvesters who hold nonresident Alaska sport fish, hunting or trapping licenses.
- c). All official and all non-official Alaska fishing derbies and trophy hunts and their participants.
- d). All commercial harvesters who reside outside of the State of Alaska and who hold valid Alaska resident licenses, and/or permits (such as: An Alaska resident trapping license, or an Alaskan resident Commercial Fisheries Entry Permit).

Category 5 Users shall include:

- a). All Other Users, and
- b). All foreigners holding valid Alaska nonresident sport fishing, hunting or trapping licenses.
- c). All US commercial harvesters who reside outside of the State of Alaska and who do not hold valid Alaska resident licenses, and/or permits (such as: US trawlers and US factory trawlers).

Other Users include:

- a). Any and all others including foreign (non US citizens) commercial fishing and hunting operations.

5. That for the purposes of Subsistence as defined in ANILCA, the State of Alaska, hereby designates seven categories of Subsistence Emergencies for its fish and game resources as hereby defined.

- A. "No Subsistence Emergency" shall mean that no level of emergency exists and all peoples (Other Users) may harvest fish and game in any manner legally provided for by Alaska laws and/or regulations.
- B. A "Class 6 Subsistence Emergency Closure" shall mean that a low level of subsistence emergency exists and all Other Users shall be prohibited (excluded) from harvesting the resource designated.
- C. A "Class 5 Subsistence Emergency Closure" shall mean that a low level of subsistence emergency exists and all Category 5 Users shall be prohibited (excluded) from harvesting the resource designated.
- D. A "Class 4 Subsistence Emergency Closure" shall mean that a higher level of subsistence emergency exists and all Category 4 Users shall be prohibited (excluded) from harvesting the resource designated.
- E. A "Class 3 Subsistence Emergency Closure" shall mean that a higher level of subsistence emergency exists and all Category 3 Users shall be prohibited (excluded) from harvesting the resource designated.

- F. A "Class 2 Subsistence Emergency Closure" shall mean that a higher level of subsistence emergency exists and all Category 2 Users shall be prohibited (excluded) from harvesting the resource designated.
- G. A "Class 1 Subsistence Emergency Closure" shall mean that the highest level of subsistence emergency exists and all Category 1 Users shall be prohibited (excluded) from harvesting the resource designated.
- H. A "Conservation Class Emergency Closure" shall mean that the very resource itself is threatened and that the highest possible level of resource emergency exists and that it is both realistic and possible by strict adherence to sound biological methods and management to bring that resource back to health and all Category 0 Users shall be prohibited (excluded) from harvesting the resource designated.

OTHER PROVISIONS NEEDED IN THE PROPOSAL (after debate and discussion).

Emergencies which arise could be recognized by:

- 1. Alaska Board of Fisheries and/or Game,
- 2. Alaska Department of Fish and Game,
- 3. Appropriate Regional ADF&G Advisory Council,
- 4. Appropriate Local ADF&G Advisory Committees,
- 5. Local City, Town, or Village Council,
- 6. Petition by concerned groups or individuals.

Emergencies, including which species and areas were involved, and class or seriousness of emergency would be determined jointly by:

- 1. The Appropriate Alaska Board of Fisheries and/or Game,
- 2. The Alaska Department of Fish and Game, and
- 3. The Appropriate Regional ADF&G Advisory Council, with
The Appropriate Local ADF&G Advisory Committees required
in attendance.

Definitions for "general", "overall" conservation closures for entire regions or the entire state may be needed and enacted.

Provisions and/or regulations for declaring and implementing these closures must be written and passed.

FURTHER DISCUSSION IN FAVOR OF THIS PARTICULAR BILL PROPOSAL DRAFT
and/or
THIS TYPE OF SUBSISTENCE LEGISLATION

DISCUSSION OF EFFECTS OF THIS PROPOSAL OR THIS TYPE OF PROPOSAL

Determination of eligibility to harvest fish and/or game in any particular legal manner will be easily made based on:

- a). Status of resource.
- b). Place of residence.
- c). Legal licenses and permits held.

A person may become eligible or ineligible to harvest if they move, or (commercially) if they buy or sell their permit. Commercial permits should migrate back to the rural villages without direct government involvement as they become valueless to nonresidents if that class emergency is declared.

Costs of collecting and analyzing great amounts of individual and community historical use data will be eliminated or greatly reduced.

Fish and Game managers will be able to determine harvest levels for particular species in relatively broad or very specific areas as the biology, habitat, movement, population, etc. of that species dictates.

Obviously, general and overall "Conservation Class Emergency" and "Class 1 Subsistence Emergency" and Class 2 Subsistence Emergency" Closures are exceptional cases indicating that the entire State's (or Region's) economy has failed or is failing.

Specific species or specific area Conservation or Subsistence Emergency Closures would be more common. The harvest of one species of fish and/game may be severely restricted in an area while another species in the same area is being harvested commercially by all users.

LEGAL TYPE DISCUSSION OF CUSTOMARY TRADE (See Appendix III)

This proposal defines the term "Customary Trade" which is used in the ANILCA Section 803 definition of "subsistence uses". Notice that the term "Barter" (which is also used in the ANILCA definition of "Subsistence Uses", and which is itself actually defined in ANILCA Section 803.(2)) is separated from the term "Customary Trade" by a phrase and by a semicolon. This seems to imply that, although "barter" is a noncommercial use of the resources, "customary trade" may in fact be a commercial use. It further implies the term "customary trade", since it is not defined in ANILCA, is open to State interpretation and the legislative definition thereof.

LEGAL TYPE DISCUSSION OF CATEGORIES OF SUBSISTENCE USERS (See Appendix III)

This proposal creates "categories of subsistence users" which is in complete compliance with the "preferences for subsistence uses" as stated in ANILCA Section 301. ANILCA'S intention seems obviously meant to protect the rural Alaskan resident both "personal use-wise" and "commercial use-wise".

It just as obviously seems to mean to protect the urban Alaska resident both "personal use-wise" and "commercial use-wise", but on a lower priority level. As discussed previously [in this paper and in ANILCA Section 301.(1)] both rural and urban commercial user has customary and direct dependence upon the resource as the mainstay of livelihood. Between the rural and urban Alaska commercial user, only their "availability of alternative resources" [ANILCA Section 804.(3)] is different and it is severely limited in both cases.

DISCUSSION OF PREVIOUS LEGAL PROBLEMS IN COMPLYING WITH ANILCA

This type of proposal should not require any constitutional amendment based on the following logic.

1. The constitutional amendment which enabled limited entry to be enacted enables us to discriminate between users based on conservation needs.
2. Limited Entry further allowed us to discriminate between users based on past participation.
3. All this proposal does is recognize conservation needs and, in compliance to ANILCA, spreads the discrimination over several categories of users based upon the severity of the emergency, the customary and direct dependence upon the resource populations as the mainstay of livelihood, the availability of alternative resources, and subsequently upon a person's residence.

This type of proposal seems legal under ANILCA, our past Alaska legislation, and our constitution.

QUESTIONS TO ASK YOURSELF

1. OVERVIEW Do we want to support this type of legislation?
Generally?
Specifically?
Can you support it individually?
2. Are there gross errors in the proposal or in the discussion.?
3. Is each user group in the category you would like to see it in?
And can you support your preference?
4. Are there other user groups not included that should be?
5. What about Sport Commercial Charter Boats? Are they in the correct category? Where should they fit into the category range? Should they be required to buy a Power Troll Permit?
6. What about Commercial Guides?
7. How should emergencies be recognized and by whom? Who should see that they are actually responded to?
8. What about elderly people who have lived off the land in rural communities but are now forced to live in urban areas because of ill health and the need to be near medical facilities?
9. Will this proposal cause a migration of nonresidents into rural areas instead of a migration of commercial permits into these areas, creating even worst situations?
10. How extensive should Subsistence Class Closures be? Should "Conservation Closure" and "Class 1 and Class 2" Subsistence Emergency closures "kick in" limited to their areas only?
11. DOES THIS PROPOSAL REALLY DO WHAT WE THINK IT DOES?

PELICAN'S POSITION ON SUBSISTENCE

PELICAN ADF&G ADVISORY COMMITTEE

SUBSISTENCE COMMENTS

3/3/82

In attempting to come up with Pelican's definition of subsistence we have come to realize that:

1. Every man "needs" to subsist;
2. Every man will utilize any resource to stay alive and/or to keep his family alive, be it fish, fowl, flora, or fauna, a renewable resource or a non-renewable resource;
3. That our governments (community, state, and federal) have been created to safeguard these basic needs and rights;
4. That our Alaska Boards of Fisheries and of Game, in particular, have been created to and have been doing just that.

We have also come to recognize the Con Game of the ANILCA subsistence issue for what it is:

1. An insidious method of gaining further Federal control over Alaska's resources, and
2. A method for lawyers, attorneys, Federal bureaucrats, and other Con Men to milk the public.

We citizens are tired of expending great amounts of time, effort, and monies in "good faith" attempts to sit down with highly paid attorneys and bureaucrats to develop realistic definitions and laws for resource management, only to find that we have wasted our family lives and exhausted our personal finances, while the attorneys have been getting rich, and further, only to find that once the issues, definitions, and laws have been ironed out and agreed upon in "good faith" and enacted, that these same lawyers and bureaucrats will then "take the other side" and further drain our treasuries and pocket books by representing various groups (supposedly wronged by legislative or regulatory oversight) in court using legal loopholes.

We recognize the Con Game for what it is --- a highly evolved and very expensive method for milking the public under the guise of protecting our rights, our interests, and our resources.

We feel that the Alaska Boards of Fisheries and of Game do now, and always have had the Alaskan citizen's interests at heart; and that they have shown exceptional sensitivity in meeting subsistence needs of the Alaskan without the expensive Con Game of statutes, definitions, and regulations. We feel that the State of Alaska has a very good batting average in the management of its resources -- at least the few that it is allowed to manage.

On the other hand, we feel that the Federal Government has shown a real lack of understanding of Alaskans and the needs of Alaskans, and consequently, has a history of insensitivity to Alaska's needs; witness:

Clearcut logging,
The Marine Mammal Act,
Wolf control, etc., and now
The subsistence issue.

We feel that the State of Alaska should at this time take a strong stand against federal control of subsistence in Alaska and/or federal mandates to Alaska concerning subsistence. The State should sue the federal government if necessary. We should be demanding our State's rights to manage our own renewable resources. We fought for these rights at Statehood and we should not be letting the Federal Government abridge them.

We feel that the Federal Government should re-examine the implications of ANILCA and back off.

Our nation was founded with the concept of all men being equal under the law. We ask, then, that the Federal Government re-examine the ANILCA Subsistence Sections as creating classes of people with different rights:

Subsistence users over "others",
Rural over urban,
Traditional user over "??????".

Further, we ask that the United States Government cease and desist this practise of taking over State's rights and authorities under the guise of righteously protecting its citizens.

AUTHOR'S REASONS FOR PROPOSAL

DISCUSSION OF THE AUTHOR'S REASONS FOR THIS PAPER AND PROPOSAL

Although I am on the Pelican ADF&G Advisory Committee and wholeheartedly support its position on Subsistence and State's rights (see Appendix I), it is my opinion that:

1. The Federal government will continue to usurp our State's rights, despite their obvious ignorance of our traditional, customs, and needs.
2. The State of Alaska, The Office of the Governor, The Alaska State Legislature, The Boards of Fisheries and Game, and The Department of Fish and Game either lack the desire, the will, the muscle, and/or the courage to fight the Federal government; or they truly know that they would lose this battle at further loss to the State.
3. The Boards of Fisheries and Game have occasionally (but very rarely) bowed to political pressures and put the interest of the urban users above the needs of the rural user (i.e. the Cook Inlet/Kenia River Subsistence issue).
4. Many other State agencies do not have the protectionist attitude toward "subsistence" and "personal use" rural users that the Alaska Boards of Fisheries and Game has shown (i.e. the clearcut, no buffer strip policies of the Alaska Department of Natural Resources).

It is for these reasons that I submit this paper. I do so with great reluctance as I feel that State will take any alternative it can to and avoid this very necessary battle over its right to govern itself, regardless of the lack of existence of acceptable legislation for compliance to ANILCA.

It is with these reservations, therefore, that I submit this paper. I feel that, notwithstanding the need for a strong stand over Alaska's right to govern itself, the preceding approach to compliance with ANILCA Subsistence is the least disruptive to the State and the customs, life-style, and livelihoods of its citizens both rural and urban. It should, I believe, allow the State to manage its fish and game resources pretty much as it has in the past.

If we accept this proposal, however, the State will continue to be ruled by our absentee owners in Washington D.C. and we will continue to have many such conflicts in the future (i.e. the Tongass Reform issue, the Glacier Bay Park versus Commercial Fishing issue).

Sincerely,
Richard W. Lundell

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

Sec. 801. The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

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

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

48 USC 1601
note.

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

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

POLICY

16 USC 3112.

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

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante, p. 2377.

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

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

DEFINITIONS

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

16 USC 3113.

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

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MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: William P. Horn *WPH* VIA TELECOPY

DATE: March 19, 1990

SUBJ: Comments on Drafts of New Article VIII, Section 19

Each of the drafts of a new Article VIII, Section 19 of the Alaska Constitution appears to be an effort to satisfy the requirements of Sections 803 and 804 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 16 U.S.C. §§ 3113, 3114. The first draft looks inadequate; the second and third drafts appear to set the stage for compliance with ANILCA. In addition, there are significant differences among the three iterations as discussed below.

DRAFT ONE

This would authorize the establishment of a preference system for subsistence uses in rural areas of Alaska. However, it is unlikely to enable the Legislature to satisfy ANILCA's requirements. The draft is deficient on at least three points.

First, it introduces the term "non-commercial uses" as part of the subsistence definition. Section 803 expressly provides for barter and sale of handicraft articles made from non-edible byproducts of subsistence resources and blanket restriction regarding commercial use may not comport with ANILCA.

Second, the "personal use" limitation is more strict than § 803. The Federal definition includes reference to "sharing" of subsistence resources. This draft may rule out such sharing. A factual hypothetical is as follows: Mr. A in a bush village

Senator Bettye Fahrenkamp
March 19, 1990
Page 2

routinely brings in moose that are provided to others in the village. He personally uses one animal. A definition that rules out sharing would likely mean that the taking of the moose to be given to others would not qualify for the preference. This is inconsistent with § 803.

Third, the new section does not provide for a "second tier" allocation per § 804. ANILCA provides a generalized preference to "rural residents" -- this is the so-called "first tier." When resources are inadequate to provide for the first tier class of individuals, § 804 authorizes an allocation within this group. A subset of the first tier class gets an added priority based on (1) customary and direct dependence, (2) local residency, and (3) availability of alternative resources. Draft: One does not provide for such a second tier allocation.

However, this may not be a fatal flaw as the Alaska Supreme Court has indicated that allocation based on these kind of criteria appears constitutional. To ensure satisfaction of ANILCA, subsequent implementing legislation or regulations should include a second tier arrangement per § 804.

DRAFT TWO

This version of a new Section 19 addresses in significant fashion the "non-commercial" and "personal use" issues raised above. It also expressly authorizes the creation of a second tier allocation system. The draft appears to empower the Legislature to pass a bill that can comply with ANILCA. Stylistically, it follows the form of Article VIII, Section 15 that set up the limited entry fishing program. That section uses the "does not restrict/does not prohibit" form rather than an affirmative authorization.

Obviously, the constitutional amendment by itself will not satisfy ANILCA. An appropriate State statute will have to be enacted to accompany or follow the amendment.

DRAFT THREE

This tracks ANILCA more closely than the other two versions. It would also enable the Legislature to act to comply with the Federal statute. It appears, however, that the second paragraph is an attempt to merge the first and second tier classes into one group. That is not authorized by ANILCA § 804. Indeed, the effort to limit the size of the first tier class has been slapped down by Ninth Circuit U.S. Court of Appeals in the Kenaitze case. Once the State manages to get by the newer McDowell hurdle, the Kenaitze matter still must be resolved.

Proposed New §19 of Art. VIII

DRAFT ONE SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the non-wasteful non-commercial uses of locally available resources owned by the state taken and used by residents for personal use.

The legislature may grant a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the state.

DRAFT TWO SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources owned by the state are the customary and traditional, non-wasteful, non-commercial uses of those resources available in the area where a resident resides, taken and used by a resident for personal or family consumption or for customary trade.

Nothing in this Constitution prohibits the legislature from granting a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the state or from allocating subsistence resources among users.

DRAFT THREE SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the customary and traditional, non-wasteful, non-commercial uses of these resources, taken by a resident in the area where the resident resides for personal or family consumption, for barter or sharing for personal or family consumption, or for customary trade.

The legislature may accord a priority in rural areas for the taking of fish and wildlife and renewable natural resources for subsistence uses, and may provide for the allocation of that taking based upon local or community residence, or customary and direct dependence on the resource.

Senator Bettye Fahrenkamp
March 19, 1990
Page 3

CONCLUSION

Drafts Two and Three appear to do the job of taking steps to satisfy ANILCA. I would suggest using the first paragraph of Draft Three and an altered version of the second paragraph of Draft Two:

SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE AND RENEWABLE NATURAL RESOURCES. Subsistence uses of fish and wildlife and renewable natural resources are the customary and traditional, non-wasteful, non-commercial uses of these resources, taken by a resident in the area where the resident resides for personal or family consumption, for barter or sharing for personal or family consumption, or for customary trade.

The legislature may grant a preference for subsistence uses of fish and wildlife and renewable resources in rural areas of the State and may allocate subsistence resources among users.

WPH:jap
WPH221H.ASR

Attachment

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MEMORANDUM

TO: Senator Bettye Fahrenkamp

FROM: William P. Horn *WPH*

DATE: April 4, 1990

SUBJ: Proposed Section 19 Language

VIA TELECOPY

The proposed constitutional language (attached) authorizing a subsistence law consistent with valid, Federal laws appears to resolve the McDowell case problems. I am persuaded, however, that there are reasons why adoption of such language could be ill-advised.

First, the provision is vague regarding Federal law. I presume that conformance with Title VIII of ANILCA is the objective. However, it is not clear on its face what "valid federal laws" the provision seeks to address. Please note that ANILCA is not the only Federal law with some subsistence references or features. The Marine Mammal Protection Act has express references to Native-only subsistence taking (16 U.S.C. § 1371(b)). Other laws such as the Bald Eagle Protection Act have Native taking provisions and there is valid Federal caselaw about the religious rights of Native Americans to take protected species. The generic reference to valid Federal law in the draft section could impose this body of Federal law on Alaska.

Second, the Alaska Supreme Court may not determine that this general provision overcomes the express common use and equal protection requirements in sections 3, 15, and 17 of the Alaska Constitution. In legal construction, the express trumps the general. The general nature of this proposal may be its undoing.

Senator Bettye Fahrenkamp
April 4, 1990
Page 2

Third, as a matter of policy, it may be inappropriate to establish a "blank" provision in the Alaska Constitution that the U.S. Congress can fill in. Not only does the section invite the Congress in, it lets Congress change the rules without regard to Alaska -- whatever Congress determines becomes constitutional in Alaska.

This is a quick review. Please let me know if you would like a more comprehensive response with appropriate statutory and case-law citations. I would be pleased to answer any questions you may have.

WPH:jap
WPH238M.ASR

Attachment

Section 19. RETENTION OF FISH AND
WILDLIFE MANAGEMENT BY THE STATE.

Nothing in this constitution prohibits the legislature from enacting laws relating to the allocation for subsistence uses of fish and wildlife and wild renewable natural resources which are consistent with valid federal laws in order to retain management authority over such resources by the State of Alaska.

*I found these things at the table -
They are not part of the record, but had some
interest value*



SUBSISTENCE:

A Strategy for Our Future

**Egan Convention Center - Lower Level
Anchorage, Alaska
April 10-11, 1990**

Conference Guide & Agenda

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611



Open Letter to Alaska Native leaders:

On behalf of the Alaska Federation of Natives and its member organizations, I would like to extend a heart-felt welcome to you. Thank you for taking the time to attend this important two-day summit conference.

As you know, on December 22, 1989, the Alaska Supreme Court ruled the State subsistence law unconstitutional. Since January, in meetings across the state, Native people have been reviewing the legal situation and the range of possible solutions to the serious situation we now face.

Over the course of these next two days, we hope to review the best possible information on the consequences of the McDowell decision as it affects Native people and hunting and fishing rights. We believe that if Native people are informed about political and legal developments which affect them, they can more effectively protect and promote their own interests and the public interest.

Immediately following the two-day meeting, the House and Senate Resources Committees of the Alaska State Legislature will hold a joint hearing on subsistence. The hearing is scheduled for Wednesday, April 11, from 5:30-9:00PM. It will be held at the Egan Convention Center in the same room as this conference. AFN strongly urges you to plan on testifying. Many legislators do not understand why subsistence is critical to the cultural and economic survival of Native families. This is an opportunity for you to share your knowledge and your views on how the situation should be resolved.

Protecting subsistence hunting and fishing will continue to be a challenge to Alaska Natives for some time. We urge you to continue to stay involved. Thank you.

Sincerely,

Julie E. Kitka
President

AGENDA

Tuesday, April 10, 1990

- 8:00am WELCOME - Julie Kitka, AFN President
INVOCATION - Rev. Anna Frank, Episcopal Diocese of Alaska
- 8:40 INTRODUCTION & PURPOSES - Ralph Eluska, AFN
PRESENTATION - Walter Charley, Athabascan Elder
- 8:55 REVIEW OF AGENDA - Co-moderators Perry Eaton & Marlene Johnson
- 9:00 PANEL: "CHALLENGES FACING ALASKA NATIVES - SUBSISTENCE"
Panel Moderators: Perry Eaton & Marlene Johnson Julie Kitka, AFN
John Shively, NANA Bob Polasky, RurAL CAP Chris McNeil, SEALASKA
- Resource people: Don Mitchell, AFN Counsel
Bill Caldwell, Alaska Legal Services
Alan Mintz, DC Counsel
QUESTIONS FROM THE FLOOR
- 10:30 Break
- ISSUE #1: FEDERAL PRE-EMPTION & DUAL MANAGEMENT OF FISH & GAME
- 10:45 FEDERAL/STATE PANEL: "HOW WOULD IT WORK?"
Panel Moderator: Johnny Hawk
Glenn Elison, USF&S Steve Behnke, ADF&G
Tom Koester, Dept. of Law Stan Leaphardt, CACFA
QUESTIONS FROM THE FLOOR
- 11:30 PANEL: "HOW WILL IT AFFECT US?"
Panel Moderator: Chris McNeil, SEALASKA
Trefon Angasan, BBNC, "Unanswered Questions & Continuing Litigation"
Ken Johns, CRNA, "Impacts on Villages Surrounded by State & Federal Land"
Myron Naneng, AVCP, "Impacts on the Y-K Delta"
Clare Swan, Kenaitze Indian Tribe, "Kenaitze Lawsuit"
Ed Thomas, T&H, "Co-Management under '638'"
Walter Sampson, NANA, "Living with Federal Management"
QUESTIONS FROM THE FLOOR
- 12:30pm Break for lunch

cont. on page 4

Conference Guide/3

AGENDA

Tuesday, April 10, 1990

2:00pm REMARKS BY CO-MODERATORS (AGENDA/PRODEDURES)

ISSUE #2: CONGRESS & ANILCA

2:05 PANEL: "OPENING ANILCA"

Panel Moderator: Edgar Blatchford

David Eluska, RurAL CAP

Cheryl Sutton, KPFA

Willie Kasayulie, ANC

Robert Willard, SENSC

Mitch Demientieff, TCC

Emily Barnett, Sierra Club

Bud Burris, Alaska Outdoor Council

Wayne Anthony Ross, Alaska Outdoor Council

QUESTIONS FROM THE FLOOR

4:00 PRESENTATION BY SENATOR TED STEVENS VIA TAPE

Marie Matsuno Nash, Senator Stevens' Staff Representative

4:20 PANEL: "CONGRESSIONAL STAFF QUESTIONS & ANSWERS"

Panel Moderator: Tim Wallis

Greg Renkas, Chief of Staff, Senator Frank Murkowski

Greg Chapados, Chief of Staff, Senator Ted Stevens

Rick Agnew, Counsel, Congressman Don Young

CLOSING REMARKS, Eddie Hopson, Inupiat Elder

5:30 Recess

Wednesday, April 11, 1990

8:30am REMARKS BY CO-MODERATORS (AGENDA/PROCEDURES)

8:40 OPENING REMARKS, Rev. Billy Sheldon, Sr., Inupiat Elder

ISSUE #3: STATE CONSTITUTIONAL AMENDMENT

9:00 GOVERNOR STEVE COWPER

9:20 QUESTIONS & ANSWERS, Mike Irwin, Office of the Governor

9:45 CONGRESSMAN DON YOUNG

10:15 Break

cont. on page 5

AGENDA

Wednesday, April 11, 1990

10:30am LEGISLATORS' PANEL: "THE NEXT FOUR WEEKS - OPTIONS AVAILABLE TO THE ALASKA STATE LEGISLATURE"

Panel Moderator: Nels A. Anderson, Jr.

Sen. Al Adams ✓ Rep. Eileen MacLean ✓ ✓ Rep. George Jacko
Rep. Kay Wallis Sen. Jack Coghill ✓ ✓ Rep. Lyman Hoffman

QUESTIONS FROM THE FLOOR

✓ Sen. Zerkoff ✓ Rep. Foster

12:30pm Break for lunch

ISSUE #4: CONSTITUTIONAL AMENDMENT APPROACH

1:30 PANEL: VILLAGE PERSPECTIVES

Dolly Garza, Southeast Tom Tilden, Bristol Bay Gary Oskolkoff, Southcentral
Paul John, Western Alaska Ronald Brower, Jr., North Slope Will Mayo, Interior

2:20 PANEL: REGIONAL PERSPECTIVES

Myron Naneng, AVCP Robert Willard, SENSC Mitch Demientieff, TCC
Trefon Angasan, BBNA Sam Demientieff, FNA

3:10 Break

3:30 PANEL: "WHERE DO WE GO FROM HERE?"

Ralph Eluska, AFN Matthew Iya, RARA Dewey Skan, Jr., RurAL CAP
Bart Garber, NARF Byron Mallott, SEALASKA Willie Kasayulie, ANC

4:45 CLOSING REMARKS Dr. Walter Soboleff, Tlingit Elder

5:00 BENEDICTION Bishop Jacob Nelson, Moravian Mission of Alaska, Bethel

CONFERENCE CLOSING

5:30pm- JOINT HOUSE/SENATE RESOURCES HEARING

9:00pm

PLEASE TESTIFY: This joint House/Senate Resources Committee Hearing is an excellent opportunity for Native people from throughout the State to make clear how critically important subsistence activities are to our cultures, economies and lifestyles. Please take advantage of it and testify.

FEDERAL/STATE OPTIONS

The following is an outline of the major legal options which have been suggested to date for solving the current subsistence problem in Alaska, beginning with an historical review of how we got here.

I. CHRONOLOGY OF EVENTS LEADING TO McDOWELL v. STATE

1960 - The *Federal government* transferred authority for management of fish and game in Alaska to the new State government.

1971 - The *Alaska Native Claims Settlement Act (ANCSA)* extinguished aboriginal hunting and fishing rights. No law was enacted on protection of subsistence, but the Conference Report stated Native subsistence and subsistence lands would be protected by the State of Alaska and Department of Interior.

1978 - The *State subsistence law* created a priority for subsistence over all other fish and game uses. It did not define subsistence users (e.g., as "rural residents," "Natives," or other).

1980 - The *Alaska National Interest Lands Conservation Act (ANILCA)* required a subsistence priority for rural residents on Federal "public lands." It also said the State of Alaska could manage fish and game on all lands if it enacted a law granting a subsistence priority to rural residents, in compliance with ANILCA.

1982 - The Federal government said the State was in compliance with ANILCA, after the Boards of Fisheries and Game adopted regulations creating a rural subsistence priority.

1982 - *Ballot Proposition 7* to repeal the State's subsistence priority was rejected by voters.

1985 - The *Madison* decision was issued by the State Supreme Court which ruled that the 1978 State law did not specifically allow the Boards to grant a subsistence priority to rural residents.

1986 - The *State subsistence law* (1978) was amended by the Legislature to give a specific subsistence priority to rural residents.

1989 - The *Kenaitze* decision was issued by the Federal appeals court which said the State's definition of "rural" (the economic nature of the community) was not consistent with that of ANILCA (the population of the community).

II. McDOWELL v. STATE DECISION

On December 22, 1989, the State Supreme Court ruled that the State law (1978, amended in 1986) granting a subsistence priority based solely on residency is unconstitutional under the Alaska State Constitution.

The impact of this decision is clear: State law is now out of compliance with ANILCA. The former rules remain in effect until July 1, 1990, as a result of the Supreme Court's stay. After that, if there is no State and/or Federal solution, "dual management" will occur: the Federal government will take over management of fish and game on its "public lands" (more than 60 percent of lands in Alaska), while the State will retain management on State and private lands (including Native corporation lands). Over all, there are four kinds of choices: to amend the State Constitution, to amend ANILCA, to amend both the State Constitution *and* ANILCA, or to do nothing.

III. LEGAL AND POLITICAL OPTIONS FOR SOLUTION

A. AMEND THE STATE CONSTITUTION'

Process: The Alaska Legislature must pass an amendment resolution by 2/3 vote of both houses (at least 27 Representatives and 14 Senators). The amendment must then be approved by a majority of voters in the General Election on November 6.

Substance: At least two major options have been mentioned to date.

1. Amend the State Constitution to allow the Legislature to adopt a law giving a subsistence priority to rural residents, thus complying with ANILCA.

Advantage: This option would leave the current system in place. The State of Alaska could continue to manage fish and game on all lands. This option requires no amendment to ANILCA.

Disadvantage: This option still requires a definition of "rural" (Kenaitze decision). The definition chosen by the Federal District Court might exclude some Native communities from the subsistence priority (particularly the Kenai Peninsula, Southeast Alaska and perhaps some regional centers).

2. Amend the State Constitution to allow the State to retain fish and game management on all lands by permitting the Legislature to adopt laws consistent with valid Federal law (ANILCA).

Advantage: This option holds greater appeal for Alaska legislators and voters, stressing State management rather than allocation priorities. It also leaves the current system of management in place under the State, while requiring no amendment to ANILCA.

Disadvantage: This option still requires a definition of "rural."

B. AMEND THE STATE CONSTITUTION AND ANILCA TO AGREE.

Process: The Alaska Legislature must pass an amendment resolution by a 2/3 vote of both houses (at least 14 senators and 27 representatives). The amendment must then be approved by a majority of voters in the General Election on November 6. The U.S. Congress (both the House of Representatives and Senate) must then adopt an amendment to ANILCA, and this must be signed by the President.

Substance: At least three major options have been mentioned to date.

1. Amend the State Constitution and ANILCA to allow a subsistence priority for Alaska Natives.

Advantage: This option protects Natives' subsistence rights statewide and includes all Natives resident in Alaska. It does not require that "rural" be defined.

cont. on page 8

Conference Guide/7

FEDERAL/STATE OPTIONS

Disadvantage: This option excludes non-Native rural people who depend on subsistence (many of whom are members of Native families). This may be seen by legislators and voters as a racial distinction.

2. Amend the State Constitution and ANILCA to allow a subsistence priority for Natives and rural residents.

Advantage: This option protects both Native subsistence rights statewide and the interests of other rural residents who depend on subsistence.

Disadvantage: This option may be seen by legislators and voters as a partly racial distinction. It still requires a definition of "rural."

3. Amend the State Constitution and ANILCA to allow a subsistence priority for rural residents and members of identifiable groups with cultures and traditions of subsistence use.

Advantage: This option would probably protect both Native and non-Native rural subsistence rights.

Disadvantage: "Cultures and traditions" might be interpreted in ways which harm Native interests. This option may still be seen by legislators and voters as a de facto racial distinction. It still requires a definition of "rural."

C. AMEND ANILCA.

Process: The U.S. Congress (both the House and Senate) must adopt an amendment to ANILCA, and this must be signed by the President.

Substance: At least two major options have been mentioned to date.

1. Amend ANILCA to conform to the State Constitution, (e.g., permit system or other criteria). NOTE: This would require that a new State law implementing this system be adopted by the Legislature and signed by the Governor.

Advantage: Some urban subsistence users, such as urban Natives, might qualify.

Disadvantage: This option is not certain to satisfy the State Supreme Court's standards of constitutionality. It might also divide villages and Native families, according to the permit criteria chosen. It would be expensive, creating a large new bureaucracy and much paperwork.

2. Amend ANILCA to pre-empt State law, requiring a subsistence priority for particular groups (currently rural residents) on all lands in Alaska. (NOTE: This might be managed directly by Federal agencies or imposed by Congress on implementing State agencies.)

cont. on page 9

FEDERAL/STATE OPTIONS

Advantage: This option unifies all fish and game management in Alaska under Federal law.

Disadvantage: Politically, it is very difficult to achieve, particularly without the agreement of the State and the Alaska Congressional Delegation.

D. DO NOTHING.

On July 1, 1990, the Federal government (Secretaries of Interior and Agriculture, with the U.S. Fish and Wildlife Service as lead) will take over management of fish and game on its "public lands," while the State of Alaska will have fish and game management on the remaining State and private lands.

UNRESOLVED ISSUES:

1. Will the Federal government manage fish and game on its "public lands" directly (through the Federal agencies) or indirectly (by imposing Federal subsistence priority for rural residents on State agencies)?
2. Will Federal jurisdiction include only federally-owned "public lands," or more than that? Will Federal jurisdiction reach out for migratory salmon in navigable waters or migrating animals on any lands, in order to avoid management chaos?
3. Will the State and Federal management systems have very different regulations, making it difficult for subsistence users to follow? Will confusion and uncertainty lead to community disruption and/or management chaos?
4. How will the Federal government define "rural," and how will this impact the Kenai Peninsula, Southeast and perhaps regional centers?
5. Will the accumulation of problems and resentments from a dual management system have further negative impact on statewide politics and ethnic group relations in Alaska? Will the increased problems and resents be focused on Alaska Natives and the U.S. Congress, and will they lead to a repeal or watering down of federal subsistence law?

NOTE: A fifth strategy (judicial) has already been tried, without success. Both the State of Alaska and AFN petitioned the State Supreme Court to rehear the McDowell case and to reconsider its decision. The petitions were rejected.

UNANSWERED QUESTIONS & CONTINUING LITIGATION

1. Assuming that on July 1, 1990, the State is not in compliance with Title VIII of ANILCA, how did Congress intend the Title VIII subsistence priority to be implemented?

There are two possibilities. The first possibility is that Congress intended the Title VIII subsistence priority to take the place of State law and intended the U.S. Fish and Wildlife Service and other federal agencies to take the place of the Alaska Board of Fisheries and Board of Game. The second possibility is that Congress intended the Title VIII subsistence to take the place of State law, but intended the Alaska board of Fisheries and Board of Game to implement priority (subject to federal oversight). The first possibility results in dual regulation of the same fish stocks and game populations. The second possibility allows regulation of the taking of fish stocks and game populations to be done by one regulator using two legal standards.

2. What is the jurisdiction of the Title VIII subsistence priority?

Section 804 of ANILCA establishes a federal subsistence priority for the taking of fish stocks and game populations on "public lands" in Alaska. 1) What stocks and populations did Congress intend the term "public lands" to include? 2) Does the section 804 priority apply fishing for fish stocks throughout their ranges (for example, to subsistence fishing for a Yukon River salmon stock up and down the entire Yukon River)? Or is the priority just limited to subsistence fishing that occurs on federal land (for example, fishing inside the boundaries of the Yukon Delta Wildlife Refuge)? 3) Similarly, does the section 804 priority apply to game animals only when they are hunted on federal land? Or does it apply to the hunting of game animals everywhere they roam?

3. Which hunters and fishermen did Congress intend the Title VIII subsistence priority to benefit?

Section 803 of ANILCA limits the subsistence priority to hunters and fishermen who are "rural Alaska residents." In 1986, the Alaska Legislature enacted a law that says that "rural Alaska residents" live in communities and areas in which hunting and fishing for food is a principal characteristic of the economy of the community or area. The Ninth Circuit Court of Appeals has held that Congress intended "rural Alaska residents" to be hunters and fishermen who live in locations that are "sparsely populated, where the economy centers on agriculture or ranching." According to the court: "rural is the antonym of urban and includes all areas in between cities and towns of a particular size." Because of the conflict between these definitions - if the Alaska Constitution is amended to give the Legislature authority to enact laws that comply with Title VIII of ANILCA - the State must deal with the question of "rural." Three policy choices have been identified to date:

- 1) amend the State definition of "rural area" to conform to the Ninth Circuit definition,
- 2) Congress must amend section 803 of ANILCA to conform to the State definition,
- 3) or Congress and the State must amend both federal and state law to enact a new, mutually agreed upon "rural" definition.

cont. on page 11

Unanswered questions (cont.)

4. *Should the Alaska Legislature pass, and should the voters adopt, a constitutional amendment that authorizes the Legislature to enact laws that comply with Title VIII of ANILCA?*

In 1978, and again in 1986, the Alaska Legislature passed laws of general applicability that the Legislature thought established a subsistence priority in Title VIII of ANILCA. ANILCA requires the benefits of the subsistence priority to be limited to "rural Alaska residents." In McDowell v. State, the Alaska Supreme Court held that the Alaska Constitution does not grant the Legislature authority to limit the benefits of a subsistence priority to rural residents." To give the Legislature the authority that the Court has said it lacks, the Governor and several legislators have introduced bills to amend the Alaska Constitution to allow the Legislature to establish a "rural resident" subsistence priority. The important unanswered questions include:

- 1) Should such an amendment be adopted? If not, should an amendment be adopted that allows the subsistence priority to be limited to Natives, Natives and non-Natives who live in ANCSA villages, or some other group of hunters and fishermen?
- 2) If such an amendment should be adopted, what is the likelihood that the Alaska Legislature, by a 2/3 vote of each house, would agree to put such an amendment on the 1990 election ballot?
- 3) And if it were to appear on the 1990 election ballot, what is the likelihood that such an amendment would be approved by a majority of the voters?

COURT CASES

There are a number of cases in the federal and state courts in which subsistence users have challenged a variety of State restrictions on subsistence hunting and fishing practices. Some of the most important of these cases were described below. If the McDowell decision results in a dual management system after July 1, these cases will be affected in different ways.

THE "RURAL" RESTRICTION

Kenaitze Indian Tribe v. Alaska (federal court). In this case, the federal court of appeals threw out the State Legislature's 1986 definition of "rural area" (as a place where subsistence is "a principal characteristic of the economy"). This definition had been used to deny subsistence fishing rights to the Kenaitze Tribe and most other subsistence users on the Kenai Peninsula. The court of appeals ruled that the definition was inconsistent with ANILCA's use of the "rural" classification, and that "rural" must be given its ordinary meaning. The federal district court is now considering whether the entire Kenai Peninsula, or only parts of it, are rural for subsistence purposes.

Last summer, the Kenaitze Indian Tribe was permitted, by a preliminary injunction, to operate a single tribal subsistence fishing net. A similar preliminary injunction for the upcoming season is currently being negotiated between the Kenaitze Indian Tribe and the State. The issue of whether the State or the federal government will have jurisdiction over the Kenai fisheries after July 1 has not yet been raised in this case.

RESTRICTIONS ON "CUSTOMARY AND TRADITIONAL" USES

Kitka v. Alaska (federal court). This lawsuit was filed by residents of Sitka. Although the Joint Boards had determined that Sitka was a "rural area" under the State's definition, the Board of Fisheries, following an approach similar to the approach the Joint Boards follow in making the "rural area" determination, ruled that Sitka residents do not qualify for "customary and traditional" uses of any fish or shellfish species, except sockeye salmon and herring. The Board therefore refused to authorize any subsistence uses of shellfish, groundfish, four species of Pacific salmon, and all other finfish. The plaintiffs have challenged these restrictions as violations of ANILCA; they also allege that they are unconstitutional under the federal Constitution. On its own initiative, the federal court has indicated that it might find parts of the City and Borough of Sitka to be non-"rural."

Sumner Strait Advisory Committee v. Alaska (federal court). In this case a local advisory committee and non-Native residents of Port Protection and Port Baker (on the northwest tip of Prince of Wales Island) challenge the finding of the Board of Fisheries that local residents do not qualify for "customary and traditional" subsistence uses of any species of fish (even though the Board of Game has found that they are entitled to subsistence uses of deer). Plaintiffs allege that the Board's action violates ANILCA. They also allege that the Board illegally refused to follow the recommendation of the regional advisory council.

Bobby v. Alaska (federal court). This is the Lime Village case in which the federal court ruled unlawful the Board of Game's closed-season and individual-bag-limit restrictions on subsistence moose and caribou hunting. The court held that the closed seasons were inconsistent with traditional hunting seasons, and that individual bag limits were in conflict with the communal system of sharing game resources. In response to the court's order, the Board eliminated individual bag limit, replacing them with a community harvest-reporting system (but individual harvest tickets are still required). The Board also eliminated the closed season on caribou, but retained two closed moose seasons. Lime Village has objected to the closed moose seasons and the requirement for individual harvest tickets, and the Board of Game has agreed to reconsider those restrictions at its next subsistence meeting. The hunting grounds of Lime Village include both federal and non-federal lands.

John v. Alaska (federal court). In this case residents of Mentasta and Dot Lake, along with the Mentasta Village Council, have successfully argued that ANILCA requires the Board of Fisheries to allow a subsistence fishery at the historic site of Batzulnetas on the upper Copper River, which has been closed to subsistence fishing since 1964. The court ruled that in refusing to permit the subsistence fishery, the Board had not taken the steps and made the findings necessary under the State subsistence law and ANILCA. The court therefore directed the Board to adopt new regulations consistent with the law. A subsistence fishery was conducted at Batzulnetas last summer under a preliminary injunction, and a new preliminary injunction for this upcoming season is currently being negotiated.

Native Village of Dot Lake v. Alaska & Kluti Kaah Native Village of Copper Center v. Alaska (federal court). These cases were filed the first week of January this year when the Alaska Department of Fish and Game, after the McDowell decision came down, issued emergency orders closing the winter Dot Lake subsistence moose hunt and the winter Nelchina subsistence caribou hunt. The hunts were reinstated when the Alaska Supreme Court stayed the effect of its McDowell decision until July 1. The plaintiffs in both cases allege that existing restrictions on their subsistence hunting violate ANILCA; they also allege that they have a constitutional right to engage in subsistence hunting. The Dot Lake moose hunting grounds include mostly non-federal lands, whereas subsistence hunting of the Nelchina caribou herd takes place on both federal and non-federal lands.

Continuing Litigation

Morry and Kwethluk IRA Council v. State (State court at Barrow). In this case a resident of Anaktuvuk Pass and the Kwethluk Tribe challenge, under both ANILCA and the State subsistence law, the \$25.00 tag fee and the hide and skull sealing requirements as applied to the subsistence hunting of grizzly bears. The bear hunting grounds of both villages include mostly federal lands.

CUSTOMARY TRADE

Tanana Fish and Game Association v. Alaska (federal court). In this case the people of Tanana challenge a Board of Fisheries regulation which prohibits them from selling the roe from Yukon River salmon lawfully taken for subsistence uses. The bulk of this incidental by-product is otherwise wasted. The Village fish and game association argues that limited exchanges of this incidental roe for cash qualify as "customary trade" within ANILCA's definition of subsistence uses, and that the State therefore cannot lawfully prohibit this trade. The association has developed a program to regulate and limit the roe trade. The local advisory committee adopted the program, but the Board of Fisheries rejected it. The issue whether the Yukon River subsistence salmon fisheries should be managed by the State or the federal government has been raised in this case.

United States v. Sakurai (federal court). In this federal criminal prosecution under the Lacey Act for selling herring roe-on-kelp, the court dismissed the charges against two residents of Hydaburg, who had earned \$7,000 to \$9,000 for such sales during each of the previous two years. The court ruled that such sales were "customary trade" within the meaning of ANILCA, and that the amounts involved did not constitute a "significant commercial enterprise."

SUSTAINED YIELD

Kwethluk IRA Council v. Alaska (federal court). This case was filed after the Board of Game in March rejected an emergency petition from the Kwethluk Tribe for an immediate, limited subsistence hunt of the Kilbuck Mountains caribou herd. The Board attempted to base its decision on the sustained yield principle. Last week the federal court granted a preliminary injunction requiring the State to make available to the Tribe between April 5 and April 15 a subsistence hunt, with a quota of 50 caribou. The court rejected the Board's sustained yield determination because the State did not have a game management plan for the Kilbuck herd and the Board had not adopted "an articulated and evenly applicable definition of sustained yield." The court criticized the Board for acting "in an *ad hoc* fashion, as though it had unfettered discretion to decide what meaning it would attribute to the sustained yield issue in any particular case." The court found that a hunt of 50 animals would not adversely affect the herd, and that Kwethluk had demonstrated an urgent need for the meat.

Tlingit and Haida Central Council v. State (State court). In this recently filed case, individual Tlingit and Haida Indians and Tlingit and Haida Central Council challenge the State's management of sea cucumbers harvests in Southeast Alaska. They allege that the State is mismanaging this resource by allowing commercial harvests in violation of the sustained yield principle, to the detriment of long-established subsistence uses of sea cucumbers throughout the region.

THE FOLLOWING BILLS have been introduced by various legislators and the Governor in an attempt to provide a legislative solution to the current situation regarding subsistence. They are listed in order of when they were introduced. For more information on these proposals please contact the bill's sponsor.

SPONSORED BY REP. RAMONA BARNES

SPONSOR SUBSTITUTE FOR HOUSE BILL (NO. 415)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION
A BILL

For an Act entitled: "An Act relating to subsistence hunting and fishing." BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.258(a) is amended to read:

(a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence [IN EACH RURAL AREA IDENTIFIED BY THE BOARDS].

* Sec. 2. AS 16.05.258(c) is amended to read:

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users on the basis of their [BY APPLYING THE FOLLOWING CRITERIA:

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

(2) LOCAL RESIDENCY;] and the

(3) availability of alternative resources.

* Sec. 3. AS 16.05.258 is amended by adding a new subsection to read:

(g) Methods and means employed in the pursuit, capture, and transport of fish or game for subsistence use may not include

(1) motorized vehicles, including motorized boats, aircraft, snow machines, trucks, and automobiles;

(2) poison or a similar substance;

(3) explosive devices or charges that could affect more than one animal at a time;

(4) gill nets, seines, or long lines;

(5) traps or snares that the Board of Fisheries or Board of Game determines to be inhumane.

* Sec. 4. AS 16.05.940(29) is amended to read:

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses with a dip net, spear [GILL NET, SEINE], fish wheel, [LONG LINE,] or other means defined by the Board of Fisheries;

* Sec. 5. AS 16.05.940(30) is amended to read:

(30) "subsistence hunting" means the taking of, hunting for, or possession of game [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses by means defined by the Board of Game;

* Sec. 6. AS 16.05.940(31) is amended to read:

(31) "subsistence uses" means the noncommercial, customary, and traditional uses of wild, renewable resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption living in the same household, and a person living in the household on a permanent basis;

* Sec. 7. AS 16.05.940(26) is repealed.

PROPOSED LEGISLATION (cont.)

SPONSORED BY REP. GEORGE JACKO, REP. PETER GOLL
HOUSE JOINT RESOLUTION (NO. 74)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to a preference for subsistence use of fish and wildlife and state-owned renewable natural resources.

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

* Section 1. Article VIII, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 19. SUBSISTENCE USE OF RENEWABLE NATURAL RESOURCES. The legislature may grant a preference for subsistence use of fish and wildlife and State-owned renewable natural resources. This constitution does not restrict the power of the legislature to allocate access among residents to fish and wildlife and State-owned renewable natural resources for subsistence uses on the basis of local residency, customary or traditional use, or dependence on the resources for food and other purposes.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the State.

INTRODUCED BY GOVERNOR COWPER

HOUSE JOINT RESOLUTION (NO. 88) IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife by rural residents.

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

* Section 1. Article VIII, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. Nothing in this constitution prohibits the legislature from limiting the taking of fish and wildlife for subsistence uses to rural residents, and from providing for the allocation of that taking among rural residents on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or wildlife population as the mainstay of livelihood.

* Sec. 2. The intent of the amendment proposed by this resolution is to validate, ratify, and reinstate any provisions of the new statutes and amendments enacted by ch. 52, SLA 1986, and of any regulations adopted under those statutes and amendments, which otherwise might have to be declared invalid under the Alaska Supreme Court's decision in McDowell v. State, 785 P.2d 1 (Alaska 1989), and to explicitly reverse the effect of the McDowell decision as to those provisions and regulations.

* Sec. 3. The amendment proposed by this resolution, and the intent of the amendment as set out in this resolution, shall be placed before the voters of the state as one ballot proposition at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the State.

PROPOSED LEGISLATION (cont.)

SPONSORED BY REP. KAY WALLIS

HOUSE JOINT RESOLUTION (NO. 90)
IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of plants, fish, and wildlife by rural residents.

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

* Section 1. Article VIII, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 19. SUBSISTENCE USES OF PLANTS, FISH, AND WILDLIFE. Nothing in this constitution prohibits the legislature from limiting the taking of plants, fish, and wildlife for subsistence uses by rural residents, and from providing for the allocation of that taking among rural residents on the basis of local or community residence, availability of alternative resources or cultural, traditional, and customary uses of plants, fish, or wildlife, or dependence on plants or fish or wildlife population as the mainstay of livelihood.

* Section 2. The amendment proposed by this resolution shall be placed before the voters of the State of Alaska at the next general election in conformity with Article XIII, Section 1, Constitution of the State of Alaska, and the election laws of the State.

*REP. LYMAN HOFFMAN'S PROPOSED AMENDMENT
TO HB88 - GOVERNOR COWPER'S PROPOSAL*

**Section 19. RETENTION OF FISH AND WILDLIFE
MANAGEMENT BY THE STATE.** Nothing in this constitution prohibits the legislature from enacting laws relating to the allocation for subsistence uses of fish and wildlife and wild renewable natural resources which are consistent with valid federal laws in order to retain management authority over such resources by the State of Alaska.

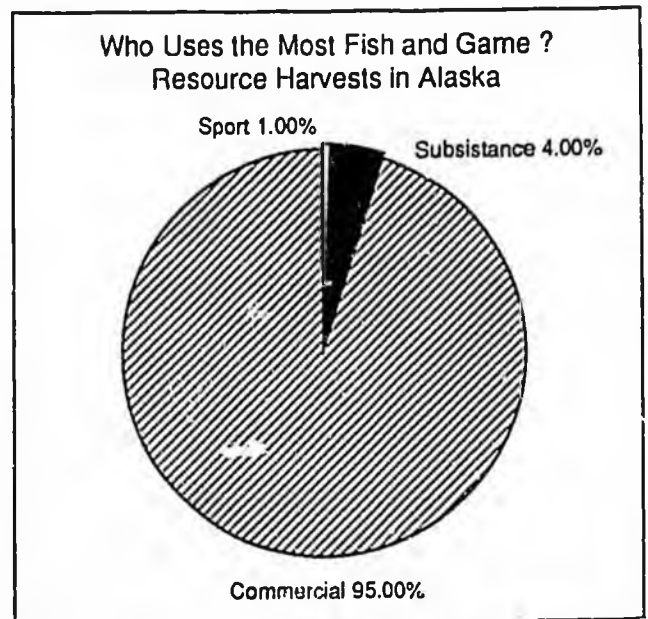
APPENDIX

Does subsistence take most of Alaska's fish & game?

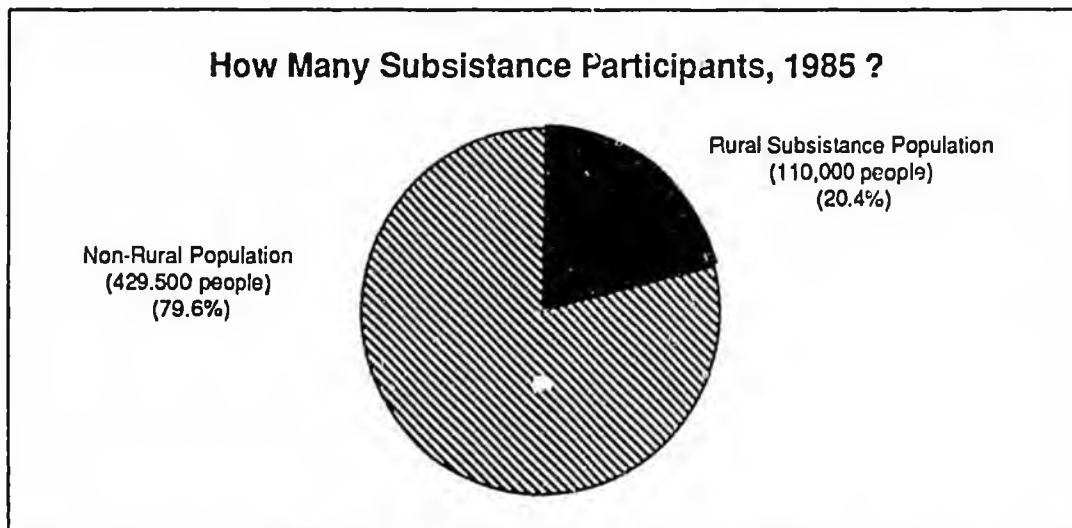
" As a general rule, no. Commercial fishing outstrips subsistence many times. In Alaska in 1986, commercial fisheries harvested about 908,500,000 pounds of salmon, halibut, herring and shellfish. This compares with a harvest of 40,305,449 pounds of subsistence foods and 7,072,046 of sport-caught fish and game. Thus, commercial fisheries took 95 percent, subsistence took 4 percent, and sport took 1 percent of the total statewide harvest. (This does not include commercial ground fish harvests, which totaled 2,995,200,000 pounds.)

Of course, the proportions vary by area. In the areas with roads, the sport harvest is usually larger than the subsistence harvest. In the areas without roads, the subsistence harvest is larger than the sport harvest. But commercial fishing is the clear leader in overall volume."

SOURCE: Alaska Fish & Game Magazine.



How Many Subsistence Participants, 1985 ?

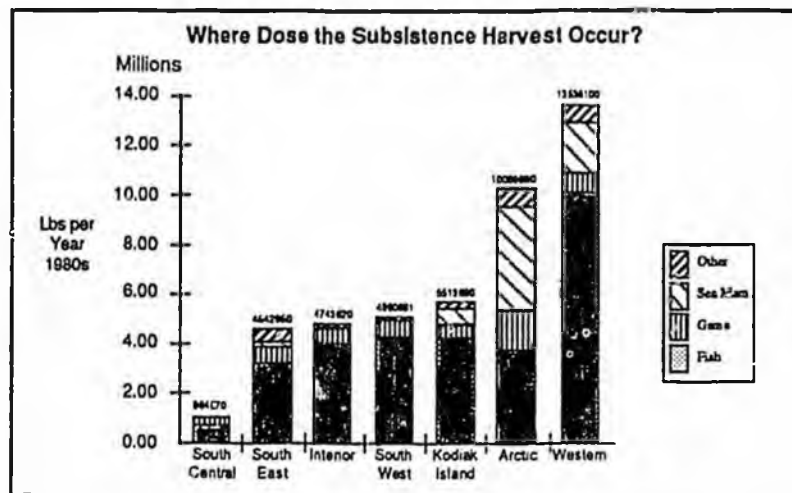


How many people participate in subsistence? " During the 1980s, our best estimate is that there were about 110,075 people in about 225 communities who participated in subsistence practices to some degree. Of these, about 50,000 were Alaska Native, and about 60,000 were not Alaska Native.

This represents the number of people living in rural areas having subsistence uses, as determined by the Boards of Fisheries and Game under the laws and regulations that existed during the 1980s. By comparison, there were about 429,500 non-rural residents, who could hunt and fish under sport, commercial, and personal use regulations, but not under subsistence regulations (Fig. 1). "

SOURCE: Subsistence in Alaska: A Summary, Division of Subsistence, Alaska Department of Fish & Game, February 26, 1990.

APPENDIX



Where does the subsistence harvest occur? " Subsistence uses occur in all regions of the state. The largest annual harvests occur in the Western Region (about 13.5 million pounds) and Arctic regions (about 10 million pounds). Other sizable non-commercial harvests occur on Kodiak Island (5.5 million pounds), Southwest Region (5.0 million pounds), the Interior Region (4.7 million pounds), and the Southeast Region (4.5 million pounds). The smallest harvest occurs in the Southcentral Region (.9 million pounds), primarily in the Copper River Basin, Tyonek, English Bay and Port Graham (Fig. 3). "

SOURCE: Subsistence in Alaska: A Summary. Division of Subsistence, Alaska Department of Fish and Game, February 26, 1990.

PUBLIC HEARING NOTICE: The Joint House and Senate Resources Committee of the Alaska State Legislature is holding a Public Hearing at the AFN Subsistence Conference, Wednesday, April 11 from 5:30 to 9:00PM (see conference agenda, page 5). The hearing will take place in the Summit Room of the Egan Convention Center, on the lower level.

Although we realize this is short notice, this hearing is of GREAT importance to Alaska Native people. The Joint Committee needs to hear your views and testimony on various bills, proposals and options being considered by the Legislature.

We strongly urge you to attend and to present your views. Depending on the number of participants, testimony may have to be limited to 3 minutes per person. However, **WRITTEN TESTIMONY IS WELCOME.** If you have had time to prepare written testimony, please mail it to the Alaska State Legislature, Joint House/Senate Resources Committee, P.O. Box V, Juneau, AK 99811.

INDIGENOUS RIGHTS, JURISDICTION AND
COLONIAL INTRUSION IN ALASKA

A Brief Overview

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INDIGENOUS RIGHTS, JURISDICTION AND
COLONIAL INTRUSION IN ALASKA:
A brief historical overview

To begin to understand the rights of Alaska's Indigenous Peoples, the Athabaskan, Tlingit, Haida, Aleut, Yupik, Inupiat¹ one must go as far back in history as possible, remembering that for ten's of thousands of years we existed as self-governing Sovereign Nations, living in harmony with the land and sea, upon which we depended for our very existence.

The impact of colonial intrusion began with the Russian occupation of the coastal areas of Alaska, and continued with the Treaties made between the United States and Russia.²

A crucial fact about these Treaties is that they were not, first and foremost, land transfer Treaties. Instead, they were mainly barter and trade agreements,³ which eventually lead to the removal of all Russian occupation of the North American Continent. The Treaties made with Russia over their relinquishment of trading rights along the West coast of North America were first signed in the 1820's. At this time Russia was trading as far south as what is now

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1. Tsimpsian People are not referred to in the information because they are the only Indigenous people of the land that the United States recognizes as having an actual reservation and they came to Alaska around the 1930's.
 2. The treaties of 1824, 1832, 1854, 1867, and 1868 effected Russia trade routes etc. along the West coast of Continental United States.
 3. Ibid. Treaties with Russia compiled in the United States Statutes may be found at the State of Alaska Court House 303 "X" Street Anchorage, Alaska).

known as Mexico under the Russian American Trading Company.⁴

Most of Alaska Indigenous People's major problems began after the 1867 Treaty of Cession was signed by the two countries, giving rise to United States occupation of Alaska.

The Alaska Natives in the Treaty of Cession were referred to as "uncivilized" for the most part. There were some Natives, referred to as "civilized" in the Treaty, who were held as slaves or servants by the Russian American Trading Company mostly around the coastal trading posts⁵.

The Treaty of Cession in reality was the purchase of the right to trade in Alaska by the United States for \$ 7.2 million.⁶ The Memorandum Descriptive "Marked AA"

(Kostlivtsov Memorandum) of 1867 documents the prior status of Alaska Natives ownership (as Caretakers) of Alaska.⁷ The Kostlivtsov Memorandum outlines the limits of the actual land purchased by the U.S., basically consisting of the land occupied by the fort at Sitka and the trading posts of the Russian American Trading Company, totalling approximately 550⁸ acres.

At no time did Alaska Natives or any foreign power sign any Treaty and/or agreement giving the United States

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4. Which is alive and well today in bush villages under the name of the Alaska Commercial Company (AC Company).
 5. 1950 Report titled "Russian Administration and the Status of Alaska Native" American Trading Company Charter
 6. Russian American Company Charter 1844 and Treaty of Cession 1867.
 7. This document has been concealed from the Alaska Natives during all the United States occupation of Alaska.
 8. This figure was taken from the Kostlivtsov Memorandum. 117600 sq. ft. multiplied by 200 possible trading posts. 44000 sq.ft. equal 1 acre) (117600 / 44000 = 2.67 acres X 200 = 534.54 acres) approximately. total acres in Alaska 365 million

ownership or jurisdiction to the rest of more than three hundred million acres of land in Alaska.

Included in the 1867 Treaty was the obligation, which the United States accepted upon signing, to obtain the consent of the Natives in Alaska in regards to any future interactions with them or any appropriation of their lands.

After 1867, the U.S. claimed Alaska as its "territory", although there existed no legal basis for this claim. Shortly thereafter the U.S. government divided all of Alaska into twelve (12) geographical areas, assigning a different Christian denomination exclusive operating rights in each, in order to convert and colonize the Natives. Railroads and roadways were constructed by the federal government. Land appropriation and resource exploitation by the federal government and American settlers, miners, commercial fishermen, farmers, trappers, timber harvesters, etc. increased. Alaska became a major military base of operations for the U.S., as increasing numbers of military personell were imported.⁹

As a result of the influx of settlers, diseases killed large numbers of Natives (there is documentation that diseases have been and continue to be purposely introduced in some communities to this day). Large numbers of Native children were forcibly removed from their villages, and were sent to government or church-run boarding schools both within and outside of Alaska. The political, cultural and economic self-determination once enjoyed by our Peoples was seriously

9. U.N. Charter Article 73e Transmission of information.

undermined during this "territory" phase of our history.

When United States became signatory to the United Nations Charter in 1945, it accepted the "sacred obligation" to bring the inhabitants of its "non self governing territories", which included Alaska, Hawaii, Guam and others, up to self government.¹⁰ Instead, in violation of this sacred agreement, the U.S. instituted statehood in Alaska, bringing us further away from, rather than closer to, the self-governing status to which we have always had a right.

In 1950, Mr. Felix Cohen¹¹ wrote a series of letters to the President of the United States, Secretary of the Interior, and the Alaska Native Brotherhood, asking for protection of remaining Native fisheries, timber, minerals, and homes from "white settlers". Instead, in 1958 the U.S. authorized the creation of the State of Alaska, through which these settlers instituted a governmental apparatus run by themselves for their own advantage, and imposed it upon the Native traditional governments. Great numbers of Alaska Natives were denied the right to vote in the Statehood referendum because of a law mandating english speaking as a prerequisite and criteria for voters.¹²

A strong turnout of settler voters was insured by allowing military personell to vote as residents anywhere else in the U.S.. With the discovery of major oil deposits in Alaska in 1968, the multi- national energy corporations,

10. U.N. Charter, Article 73 Non Self-Governing Territories.

11. Author of the Handbook on Federal Indian Law.

12. Alaska Legislature House Joint Resolution 51, of 1970.

along with the State and federal governments, pushed for a means to "clear title" to Alaska's lands away from the traditional and still legal owners, the Indigenous Peoples. The result was the Alaska Native Claims Settlement Act (ANCSA), passed by the U.S. Congress on December 18, 1971. ANCSA was an act of Genocide¹³ perpetrated against the Indigenous Peoples of the the North American Continent and institutionalized as federal law, once again without the consent of the vast majority of the Alaska Native Peoples. The State of Alaska, the Federal government and the multi-national energy corporations were the major beneficiaries of ANCSA, while the Indigenous Peoples lost more than 330,000,000 acres of our traditional land base, had profit-making state chartered corporations imposed upon us, and who were denied any land rights to all Native children born after 1971.

Although the text of ANCSA denies that it was "a jurisdiction act",¹⁴ it nevertheless claimed to terminate traditional Native hunting and fishing rights, placing it in direct conflict with the inherant rights of Alaska Natives to exert jurisdiction over their own subsistence

Many Alaska Native Villages (including Chickaloon) refuse to except the valididy of ANCSA because the vast majority of Alaska Natives never had the opportunity to vote or otherwise approve the Act. The persons who voted in favor

13. Genocide as defined by the United Nation is "an intent to destroy in whole or in part, a national, ethnical, racial, or religious group."

14. Alaska Native Claims Settlement Act Public Law 92-203, Section 2f.

of accepting ANCSA at the Alaska Federation of Natives Convention in 1971 (used as the "proof" of Native acceptance of ANCSA by the U.S. government) did not legally represent the vast majority of Native Alaskan's. 15

In 1991 the provisions of ANCSA will go into full effect, and many villages may lose what is left of their land base through taxation, sale of "Native corporation" stock to non-Natives, confiscation of lands for corporate debts, and other forms of so-called legal land theft provided for by ANCSA and its amendments. Transfer of "corporation" lands to tribal governments is the only protection for Alaska Natives, but this option is not being presented to the villages by governmental, corporate and/or state-chartered organization officials who claim to have our interests at heart.

Similarly, great numbers of these same government officials and corporate representatives are currently involved in presenting "options" to Native communities regarding the preservation of our Subsistence rights. The proposal of a State constitutional amendment as a solution is another example of a campaign of misinformation, and would result in placing Native communities more directly under the thumbs of the those who claim the right to impose their authority over us while they continue to appropriate our resources as they see fit.

15. Under Freedom of Information Act we learned the U. S. Dept. of Interior violated many Federal Statutes by not having provided a vote in each and every village to relinquish lands or jurisdiction to the U.S.A. or the State Of Alaska.

The fact is that, upon its formation, the State of Alaska disclaimed any jurisdiction over Indian lands, including fishing rights. This "disclaimer clause" is written into the State of Alaska Constitution as follows: "The State of Alaska and its people shall disclaim any and all Lands owned, occupied, and/or claimed by Natives of Alaska, including fishing rights FOREVER)".¹⁶ Meanwhile harassment, and arrests of Native hunters and fishers by State Fish and Game continues, in violation of the State's own constitution.

Amending the Constitution to authorize more State control over our way of life would result in a further denial of our right to self-determination and self-government.

This is the one option not being presented by the State, federal and corporate representatives currently debating the issue of our Subsistence rights -- our basic and fundamental right to assert our sovereignty and self-determination in the area of subsistence as well as in all areas of our lives. This is a right we have never given up or relinquished, just as we have never given up or sold our lands to any government.

The Federal Government recognizes at least some of our Traditional Governments (Chickaloon is one example),¹⁷ but the State of Alaska continues to contest every assertion of sovereignty by the Traditional Tribal Governments. Although the State of Alaska is Public Law 280 State, and uses this law to justify its jurisdiction over Natives (in direct

16. State of Alaska Constitution, Article XII, Section 12.

17. See Federal Register Vol. 51, No. 132, July 10, 1986.

contradiction to its own Constitution), it continues to fail to comply with the terms of the Indian Civil Rights Act of 1968 which mandates that PL 280 states obtain the consent of the enrolled adult members of each tribe, band, group, village, etc, before any decision can be made affecting Indian lands, jurisdictional rights, etc.¹⁸

It can be clearly seen that at the heart of the problems of our Native Peoples in Alaska is this crucial historical reality: the United States Government has not fulfilled its sacred obligation towards the inhabitants of Alaska,¹⁹ nor has it or the State of Alaska ever obtained the consent of Alaska Natives to appropriate our lands, assume jurisdiction over us, or to otherwise intrude into our way of life.

This brief overview is not intended as a detailed legal or historical analysis but rather as an introduction to certain trends and perspectives which continue to effect our lives as Native Peoples and Nations in Alaska. In closing, we have included the following chronology of the laws, acts and other significant events which have had a profound effect on the lives of Alaska's Indigenous Peoples since the beginning of colonial intrusion. Reference materials and historical documents are available to those wishing to learn more about this chain of events and its effects upon our Peoples.

18. See 25 CFR 1.4 State and local regulations of use, and 30 CFR 229.105, Evidence of Consent, 30 CFR 229.106 withdrawal of consent

19. Ibid at 10.

- 1867 Treaty Of Cession
- 1871 U.S.A. Ending of Treaty Making with Indigenous Nations
- 1884 Alaska was divided up by the "Missionary Christian Churches"(See Eskimo Administration by Diamond Jennings)
- 1884 District Organic Act
- 1906 Native Allotment Act
- 1924 Indian Citizenship Act
- 1936 Indian Re-organization Act was extended to Alaska (IRA)
- 1945 United States Signed United Nations Charter (Art. 73)
- 1953 Public Law 280 1958 Alaska Statehood Act sec. 4.
- 1959 Alaska became the 49th State of the United States
- 1968 Indian Civil Rights Act amending PL 280 (ICRA)
- 1968 Oil was Discovered on the North Slope at Prudoe Bay
- 1970 State of Alaska removed the english speaking Prequisite to vote in Alaska.
- 1971 Alaska Native Claims Settlement Act (ANCSA)
- 1975 Indian Self-Determination and Educational Assistance Act
- 1976 Federal Land Policy and Management Act (FLPMA)
- 1978 Indian Child Welfare Act (ICWA)
- 1980 Alaska National Interest Lands Conservation Act (ANILCA)
- 1982 Indian Tribal Governmental Tax Status Act (ITGTSA)
- 1982 Alaska Railroad Transfer Act
- 1984 Indian Tribal Governmental Tax Status Act (amendments)
- 1986 Recodification of United States Code title 25 "Indians"
- 1988 ANCSA "1991 Amendments"
- 1988 Genocide Act (Proxmire Act) ratified by U.S. Congress
- 1989 Investigation of the Alaska Offices of the Department of Interior by the Senate Select Committee on Indian Affairs.

SUBSISTENCE

BY LINCOLN TRITT

AS MONEY IS IMPORTANT TO THE DOMINION SOCIETY, SO TOO IS SUBSISTENCE WHICH DEFINED IN OUR TERM IS THE FOUNDATION ON WHICH THE EXISTENCE OF THE NATIVE IS BASED, IT IS THE ESSENCE OF OUR MORAL, PERSONAL, SOCIAL AND ECONOMIC VALUES.

THE MATERIAL VALUES, BROUGHT ON BY THE LAND CLAIMS AND BY THE PIPELINE ARE NOT UNDERSTOOD BY THE NATIVE PEOPLE. FOR THIS REASON, IT HAS ALREADY DAMAGED OUR SOCIETY THROUGH ALCOHOL, DRUGS AND SUICIDES ETC.. IF WE LOSE OUR SUBSISTENCE RIGHTS, IT WILL ONLY ENHANCE THE PROBLEMS OF AN ALREADY DISRUPTED NATIVE SOCIETY.

EVEN NOW, THE CONCEPT OF SUBSISTENCE IS USED IN ALCOHOL AND DRUG PROGRAMS IN THE INTERIOR WITH MORE SUCESS THAN OTHER PROGRAMS. SUBSISTENCE IS NOT ONLY THE RIGHT TO HUNT AND FISH, BUT MORE FOR THE EXISTENCE OF NATIVES AS PEOPLE.

MOST ISSUES ARE DEALT WITH IN THE ARENA OF THE DOMINION SOCIETY, SO THE ISSUES ARE GENERALLY ONE-SIDED AND THE DEPTH OF OUR CONCERNS ARE NOT UNDERSTOOD. THE STATE CONSTITUTION IN ITS PRESENT FORM HAS THE POTENTIAL TO DESTROY OUR PEOPLE.

NATIVE LEADERSHIP IN URBAN SETTINGS HAVE MORE RECOGNITION THAN RURAL. SINCE SUCH GROUPS HAVE ADOPTED THE LIFE OF URBAN STRUCTURE THEY CAN AFFORD TO GIVE CONCESSIONS THAT RURAL NATIVES CANNOT AFFORD TO GIVE.

FOLLOWING PROCEDURES AND POLICIES OF THE DOMINION SOCIETY ARE ALSO FOREIGN TO THE NATIVE UNDERSTANDING OF THE SITUATIONS.

IN CLOSING, I WANTED TO REQUEST THAT THESE IMPORTANT FACTS ARE TAKEN INTO CONSIDERATION WHEN DEALING WITH THE SUBSISTENCE ISSUES.

SUBSISTENCE SUMMIT CONFERENCE
Alaska FEDERATION OF NATIVES
RESOLUTION NO. 90-1
APRIL 11, 1990

ENTITLED: Alaska NATIVE SUBSISTENCE RIGHTS:
AN AFFIRMATION AND A STRATEGY

WHEREAS, the Alaska Federation of Natives, constituted of Regional Corporations, Regional non-profit organizations and other affiliated groups from throughout Alaska, represents those entities and communities in advancing their subsistence rights and interests; and

WHEREAS, approximately four percent (4%) of all fish and wildlife harvested in Alaska is taken by subsistence users; and

WHEREAS, less than one percent (1%) of salmon harvested in the State is taken by subsistence users; and

WHEREAS, in the 1980s, 50,000 Natives and 60,000 non-Natives were subsistence users; and

WHEREAS, approximately 40,000 urban Natives are deprived of their subsistence rights; and

WHEREAS, under ANILCA, the determination of priority subsistence rights among resource users is made only when it is necessary to restrict the taking of populations of fish and wildlife in order to protect the continued viability of such populations; and

WHEREAS, Congress declares that the continuation of opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands, and by Alaska Natives on Native lands is essential to Native physical, economic, traditional and cultural existence and to non-Native physical, economic, traditional and social existence; and

WHEREAS, as identified in Alaska Native Health Service studies, Alaska Natives may be adversely affected by the unavailability or scarcity of traditional foods and changes in Native lifestyle; and

WHEREAS, Title VIII of ANILCA was enacted in part to fulfill the unmet subsistence oriented requirements and purposes of ANCSA and to essentially protect the cultural and traditional Alaska Native lifestyle;

NOW THEREFORE BE IT RESOLVED that the Alaska Federation of Natives is directed by the delegates herein assembled at the Subsistence Summit Conference to adopt as its principal direction and recommends to all appropriate Native organizations the following:

- Act to continue to support the inherent Native rights to subsistence resources and uses.
- Act to gain approval of an amendment to the Constitution of the State of Alaska that allows the State to exercise management jurisdiction over all fish, wildlife, plant and other renewable natural resources within its boundaries and provides that the State shall exercise management of subsistence resources therein in accordance with applicable federal law.
- Act prior to July 1, 1990, to have the State of Alaska review and revise as necessary all State subsistence statutes, policies, regulations, programs and practices in every area of State jurisdiction in order to establish an overall subsistence management regime that is responsive to the true subsistence needs of affected Alaskans. Such review and revision shall include representation from Native organizations that represent those Alaskans directly affected. This review shall seek to establish a definition of "rural" which includes as many Alaska Native people as possible and that the State administration adopt a subsistence system for individuals not in "rural" areas who can demonstrate traditional and customary utilization of natural resources. Such review and revision shall be undertaken with the fundamental intent to allow those Alaskans who by custom, tradition, location, and circumstance have practiced subsistence use of Alaska's resources up to the present and will in the future, to do so in an appropriately responsive, sensitive, comprehensive, timely and continuing manner.
- Act immediately to request and to take action to involve affected Native organizations directly and fully in development, promulgation and implementation of any federal subsistence management regime developed for federal lands in the event State management is terminated. Native organizations shall resist, with all possible

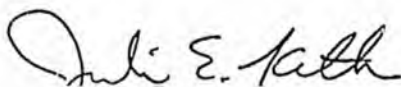
force, any attempt by the State of Alaska to contract with the federal government for any role in managing federal lands for subsistence uses. Tribal contracting for management of federal lands for subsistence uses will be strongly supported.

- Act to initiate a vigorous campaign to educate and familiarize public officials and legislators with all aspects of subsistence resources and uses.
- Act to initiate a vigorous registration campaign across the State of Alaska.

BE IT FURTHER RESOLVED that all Native entities and organizations shall withdraw after July 1, 1990, their support for State subsistence management on federal lands and for a State constitutional amendment if there is not a satisfactory resolution pursuant to the review and revision of State subsistence management requested herein; and

BE IT FINALLY RESOLVED that in the event of the above withdrawal of Native support, all affected Native organizations shall pursue with all appropriate resources any and all legal and Congressional actions to secure their rights to Alaska's subsistence resources and uses.

Passed and approved this 11th day of April, 1990, by delegates to the AFN Subsistence Summit Conference.



Julie E. Kitka
President

SUBSISTENCE SUMMIT CONFERENCE
ALASKA FEDERATION OF NATIVES
RESOLUTION NO. 90-2
APRIL 11, 1990

ENTITLED: ALASKA NATIVE SUBSISTENCE RIGHTS: A PRIORITY FOR
ALASKA NATIVE TRIBAL MEMBERS

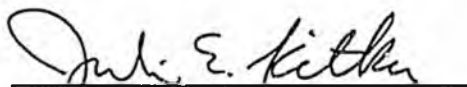
WHEREAS, Alaska Native tribes have managed fish and game in their traditional areas since before anyone can remember, and both the Native people and the animals benefited from tribal management; and

WHEREAS, members of Alaska Native tribes today, and in the future, rely on the right to harvest subsistence resources to nourish their bodies, and for the survival of their culture; and

WHEREAS, the only way to guarantee subsistence rights for members of the Alaska Native tribes is for tribal members to be given a priority to harvest subsistence resources on all lands in Alaska that they have traditionally and customarily used;

NOW THEREFORE BE IT RESOLVED that Native tribes and organizations will work in the long-term to gain a subsistence priority for Alaska Native tribal members, and to affirm the power of Alaska Native tribes to manage and regulate subsistence uses by their members.

Passed and approved unanimously by the delegates to the AFN Subsistence Summit Conference this 11th day of April, 1990.



Julie E. Kitka
President

SUBSISTENCE SUMMIT CONFERENCE
ALASKA FEDERATION OF NATIVES
RESOLUTION NO. 90-3
APRIL 11, 1990

ENTITLED:

WHEREAS, the McDowell v. State decision by the Alaska Supreme Court puts the State out of compliance with the federal subsistence preference found in Title VIII of ANILCA and will lead to a federal assumption of fish and game management authority on federal lands in the State after July 1, 1990, unless the law is changed; and

WHEREAS, there is a substantial doubt that the law can be changed in time to avoid federal takeover of fish and game management on federal lands; and

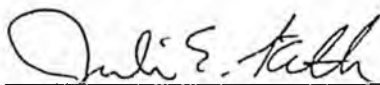
WHEREAS, joint State and federal planning for implementing a dual fish and game management system in the State after July 1, 1990, has taken place without participation or over consultation with the Alaska Federation of Natives or other Native organizations; and

WHEREAS, the sound management of Alaska's fish and game resources is inseparable from Native culture and tradition and must be protected by all possible means; and

WHEREAS, Representative Lyman Hoffman has proposed a State constitutional amendment which would allow the State to manage subsistence resources in accordance with federal law and retain fish and game management authority on federal lands.

NOW THEREFORE BE IT RESOLVED that the body assembled herein directs the Alaska Federation of Natives to work towards amending the State constitution to allow the State to manage subsistence resources consistently with federal laws and retain fish and game management authority on federal lands.

Passed and approved unanimously by the delegates to the AFN Subsistence Summit Conference this 11th day of April, 1990.



Julie E. Kitka
President

1990

Constitution Convention

Memorandum of Record

In view of the ANILCA threat of Federal "take over," the overwhelming need for this new constitution is self-evident.

Supporters of Rep. Lyman Hoffman's HR? which spawned the new Declaration of Wrongs "Say it would give legislators flexibility in responding to federal laws, while also preserving state management rights." Rep. Curt Menard said "It's the best I've seen that would be close to acceptable in my district."

Compliments of a: Anti Supreme Court/McDowell Constituency

THE NEW REVISED EDITION

of the complete

ALASKA

Declaration of Independence

and

State Constitution

1990

Take with a grain of salt - smile - and see your legislator in the morning.

PREAMBLE

we the people of Alaska,
grateful to God and those who
fathered this simple document;
to secure and transmit a diversity
of preference, priority, privilege,
prejudice and transmit to all
succeeding generations a heritage
of a more divided class society;
and in order to once again
secure full (Federal) control
of our own destiny, do ordain
and establish this constitution
for the State of Alaska.

ARTICLE I

Declaration of Rights Wrongs

SECTION 1. There is nothing
in this State constitution
that prohibits the Legislature
from passing any laws as
long as they comply with
Federal law.

11 April 1990

Joint House of Senate Committee of
Resource Hearing on Subsistence

For the past 10 year I have been wrong. The full power and resources of the US and State of Alaska has been used to prove and keep me wrong. Millions of dollars have been spent to make ^{me} wrong by passing laws, regulations and policy and then lobbying for their revision as soon as they were contested and or found invalid. The full use of propoganda in news releases, advertizements department memos and studies, supression of facts, misuse of public funds and out right lies, was the political pressure for such expenditures. Complete public Advisory Boards and a Commissioner of Fish and Game were fired, enforcement officers were transferred, government aids were censured, legislators lost elections, agency employees were harassed into early retirement and violators were selectively prosecuted or released to uphold the intent of

prioritized discrimination, secret law suit negotiations, federal and State policy and regulations used with selectively applied threats and were all the norm. They used State and federal attorneys, legislators, congressional delegations, agency personnel, socialist, biologist and expert experts. They unilaterally determined the valuelessness of my customs, traditions, ancestry, origin, lifestyle, family membership, dependency, residency, uses, methods, means and all known and unknown characteristics of my culture. I like every individual person have these human characteristics in a variation of diversities. But I found out that all of my character was wrong. Each part counted for nitch and the sum total was absolute zero, not because of what I could or should do; and in no way by the past, present and future would my considered personal individual character ever be right.

I moved from being wrong as a resident of Anchorage, that Federal cited largest population urban community and continued to be just as wrong as a resident of the Kenai Peninsula, that State cited largest area urban community of Alaska. And then when this urbanized classification was found to be illegal, it was legally made the largest land base educational fishery in the world.

But I was denied the educational opportunity because of a weighted ethnic identity. Even the mixture of my indigenous identities in the human race were all wrong.

As you may have heard, in the real world, some are said to be "more equal" than others, but in Alaska some people have "more equal" personal cultural characteristics than others. To some this may not sound so bad, but it makes me wrong by law and I can never change to be equally right

But wait, after 10 years I am right, not wrong but now I am Constitutionally legally right. Full blown, legally certified, court ordered, unbelievably right. Not better, not worse; but equally, yes equally right. My gosh I even expected the Governor to call me in, put his arm around my shoulder and say, you are right and this State is now committing its resources to defend your rights and those who ~~had~~ successfully wished to keep you wrong must now spend their own private resources to try to again invalidate you rights. But where my past, of 10 years of being unchangeably wrong, was a night mare; my present expectation of being equally right is only a dream.

And now again All federal and State resources, are to be used to fester the Federal take over threat; to justify those demands

to remove the Constitution's protection of common use equality for All Alaskans by making them invalid by amendment. Again my individual cultural character will be wrong wrong wrong and can no longer be made legally equally rights.

Who am I, I am the majority of Alaskans, I am the 75% who live in the wrong place, have the wrong culture, the wrong tradition, the wrong ancestry, the wrong individual and group character diversities. And again we can not justify, to the elders of our past, our peoples of the present or the children of the future the desire for equality for all. But others can again because of their elders of the past, their cultural qualified differences of the present and the cultural inheritances of their descendents they justify demanded self-interest priorities

and preferences.

I may never gain the equality I seek for all people, but I will never be the passive lackey of the legacy of continued injustice.

Those who demand this Constitutional amendment are the bequester of such a legacy of qualified priorities and a classified society.

In closing I propose that the sociologist, of the Subsistence Section make another objective study; this one of the lemming type exit of the thousands of residents, from the ANILCA cited urban Anchorage, in their annual migration to the Russian River fisheries. I would hope the study could explain, to the kids, their lowest class priority importance in the extended family principle. The study should be couched to the youth in the difficult attempt to explain the lack of any urban cultural importance of

such fish and wild life experiences; and how it would be more productive to seek legalized priorities in the fast growing urban customs and traditions of street gangs, video game parlors, street cruising and drug related activities. Thus the legislators would be alerted to the possible importance of a federal ANILCA mandated type urban and or local urban resident priority preferences and a companion Constitutional amendment to invalidate the problems of the equal rights of common use.

Then the perpetuation of their "urban" lifestyle could also be ensured. Asinine isn't it, just as asinine as is the priority right and the elimination of equal common use based on selective culture, customs, tradition, ancestry, residency etc; ~~then~~^{so} the perpetuation of the "rural" lifestyle could also be ensured.

Since the beginning of time each and all individuals have selectively chose their preferences of available characteristics of existing societies. Some will demand priority others will seek equality. The resulting ever changing diversity of cultures can not be stoped by the laws of men.


Dale Bondurant

Box 527

Cooper Landing AK
99572

Phone 595-1316

Ahtna, Inc.



GLENNALLEN OFFICE
P.O. BOX 849
GLENNALLEN, AK 99588
PHONE: (907) 822-3476
FAX: (907) 822-3495

ANCHORAGE OFFICE
406 W. FIREWEED LANE, NO. 101
ANCHORAGE, AK 99503
PHONE: (907) 274-7662
FAX: (907) 274-6614

My name is Ken Johns, and I am representing Ahtna, Incorporated; which is a Native Regional Corporation established under ANSCA. I would like to thank the House/Senate Resource Committee for the opportunity to speak to you on behalf of the Ahtna people on this issue which profoundly affects our families and traditional lifestyles.

We would like to thank Representative Wallis for her efforts on behalf of the Alaskan Natives, but realizing the political reality of the situation, Governor Cowper's bill seems to be the most realistic at this time.

We have followed the caribou herds and moose. We have depended on fish and small game for survival and now have to compete for our very way of life!

We are from an economically depressed region and must compete with the more economically advantaged urban residents of Anchorage and Fairbanks.

The Ahtna Region is a land that is covered by three major road systems of the State! We are governed by the State and Federal laws. Yet, we are people who have survived by subsistence for years.

Aside from this we have had major developments that has impacted our region such as the Alyeska Pipeline and the Anchorage-Fairbanks Intertie. Most of the people hired to work on these projects are from outside our region.

We are constantly hampered by outside controls. We have Game Board and Fish Boards and advisory boards. In other words there is a whole range of boards we must go through just to get a moose or to fish!

There is something wrong with this process. It needs to be re-evaluated with our participation!

We strongly recommend and support:

- (1) Governor Cowper's bill without amendments.
- (2) Re-evaluation of current management policies with emphasis on Fish & Game subsistence allocations.
- (3) We strongly feel that we are the MOST affected with regard to the year round road systems. Year round access of snowmachines, ATVs, dogsleds, boats, etc., which all bring in large numbers of urban hunters and fishermen. Therefore, we feel there is a mandatory justification for placing an Ahtna representative on both boards of Fish and Game and strong participation on advisory boards.
- (4) We need adequate funding to offset the ever increasing trespass violators on Ahtna land.

Ahtna Subsistence Testimony
Page Three

Thank you again for this timely opportunity to express our concerns.

For any further questions you may contact Nick Jackson who handles our subsistence issues at (907) 822-3476 or (907) 274-7662.

Hello: My name is
Robert Larson.

I'm from ^{the} Kook

Traditional Council, located
in the Bristol Bay Area, and
all I want to say about
this subsistence issue, is
that I hope my kids are
able to participate in it
if they need or want, and
the kids they have can do
the same in the future.

So let's preserve it
for all that have a
need for it. ~~Thank you.~~

~~Robert Larson~~

Thank you.

NOME ESKIMO COMMUNITY
P.O. BOX 401
NOME, ALASKA 99762

RESOLUTION 90-04

A RESOLUTION outlining the basic position of Nome Eskimo Community regarding proposed action to be taken on settlement of the subsistence issue.

WHEREAS, the Nome Eskimo Community sponsored a potlatch to address the subsistence issue; and

WHEREAS, a substantial representation of Nome Eskimo Community Membership was in attendance; and

WHEREAS, a motion passed unanimously to recommend that we do not amend ANILCA (Alaska National Interst Lands Conservation Act); and

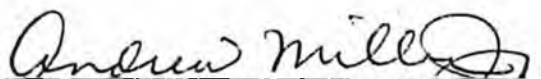
WHEREAS, a motion passed unanimously to seek an Alaska Constitutional Amendment to bring the Alaska State Constitution into compliance with ANILCA; and

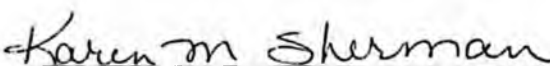
WHEREAS, a motion passed unanimously to seek an amendment of the Alaska Constitution to allow for a rural subsistence priority, which would protect customary and traditional uses of fish and game; and

WHEREAS, the Nome Eskimo Community Council Members, representing 2000 members, fully endorses the positions taken by the membership;

NOW THEREFORE BE IT RESOLVED THAT: Nome Eskimo Community directs its representative to the AFN Subsistence Meeting and staff to deliver the message on the positions we take on the Subsistence issue.

PASSED and APPROVED this 30th day of March, 1990 by the NOME ESKIMO COMMUNITY I.R.A. COUNCIL unanimously.


Andrew Miller, Jr., Vice-President
Nome Eskimo Community
I.R.A. Council


Karen M. Sherman, Secretary/Treasurer
Nome Eskimo Community
I.R.A. Council



Mike Mathers/News-Miner

WELCOME—Tana Fairbanks eats fry bread as she sits with her grandmother, Maye Edwin, at the Eagles Hall Tuesday evening. The two attended the Alaska Natives'

welcome ceremony for delegates to the mid-year conference of the National Congress of American Indians.

Indian issues similar in Lower 48

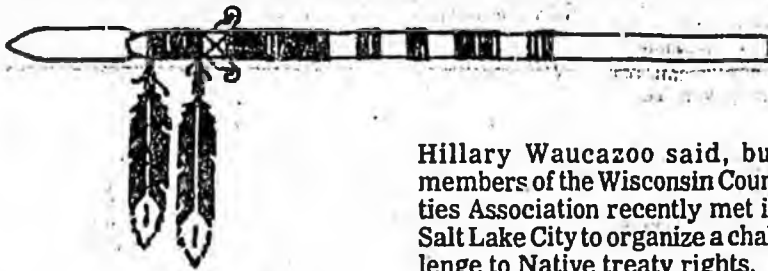
By **BRIAN O'DONOGHUE**
Staff Writer

The struggle for subsistence rights and tribal sovereignty in Alaska mirrors treaty disputes in the Lower 48, according to delegates at American Indian convention here.

"Alaska has a whole bunch of problems similar to problems in the Lower 48," said Wayne Ducheneaux, president of the National Congress of American Indians. "We've already been through some of the turmoil you're going through. A lot of the problems just now breaking in Alaska are going to affect us down south. This conference gives us a chance to be better informed and able to help you folks."

Ducheneaux and over 100 delegates, including about 40 from the Lower 48, are in Fairbanks this week for the mid-year convention of NCAI, the nation's oldest American Indian rights group. Alaska-area Congress vice president Will Mayo, of the Tanana Chiefs Conference, served as emcee during Tuesday's opening day of session.

NATIONAL CONGRESS OF AMERICAN INDIANS



Banners from TCC's 43 villages provided a colorful backdrop to the proceedings in Eagles Hall.

Loretta Metoxen compared the mounting discord over Alaska subsistence rights to a conflict over tribal fishing privileges in Wisconsin.

The dispute arose after a court upheld claims filed by six Indian tribes to a major share of fishing rights in Lake Superior. It has cost the state of Wisconsin \$2 million a year to protect Indians from harassment from residents infuriated by the usage of old treaty rights, Metoxen said.

Not only are Native fishermen being pelted with ball bearings hurled by Wrist Rocket slingshots, Wisconsin Indian leader

Hillary Waucazoo said, but members of the Wisconsin Counties Association recently met in Salt Lake City to organize a challenge to Native treaty rights.

"Many times my heart is crying as I read news releases of what's happening there,"

Waucazoo said.

In her greeting to convention delegates, Fairbanks North Star Borough Mayor Juanita Helms said she shared Native concerns about the Legislature's refusal to place a constitutional amendment on the ballot to let the voters resolve the subsistence debate.

"It's an immediate issue we have to deal with," Helms said, "because I can't see at any time any benefit to the federal government."
(See **INDIANS**, Back Page)

Northwest tribes more developed in business

By **TIM KLASS**
Associated Press Writer

SEATTLE—Indians in the Pacific Northwest are more advanced in business than their counterparts in much of the rest of the country and thus need more sophisticated help, a federal official said Tuesday.

"The Northwest tribes seemingly have a high level of sophistication in economic development," said William T.
(See **TRIBES**, Back Page)

INDIANS:

Issues similar in Lower 48

NATIONAL CONGRESS OF AMERICAN INDIANS

(Continued from page 1)



The Alaska Supreme Court recently struck down the rural preference in the state's subsistence law as unconstitutional. Because a rural subsistence priority is mandated by the U.S. Congress, on July 1 federal officials will assume control of fish and game management on federal land in Alaska unless the state takes action to resolve the constitutional conflict. Gov. Steve Cowper proposed amending the state Constitution to allow enactment of a rural subsistence priority law, but the Legislature declined to put it on the ballot. Delegates at the convention were repeatedly urged to lobby for a special session to consider a subsistence amendment.

Morris Thompson, president of Doyon Ltd., the Interior Native corporation, reminded delegates of the vital role the Indian Congress played during the 1960s struggle for the Alaska Native land claims settlement. At the time, he recalled, the Alaska Federation of Natives was broke. An appeal to the Indian Congress resulted in a \$250,000 loan from the Yakima Tribe in Washington.

"That seed money was critical to the organization," he said. "It was critical to determining what rights Alaska Natives had to land ownership."

More recently, Thompson said, Alaska Native groups spent \$490,000 en route to victory in 1982 referendum on subsistence. "This time I predict it's

going to take \$700,000-\$800,000 to win the battle."

The big difference between the status of Native groups here and their Lower 48 counterparts is the state's reluctance to admit that tribes exist in Alaska, said Mike Irwin, a representative from Gov. Steve Cowper's office.

"We really never get to the substantive questions," Irwin said. "When there's a problem, the line of attack is to question whether that group is really a tribe."

Citing a recent state brief filed in a case involving the village of Noatak, Irwin said support is growing within the administration for village self-determination.

"I think that before the end of the Cowper administration we will see state policy recognize the existence of tribes in Alaska," Irwin said, "and that the majority of the villages are such tribes."

Apeshnahkwat, a Wisconsin-area Indian attired in a business suit and long gray braids, urged delegates to place Indian rights issues before the World Court in Europe.

"Treaties are still important," he said, "but I don't think you go to the wolf watching the chicken coop and ask him for slack. You go to the bear watching the wolf. It's time we call on the leadership to start looking at some of the international avenues available to us."

Many of the delegates contrasted the U.S. government's support for freedom overseas with the Interior department's resistance to tribal sovereignty.

"The federal government seems to be more concerned about self determination in the eastern bloc countries," said Willie Kasayulie, a Native leader from the Yukon-Kuskokwim Delta area. "They need to open their eyes and look closer to home."

Despite the serious nature of the issues, a generally optimistic mood prevailed among delegates Tuesday.

"We don't see the walls that stand before us," Mayo said at one point. "We only see the goals we want to reach."

The convention will continue through Friday at the Eagles Hall.

TRIBES

(Continued from page 1)

Richardson Jr., deputy assistant secretary of the interior for Indian economic development.

"They're talking calculus while a lot of the others are talking arithmetic," he said.

The attendance of about 150 tribal leaders from Washington, Oregon, Idaho, Montana, Alaska and California at the two-day Northwest Economic Development Conference also "shows that there is a high level of interest," Richardson said.

Stan Speaks, director of the Bureau of Indian Affairs area office in Portland, Ore., said attendance would have been even better had it not been for this week's National Conference of American Indian Chiefs meeting in Fairbanks.

The meeting which concluded Tuesday was the fourth in a series of regional gatherings with Indian leaders, mostly to gather information for use in drafting a budget for the agency for fiscal 1992. Two more are planned.

"We're going to make a request for more money," said Richardson, a former Choctaw tribal business leader from Mississippi, "There's never enough money with the federal cutbacks as they are now."

He said tribal needs for economic development as expressed at the conference centered on access to capital—"probably the biggest"—and help with marketing and technical assistance.

6/6/90
More to story

May 29, 1990
402 Iditarod Ave.
Fairbanks, AK 99701

To the editor:

Brian O'Donoghue's May 23 article covering the National Congress of American Indians recent meeting in Fairbanks again demonstrates the Daily News-Miner's incredible capacity for insightful, superficial, and sensationalistic reporting while missing the point of the real news. His description of the similarities of tribal sovereignty and "subsistence" issues between Alaska and Lower 48 Native groups was accurate as far as it went, yet it failed to report upon or identify underlying issues of utmost importance to Alaskans.

A Lower 48 Native participant in the conference drew a parallel between "the mounting discord over Alaska subsistence rights to a conflict over tribal fishing privileges in Wisconsin," and decried "the harassment from residents infuriated by the usage of old treaty rights." What the DNM failed to ask was: "What was infuriating the residents?" Could it have been the fact that Natives were harvesting walleye pike on their spawning beds at night with the aid of spears and halogen lights to be sold *commercially*, in the name of "subsistence"?

Or could it have been the fact that Natives, in the name of "subsistence," have so depleted the fishing resources that entire fishing re-

sorts and communities have virtually died resulting in the unemployment of hundreds of persons including Natives? Or could it have possibly been the fact that the Natives in some areas have so fouled and depleted their own nest that they return again and again to court with the aid of the taxpayers dollars to expand their sphere of destruction?

Yes, Brian, there are parallels: some frighteningly imminent, but ones we all, Native and non-Native alike, would wish to avoid. It's regrettable that you missed the point and the opportunity to assist Alaskans with a very difficult issue.

Sincerely yours,
Jack G. McCombs