Subsistence Packet, 6-25-90

(Special Session)

Alaska State Legislature

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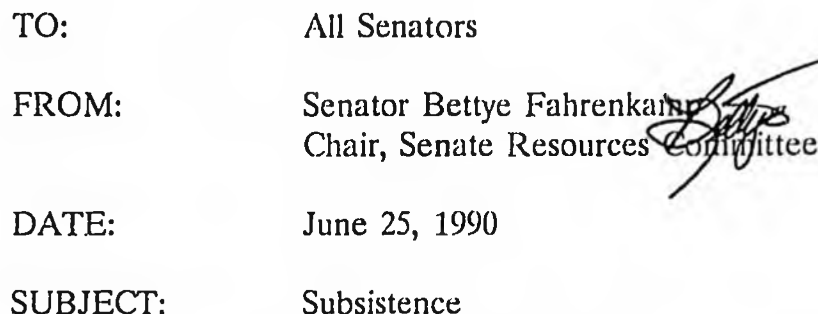
MEMORANDUM

TO: All Senators



FROM: Senator Bettye Fahrenkamp
Chair, Senate Resources Committee

DATE: June 25, 1990

SUBJECT: Subsistence

Enclosed is a packet of information about subsistence. I have included for your information two opinions on different sides of the issue. I hope this will be helpful to you.

MEMORANDUM

TO: Oliver Burris, President
ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC.

FROM: Paul A. Lenzini
Pierre J. LaForce

WILKINSON, BARKER, KNAUER & QUINN
Washington, D.C.

RE: ANILCA and the Property Clause -- Extension of Federal Wildlife Jurisdiction Over Non-Federal Lands

EXECUTIVE SUMMARY

ISSUE: May the Federal Government exercise regulatory authority over management of fish and wildlife on State and private lands and waters upon implementation of a subsistence program under Title VIII of ANILCA?

APPLICABLE LEGAL AUTHORITIES: Property Clause of the United States Constitution (Art. IV, Section 3); ANILCA.

DISCUSSION: Under the Property Clause of the United States Constitution, Congress is empowered to extend federal regulatory authority over federally-owned lands and activities thereon, to the exclusion of state law. The Property Clause power has been interpreted liberally by the federal courts, and it has been held to extend to management of wildlife on federal lands. The Property Clause power is vested in the Congress, which must act affirmatively, through legislation, to exercise the power.

In ANILCA, Congress, in exercise of the Property Clause power, established a subsistence management system for federal lands in Alaska. While it was anticipated that the State would manage for subsistence consistent with the substantive and procedural provisions of ANILCA, provision was made for a federal takeover of subsistence management if the State failed to do so. ANILCA makes no provision for extension of federal regulatory power over non-federal lands and waters, nor does it contain legislative findings or purpose supporting or

mandating federal regulatory control over fish and wildlife management of non-federal lands and waters in furtherance of the ANILCA subsistence management system on federal lands.

We conclude that Congress has not exerted its Property Clause power in ANILCA so as to authorize an extension of federal management of fish and wildlife to State and private lands and waters in Alaska, even after the Federal Government assumes administration of the ANILCA subsistence management system.

* * * * *

MEMORANDUM CONCERNING AUTHORITY OF THE FEDERAL GOVERNMENT PURSUANT TO ANILCA TO MANAGE FISH AND WILDLIFE ON NON-FEDERAL LANDS AND WATERS IN IMPLEMENTATION OF THE TITLE VIII SUBSISTENCE PRIORITY

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INTRODUCTION

This memorandum addresses the issue whether, pursuant to the Alaska National Interest Lands Conservation Act ("ANILCA"), the Federal Government may exercise regulatory authority over management of fish and wildlife on non-federal (State and private) lands and waters in Alaska, upon assumption by federal officials of administration of the subsistence management system. Subsumed in this question is whether the Property Clause of the U. S. Constitution permits the Federal Government to exercise police power over non-federal lands and waters and activities thereon.

We conclude, ultimately, that, in our opinion, ANILCA does not constitute or contain a grant of regulatory authority permitting federal management of fish and wildlife on non-federal

lands and waters in Alaska. In reaching that conclusion, we have considered (a) the nature of the Property Clause and the scope of congressional power granted thereby, as explained by the Supreme Court and other federal courts, and (b) the text and legislative history of ANILCA insofar as these bear on the issue of federal involvement in the management of fish and wildlife in Alaska. The analysis set forth herein follows that order, i.e., first, a discussion of the Property Clause implications, and, second, an analysis of ANILCA and its legislative history.

I. The Property Clause

Article IV, Section 3, Clause 2 of the U. S. Constitution provides, in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ....

This language has been interpreted by the Supreme Court to confer plenary authority on Congress to exercise legislative authority over federal lands and matters affecting those lands. Kleppe v. New Mexico, 426 U.S. 529 (1976). It is also clear that the Property Clause is not self-executing; Congress itself must determine whether to exercise this power. Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982). See also California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (even where power exists to act under the Property Clause, inquiry must be made whether Congress has exercised that power).

Recent federal cases, considering the implications of Property Clause authority, have confirmed that Congress' power over federal lands is without limitation, and that, in exercise of such power, congressional enactments may impact on non-federal lands and activities thereon. The most prominent of these cases was Kleppe v. New Mexico, 426 U.S. 529 (1976). There, the Supreme Court considered the constitutionality of a federal statute designed to protect wild horses and burros on federal lands. In that enactment, Congress' stated purpose was to protect wild horses and burros on public lands from capture, harassment and death. Congress had also committed these animals to the jurisdiction of federal officials, who were directed to protect the animals as components of the public lands. Further, the statute found that these animals are an integral part of the natural system of public lands, and the legislative history of the statute contained findings that management of these animals was necessary for the achievement of ecological balance on the public lands.

Considering this congeries of legislative determinations and findings, the Supreme Court concluded that the constitutional challenge was without merit. In doing so, the Court noted that determinations under the Property Clause were entrusted primarily to the judgment of Congress (id. at 536) and that courts had accorded that congressional power an expansive reading. Id. at 539. The Court then noted that its precedents

had established "that the power granted by the Property Clause is broad enough to reach beyond territorial limits." Id. at 538.[1/]

In further explanation of the scope of congressional authority, the Court in Kleppe stated:

> [T]he Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands.... And while the furthest reaches of the power granted by the Property Clause have not been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations. [Id. at 539.]

The Court then described the nature of the power conferred upon the Congress by the Property Clause as follows:

> In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.... Although the Property Clause does not authorize "an exercise of a general control over public policy in a State", it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it."... In our view, the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there. [Id. at 540-41.]

The Court finally held that, upon exercise of Property Clause power, any conflicting state regulation must succumb.

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains power to enact legislation respecting those lands pursuant to the Property Clause.... And when Congress so acts, the federal legislation necessarily overrides

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1/ See, e.g., United States v. Alford, 274 U.S. 264, 267 (1926) where the Court observed: "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."

> conflicting State laws under the Supremacy Clause. [Id. at 543.]

The Supreme Court in Kleppe reserved the question of the reach of federal power under the Property Clause to non-federal lands and activities thereon:

> While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control,...we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands.... [Id. at 546.]

The question left unanswered by the Supreme Court has been addressed by lower federal courts, and uniformly resolved in favor of the exercise of congressional power. In Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) the court considered the constitutionality of certain provisions of the Boundary Waters Canoe Area Wilderness Act as applied to certain non-federal lands and waters. Specifically, that statute prohibited motorized transportation within the Boundary Waters Canoe Area Wilderness. The State of Minnesota contended that Congress had no power to impose those prohibitions on non-federal lands and waters within the Wilderness. (The United States owned some 90 percent of the land within the Wilderness; the State owned most of the remainder and all of the beds of lakes and rivers within the Wilderness.[2/])

2/ The United States had title to 920,000 acres of land, while the State owned 121,000 acres of land and 161,000 acres of lake and river beds.

The Eighth Circuit first noted that it was called upon to decide the question left open in Kleppe, viz., "the scope of Congress' Property Clause power as applied to activity occurring off federal land." Id. at 1248. The court then noted that the Property Clause was to be accorded a liberal construction:

> The Court in Kleppe, however, rejected any narrow construction of the Property Clause, holding that Congress possessed full legislative/police power over activities occurring on federal property. In other words, any conduct taking place on United States land may be subject to congressional authority, regardless of its relationship to that land. [Id. at 1248 n.16.]

The court observed that the Supreme Court had acknowledged in Kleppe that regulation under the Property Clause may have some effect on non-federal lands:

> Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. [Id. at 1249.]

In that vein, the court held that Congress had the power to dedicate federal lands for particular purposes, and, as a necessary incident to that power, must have the ability to insure that lands be protected against interference with the intended purposes of those lands. Id. at 1249.

Finally, the court in the Boundary Waters case noted that, in order for Property Clause authority validly to extend to non-federal lands and activities, there must be a demonstrated showing that these non-federal activities will or may impact on the federal lands.

> Congress has no plenary authority over conduct on non-federal land,...rather, Congress must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property. [Id. at 1249 n.18.]

Another Eighth Circuit ruling, United States v. Brown, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977), involved review of a conviction for violation of a National Park Service regulation prohibiting firearms and hunting in a national park. The defendant had been arrested in non-federal waters within the park. The court first found that a congressional intent to exercise regulatory jurisdiction over the waters within the park was clearly demonstrated in the statute. Id. at 820. The court also found that hunting on waters within the park could significantly interfere with the use of the park and the purpose for which it was established. It concluded that because hunting occurred in close proximity to adjacent park lands, the potential danger of unwarranted intrusion on public lands, injury to park users and disruption of wildlife migration patterns could adversely impact the federal lands. It was also noted that the federal park lands adjacent to non-federal waters could be exposed to uses proscribed on park lands.

The court in Brown also noted that it was presented with the question left unanswered in Kleppe, viz., "whether the Property Clause empowers the United States to enact regulatory legislation protecting federal lands from interference occurring on non-federal public lands...." Id. at 822. Relying on the

recognition in Kleppe that the Property Clause was broad enough to have extra-territorial effect, it was held:

> The crucial question is whether federal regulation can be deemed "needful" prescriptions "respecting" the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause.... In light of these general standards, we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands. [Id. at 822.]

Finally, in Free Enterprise Canoe Renters Ass'n v. Watt, 549 F.Supp. 252 (E.D.Mo 1982), aff'd, 711 F.2d 852 (8th Cir. 1983), the court considered the validity of a federal regulation prohibiting canoe rental activities without a permit within the boundaries of the Ozark National Scenic Riverways, insofar as that regulation applied to activities on non-federal lands within the Riverways. The Park Service regulation had been adopted after a study showed a need for the Federal Government to exert greater control over canoe rental operations within the Riverways. The district court held that issuance of the regulation and application thereof to activities on non-federal lands constituted an appropriate exercise of the Property Clause. The district court relied on the "expansive reading" of the Property Clause given by the Supreme Court. 549 F.Supp. at 262. The court also found that the regulation was reasonably related to the statutory purposes of the Riverways and was, therefore, valid. On appeal, it was held, in pertinent part:

> It is undisputed that the United States acted within its constitutional authority in attempting to regulate the business activities of the members of the association as they affect the ONSR, even though the members themselves may never enter federally-owned property, but strictly keep to state or county roads and rights-of-way within the ONSR. [711 F.2d at 855-56.]

The following decisional principles are apparent from the foregoing cases:

1. The Property Clause confers broad power on Congress to exercise regulatory authority over federal lands and activities thereon;

2. The Property Clause power is not self-executing; congressional action, in the form of legislation, is necessary for exercise of that power;

3. Decisional discretion under the Property Clause is conferred on the Congress, and reviewing courts give considerable deference to that discretion;

4. The Supreme Court has not fully articulated the reach of the Property Clause power over non-federal lands and activities, albeit it has held that the Property Clause may have extra-territorial effect; and

5. The lower federal courts have construed the Supreme Court's decisions to permit the extension of federal regulatory power over non-federal lands where there is a "nexus" between activities on the non-federal lands and impacts on the federal lands.

II. ANILCA and Its Legislative History

Of relevance to the question whether Congress has exercised its Property Clause power in ANILCA to authorize federal management of fish and wildlife on non-federal lands and waters are the following provisions of ANILCA:

(i) Section 101(c), which recites that one of the purposes of ANILCA is "to provide the opportunity for r' al residents engaged in a subsistence way of life to coı. ınue to do so."

(ii) Sections 102(1)-(3), which together set forth the definition of "public lands".

(iii) Title VIII, dealing with the subsistence preference and related matters.

(iv) Sections 1314(a)-(b), stating Congress' intent regarding the wildlife management authorities of the State of Alaska and the Federal Government.[3/]

A. The Statute

ANILCA is a massive statute in sheer size, coverage and implications. However, only a small portion thereof is relevant to subsistence generally, or, even more narrowly, subsistence management by the Federal Government of non-federal lands and waters.

[3/] To facilitate review, we have appended hereto the full text of the foregoing statutory provisions.

Generally, ANILCA contains legislative findings that the "public lands"[4] in Alaska must be managed to assure and encourage subsistence use thereof by rural residents of Alaska. To that end, Congress included a subsistence title (Title VIII) in ANILCA which, inter alia, provides for a subsistence priority system on public lands in Alaska. Title VIII defines subsistence and identifies those individuals entitled to the subsistence priority. The subsistence title also establishes a subsistence management system governing the public lands, which system is to be administered by the State or, in the absence of State involvement, by the Federal Government. The subsistence title also contains provisions authorizing federal officials to enter into cooperative agreements "to effectuate the purposes and policies of this title" and providing for the issuance of "such regulations as are necessary and appropriate to carry out [the federal officials'] responsibilities under this title."

Finally, in Section 1314(a), Congress articulated that nothing in ANILCA was intended "to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in Title VIII of this Act". Similarly, in Section 1314(b), Congress stated that, except as specifically provided in ANILCA, nothing therein "is intended to enlarge or diminish the responsi-

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[4] By definition, "public lands" are lands, waters or interests therein the title to which is in the United States.

bility and authority of the [federal officials] over the management of the public lands."

It is significant that ANILCA contains no express authority for a federal takeover of fish and wildlife management on non-federal lands and waters should the State decline to manage the subsistence priority system on public lands. Similarly, there is no express finding that the management of non-federal lands and waters or the activities thereon will have an impact on the federal lands or the subsistence priority system adopted by the Congress for those lands. Nor is there an express finding that the exercise of federal regulatory power over non-federal lands is "needful" for the protection of those lands and Congress' plans therefor.

In fact, analysis of the operative provisions of the subsistence title demonstrates that ANILCA confers regulatory authority over the subsistence management of public lands in only a specific and limited fashion. Based on its legislative findings (§ 801) regarding the importance of maintaining a continued opportunity for subsistence uses by rural Alaska residents and the protection of same, Congress declared, as a matter of policy, that the public lands be utilized so as to preserve a continuing subsistence use of those lands, and further declared non-wasteful subsistence use to be the priority consumptive use of fish and wildlife resources on the public lands (§ 802).[5/]

[5/] It is noteworthy that Congress also declared, as a matter of policy, that federal officials, "in protecting the continued (continued...)

In Section 803 of ANILCA, Congress defined "subsistence uses" and related terms, and, in Section 804, established a priority for non-wasteful subsistence uses on the public lands, including criteria for establishing this priority.

Sections 805-807 of ANILCA deal with the subsistence management system established to carry out the subsistence policy adopted by Congress for the public lands. Section 805 provides for the establishment of subsistence resource regions encompassing all the public lands in Alaska and for the establishment of local and regional advisory bodies to make recommendations concerning the subsistence management of public lands. Subsistence management of the public lands is to be administered by federal officials or by the State, should the State enact and implement laws consistent with the subsistence priority and management system set out in the subsistence title of ANILCA. State administration of the subsistence management system is to continue only while state statutes conforming to the ANILCA subsistence standards and requirements are maintained. (§ 805(d).)

Under Section 806, the Secretary of the Interior is directed to monitor the State's administration of its subsistence management system to assure compliance with the mandates and purposes of ANILCA. Section 807 of ANILCA provides a private

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[5/] (...continued)
viability of all wild renewable resources in Alaska" shall cooperate with adjacent landowners and land managers, including Native Corporations, and appropriate State and Federal agencies. § 802(3).

right of action for parties aggrieved by the failure of the State or the Federal Government to provide for the subsistence use priority.

Federal officials are authorized under Section 809 to enter into cooperative agreements to effectuate the purposes and policies of the subsistence title. Finally, Section 816(b) preserves the authority of federal officials to close the public lands to subsistence uses.

Of direct relevance to an assessment of the reach of subsistence management authority granted federal officials by Title VIII of ANILCA are the provisions subsections (a) and (b) of Section 1314. In the former subsection, it is expressly provided that nothing in ANILCA is to be deemed to enlarge or diminish the State's authority to manage fish and wildlife on the public lands "except as may be provided in Title VIII of this Act." Conversely, Section 1314(b) recites that, except as otherwise specifically provided, nothing in ANILCA is intended to enlarge or diminish the responsibility and authority of federal officials over the management of the public lands.

The plain meaning of these provisions is that the extant authority of the State relating to fish and wildlife management on public lands is to remain the same unless provided otherwise in the subsistence title. Similarly, federal authority over the management of public lands is to remain the same except

as specifically provided otherwise by ANILCA.[6] It would therefore seem clear that no diminution of state authority or expansion of federal regulation was intended except as might be specifically provided in the subsistence title. The only specific provision in the subsistence title regarding state management of fish and wildlife on federal lands is the requirement that the State adopt a subsistence management system consonant with the subsistence policy promulgated in Title VIII, in the absence of which federal officials are to undertake subsistence management on the public lands.

Section 1314(b) is explicit that federal regulatory authority over the management of public lands cannot be expanded without a specific provision therefor in the Act. Again, other than the provision in Section 805 for establishment of a subsistence management system for the public lands, federal monitoring of that system as authorized by Section 806 and the limited judicial enforcement procedures set out in Section 807, the subsistence title creates or confers no new regulatory authority on federal officials regarding management of the public lands.

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[6] In determining whether Congress has preempted a regulatory area traditionally occupied by the states, the Supreme Court insists upon a showing that such a result was the clear and manifest purpose of Congress. E.g., DeCanas v. Bica, 424 U.S. 351, 356 (1976) (preemption requires that "Congress has unmistakably so ordained"); New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 414 (1973) (preemption requires "direct and unambiguous language"); International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958) (preemption requires "a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.")

As noted earlier, there is no express declaration by the Congress that a unified wildlife management system is necessary for the protection of subsistence uses on the public lands.[7] Likewise, there is no express grant to federal officials of regulatory authority over subsistence management on non-federal lands and waters in the event state administration of the subsistence management system is terminated. Absent such provisions or similar authorizations,[8] the plain language of the statute does not allow a conclusion that Congress, by the enactment of ANILCA, delegated authority to regulate fish and wildlife on non-federal lands and waters in Alaska to accompany federal administration of the subsistence management system of Title VIII.

One last matter. It has been asserted that Congress intended the definition of "public lands" to include all Alaska waters because the definition of "land" in Section 102(1) of ANILCA means "lands, waters and interests therein" and the navigational servitude of the United States is said to be "an inter-

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7/ The several provisions and findings in Title VIII regarding "cooperative agreements" among federal land managers and their State and private counterparts can certainly be regarded as Congress' prescribed mode for achieving unified management.

8/ Given the provisions of Sections 1314(a) and (b), viz., that State and Federal management authority are not deemed to have been enlarged or diminished except by express provision of ANILCA, a contention of implied delegated authority would appear unsupportable. Further, absent federal legislation on the subject, a state has exclusive power to protect and manage fish and wildlife within its borders. Cary v. South Dakota, 250 U.S. 118, 120 (1917).

est in water title to which is in the United States." This argument was rejected explicitly by the Ninth Circuit in City of Angoon v. Hodel, 803 F.2d 1016, 1027-1028 N. 6 (9th Cir. 1986), cert denied, 484 U.S. 870 (1987), and in any event does not withstand scrutiny. The navigational servitude of the United States is described as "an exercise of the Government's power to regulate navigational uses." United States v. Cherokee Nation, 107 S.Ct. 1487, 1490 (1987). As Justice Douglas stated for the Court in United States v. Twin City Power Co., 350 U.S. 222, 224 (1956), "That clause speaks in terms of power, not of property." Even where there has been disagreement as to its applicabilitry, there has been unanimity that the servitude is a matter of power, not of property. E.g., Kaiser Aetna v. United States, 444 U.S. 164, 177, 187 (1979); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 375-376 (1977). The Ninth Circuit was clearly correct in City of Angoon when it stated that "the United States does not hold title to the navigational servitude [and thus] the servitude is not 'public land' within the meaning of ANILCA." 803 F.2d at 1027-1028, n. 6.

B. Legislative History[9]

Our review of the legislative history indicates that, with one exception, the legislative record confirms that Congress

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[9] We note, at this point, our view that the statutory language is clear and unambiguous on the geographic reach of federal authority to manage fish and wildlife for subsistence purposes, and that a reviewing court would have no need or cause to refer to the legislative history of ANILCA. Nonetheless, that history supports our conclusions.

intended no federal takeover of fish and wildlife management on non-federal lands and waters in the event the Federal Government were to assume administrative responsibility for the subsistence management system on public lands.[10] To the contrary, the legislative record demonstrates that the Congress affirmatively resisted any such bold expansion of federal authority.

A brief chronological history of the enactment of ANILCA is helpful in understanding the implications of the several statements made concerning subsistence management and wildlife regulation. Consideration of the ANILCA legislation extended over several years, and involved numerous bills. In 1979, the House Committee on Interior and Insular Affairs reported out an Alaska Lands bill. See H.R. No. 96-97, Pt. I, 96th Cong. 1st Sess. (1979). This bill did not meet with the approval of the Committee chairman, Congressman Udall, who along with others of his persuasion, filed extensive Dissenting Views on the bill. See H.R. Rep. No. 96-97 at 380-611. These Dissenting Views included a section on subsistence. Id. at 537-47.[11] At the same time the House Committee on Merchant Marine and Fisheries reported out another Alaska Lands bill. See H.R. Rep. No. 96-97, Pt. II, 96th Cong., 1st Sess. (1979). On the House floor, the

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[10] As demonstrated herein at pp. 25-27 infra, this one aberration was not a true or accurate recital of congressional intent and action regarding subsistence management authority.

[11] Subsequently, Congressman Udall stated that the Dissenting Views "constitute a significant part of the legislative history of the Alaska National Interest Lands Conservation Act." 126 Cong. Rec. H10548 (daily ed. Nov. 12, 1980).

Udall forces prevailed, and the House passed still another version of the Alaska Lands legislation, this one sponsored by Congressman Udall and others.

The House-passed bill was thereafter sent to the Senate, where it was referred to the Committee on Energy and Natural Resources. That committee reported out its own version of an Alaska Lands bill for consideration by the Senate. See S.Rep. No. 96-413, 96th Cong., 1st Sess. (1979). The Senate committee bill underwent further amendment on the Senate floor before passage by the Senate on August 19, 1980.

At first, the Senate bill was unacceptable to the House leadership, including Congressman Udall. See, e.g., 126 Cong. Rec. H10350, H10374-75 (daily ed. Oct. 2, 1980). Subsequently, however, the House leadership capitulated and recommended that the House agree to the Senate version of the legislation in full, at the same time noting that, in their view, the Senate bill "falls far short of the kind of bill we wanted". 126 Cong. Rec. at H10527 (daily ed. Nov. 12, 1980).

The matter of regulatory jurisdiction over federal lands and the Property Clause authority of the Congress were issues that Congress addressed directly during the ANILCA legislative debate. In 1978, the House Committee on Interior and Insular Affairs reported out an Alaska Lands bill. See H.R. Rep. No. 95-1045, Pt. I, 95th Cong., 2nd Sess. (1978). Therein, the Committee, relying on the Kleppe case, expressed its view "that it would be well within the powers of the Federal Government to

assume exclusive jurisdiction over the regulation of the taking of fish and wildlife on the public lands for subsistence use." Id. at 184. The Committee further noted that, while several arguments had been made for direct federal responsibility, the Committee had concluded that it was appropriate that the State have responsibility for day-to-day wildlife management for subsistence uses. Ibid.

The Committee was persuaded that the Property Clause permitted federal preeminence in the management of federal lands:

> However, it is clear that, pursuant to the Property Clause of the U.S. Constitution, the Federal Government, including the Executive Branch, has the authority and responsibility to control entry and use of the public lands, including such uses as the taking of fish and wildlife. In addition, the Executive may make rules and regulations for the control and management of fish and wildlife species on lands within conservation system units even though these regulations may be more restrictive than the laws of the State. This principle, based on the Property Clause, has been upheld by several Supreme Court decisions, the most recent being Kleppe v. New Mexico, 426 U.S. 529 (1976). [Id. at 218.]

Congressman Udall reasserted the supremacy of congressional power over federal lands in his Dissenting Views to the 1979 Report of the House Interior and Insular Affairs Committee. See H.R. Rep. No. 96-97, Pt. I at 540. These Dissenting Views also characterized the issue of "states rights" in managing fish and wildlife as a "non-issue". Instead, the Dissenting Views argued, the real issue was a dispute as to who is to regulate the taking of "resident" fish and wildlife on the public lands in Alaska. The Dissenting Views then concluded, in language partic-

ularly probative of the ultimate issue under consideration here, as follows:

> There is no argument that the State has the responsibility for regulating the taking of resident fish and wildlife on the immense acreage of "non-public" i.e., State and private lands. There is, however, a false assertion that the Federal Government, as the trustee of the public lands for all the American people, has no land ownership Constitutional rights governing fish and wildlife taking uses of its lands, as do all other landowners in the United States. [Id. at 544.]

The Dissenting Views rejected the state's argument that it should have sole authority for regulating harvests with no federal role at all even on federal lands, noting that this view was contrary to Supreme Court precedent. Id. at 545.

It is highly significant that, at a time when Congressman Udall was soliciting the support of his peers for the Udall version of the Alaska lands legislation, he asserted, in no uncertain terms, that the bill would have no impact whatsoever on the State's regulatory authority over State and private lands, to the point that he dismissed any concern about this as a fabricated "non-issue".

On the Senate side, the bill reported out by the Senate Committee contained provisions substantially the same as Sections 1314(a) and (b) of ANILCA as eventually enacted.[12/] See S.Rep. No. 96-413 at 80. The Committee reported that this statutory language, adopted as a Committee amendment, "preserves the status

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12/ There was no equivalent section in the House-passed bill.

quo with regard to the responsibility and authority of the State to manage fish and wildlife, and reconciles this authority with the Act, including the subsistence title." Id. at 308. The Committee further noted that the section confirmed the status quo with regard to the authority of federal officials to manage wildlife habitat on federal lands. Ibid.

When the Senate committee bill was brought to the floor for consideration, Senator Stevens introduced an amendment to Section 1314(a) of the bill. The purpose of this amendment, as explained by Senator Stevens, was "to refine the language of several provisions of the Alaska lands bill to further clarify policy decisions made by the Senate Energy and Natural Resources Committee with respect to fish and wildlife management." 126 Cong. Rec. S. 6000 (daily ed. May 30, 1980). Senator Stevens further explained that his amendatory provisions clarified that "except as specifically may be provided in Title VIII, nothing in the Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands." Ibid. The Stevens amendments became part of the bill passed by the Senate, which eventually became law.

In discussing the Senate bill which was eventually passed by the Senate (and eventually enacted), the minority manager of the legislation, Senator Hatfield, noted:

> The subsistence management provisions represent a continuation of the careful balancing of the roles and responsibilities of the State and Federal governments. They reflect

> a delicate balance between the traditional responsibility of the State of Alaska for the regulation of fish and wildlife populations within the State and the responsibility of the Federal government for the attainment of national interest goals, including the protection of the traditional lifestyle and culture of Alaska Natives. 126 Cong. Rec. S. 11199 (daily ed. Aug. 19, 1980).[13]

The one contrary indication in the legislative record regarding what was accomplished or meant to be accomplished concerning fish and wildlife jurisdiction over non-federal lands and waters appears in an "explanation" of the ANILCA legislation submitted to the Congressional Record by Congressman Udall. It is noteworthy that Congressman Udall submitted this off-the-floor "explanation" after capitulation by the House and agreement to pass the Senate version of the legislation.[14] The Udall "explanation" takes up some nineteen pages of fine type in the Congressional Record. See 126 Cong. Rec. H10532-50 (daily ed. Nov. 12,

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13/ Despite power under the Property Clause to take control into its own hands, Congress has traditionally reserved to the states authority to manage wildlife on federal lands. E.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (BLM lands and national forests); Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528 (national forests); Conservation Programs on Government Lands, 16 U.S.C. § 670h(b) (BLM lands, national forests, military reservations, NASA and Department of Energy lands); Engle Act of 1958, 10 U.S.C. § 2671 (military reservations). And see Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1247-1250 (D.C. Cir. 1980) (authority of the Secretary of the Interior to intervene in state program to reduce wolf populations on BLM land in Alaska is limited and responsibility for wildlife management was reserved by Congress to the State).

14/ It is clear that the House leadership, particularly Congressman Udall, was most reluctant to accept the Senate bill, viewing it as falling short of the House bill. See, e.g., 126 Cong. Rec. H10527 (daily ed. Nov. 12, 1980).

1980). In his description of the subsistence title, Congressman Udall referred to 1977 testimony of Governor Hammond concerning the importance of a unified management system for fish and wildlife resources throughout their range. Congressman Udall then added:

> This is particularly important with fishery resources. Consequently, it has always been our intent to apply the subsistence preference to all fish stocks in the waters of Alaska. This result enables the State of Alaska to continue its lead in fisheries management without unnecessary disruption. It also should be stressed that if for any reason the State should ever repeal its subsistence statute, this preemptive section would continue the subsistence preference for fish throughout the waters of Alaska. [Id. at H10547.]

This statement, asserting a federal preeminence on subsistence management regulation "throughout the waters of Alaska" is completely at odds with the Dissenting Views submitted by Congressman Udall and others in H.R. Rep. No. 96-97, 96th Cong., 1st Sess. (1979). There, Congressman Udall had asserted, without equivocation: "There is no argument that the State has the responsibility for regulating the taking of resident fish and wildlife on the immense acreage of "non-public" i.e. State and private lands." Id. at 544.[15/]

We conclude, and submit, that the Udall "explanation" of November 12, 1980 was an exercise in legislative revisionism,

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[15/] It is to be recalled that Congressman Udall described the Dissenting Views as "a significant part of the legislative history of [ANILCA]." 126 Cong. Rec. H10548 (daily ed. Nov. 12, 1980).

an attempt to characterize congressional action in a manner not at all consistent with either the text of the statute or the legislative record. Indeed, Congressman Udall's attempt to "put his spin" on ANILCA was severely criticized by Senator Melcher on the Senate floor, as follows:

> [T]he House was unable to muster the necessary support to amend the Senate compromise Alaska lands bill; certainly their attempts to amend it with fine print in the Record will not stand. [126 Cong. Rec. S14770 (daily ed. Nov. 20, 1980).][16]

The conclusory language of the Udall "explanation" concerning the extension of the federal jurisdiction over non-federal lands, with its total absence of any articulation of source authority, must be viewed as an exercise in wishful thinking, rather than a reliable statement of the meaning of the legislation and the intent of Congress. There is no provision in ANILCA to support the assertion made by Congressman Udall, and no reference is made to any. These facts, coupled with Congressman Udall's earlier, unequivocal assertion that the State of Alaska's regulatory authority over non-federal lands was unquestioned, compel a conclusion that the Udall "explanation" is inaccurate and unreliable.

That said, we reiterate that all of the reliable and relevant legislative history of the ANILCA legislation supports

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16/ In the interest of precision, it should be noted that Senator Melcher's criticism was addressed at another section of the Udall "explanation". Nonetheless, the same criticism is applicable to Congressman Udall's contrived version of what was enacted regarding subsistence.

the view that neither expressly nor implicitly did Congress delegate authority to the Secretary of the Interior or to any federal agency to manage fish and wildlife for subsistence purposes on non-federal lands and waters in Alaska.

CONCLUSION

Based on the decisional principles outlined by the federal courts in the Property Clause cases and an analysis of the text and legislative history of ANILCA, it is our conclusion that Congress in ANILCA did not exercise its Property Clause power so as to authorize federal management of fish and wildlife on non-federal lands and waters, even where the federal authorities have assumed administration of the subsistence management system.

A P P E N D I X

(Relevant ANILCA Sections)

Section 101(c):

(c) It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

Sections 102(1)-(3):

SEC. 102. As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Title VIII:

FINDINGS

SEC. 801. The Congress finds and declares that—

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

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

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

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

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

POLICY

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

(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;

(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—

(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:

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

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

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

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

FEDERAL MONITORING

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

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

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

COOPERATIVE AGREEMENTS

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

SUBSISTENCE AND LAND USE DECISIONS

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

SEC. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

SEC. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

SEC. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

REGULATIONS

SEC. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title.

LIMITATIONS, SAVINGS CLAUSES

SEC. 815. Nothing in this title shall be construed as—

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

SEC. 816. (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

Sections 1314(a) and (b):

TAKING OF FISH AND WILDLIFE

SEC. 1314. (a) Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution.

(b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

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June 23, 1990

Re: Special Session -- Constitutional Amendment

Dear Legislator:

Governor Cowper has called you back into special session to consider passage of a resolution placing a Constitutional amendment on the November ballot. Unfortunately, Governor Cowper did not reveal his plan until late Friday, two days before the special session was to begin. He stated this was to avoid debate in the media. It is unfortunate that Governor Cowper has taken the position that there should be no public debate concerning an issue which affects each and every Alaskan and future Alaskans. A change to the State Constitution should not be taken lightly. It is something that should be debated by all those involved, namely the public. The debate should occur <u>before</u> an amendment is placed on the ballot to determine whether it is in the people's best interest to even place it before them.

We have written previous letters to you on June 4 and June 21, 1990, discussing the involved issues in detail. Now that Governor Cowper has belatedly released his "temporary Constitutional amendment" plan, at a point really too late for any meaningful public input or debate, we are writing to recommend that the Legislature do the following at the special session:

1. Do not place any constitutional amendment on the ballot.

2. Do not try to solve the problem through passage of legislation on this complicated subject in this short period of time.

3. Join the lawsuit presently filed to set aside the provisions of ANILCA which dictate to the State the manner in which the State should manage its resources, and return control of these resources to the State.

4. Urge our Congressional delegation to seek appropriate amendments to ANILCA. With their assistance, this is an easy solution. ANILCA itself has been amended nine times since its enactment and an amendment to Title VIII was recently filed at the request of the same people who argue no amendment can be requested.

This is the best solution, because:

1. A constitutional amendment is bad enough. However, a "temporary constitutional amendment" is a self-contradictory concept, and will create more problems than it solves.

2. The proposed federal subsistence regulations do not appear to be impossible to live with for a period of time, and they apply on federal and not on state land in any event.

3. The United States government has conceded that ANILCA has given it no authority over state waters and the fish resource, and is not attempting to regulate fisheries.

4. Most important, under the terms of ANILCA, <u>if the legislature does nothing to comply with ANILCA</u>, ANILCA will not allow aggrieved subsistence users to sue the State in Federal Court. Once the Legislature attempts to implement or interpret ANILCA, § 807 allows lawsuits in Federal Court against the State. This particular door must not be opened.

<u>A "Temporary" Constitutional Amendment is improper</u>

Because Governor Cowper has not been able to muster support for a constitutional amendment, at this time, he is proposing an amendment which includes a "sunset" provision. A constitutional amendment with the "sunset" provision is essentially a contradiction of the constitutional amendment process. A "sunset" provision implicitly seeks to achieve consensus on the ground that an amendment is temporary rather than that it is wise. It requires that the entire issue be revisited and thereby forestalls a resolution around which the opposing camps may begin to coalesce. Instead of closing the public division, a constitutional amendment with a "sunset" provision merely declares that the debate must continue.

Under a Constitutional amendment with a "sunset" provision, the provisional nature of a State regulatory program would color administrative decision making and judicial review of any State subsistence regulations. There is no law on what a "sunset" provision means. It is literally never used in the constitutional amendment process, except when a Constitution is first adopted. In other words, it will do more to create confusion, not only in the minds of those individuals who must live with the State regulations - the subsistence users themselves - but also the courts.

Nearly all those parties who are participating in this process

agree that something is wrong with the law passed by Congress in 1980, namely the Alaska National Interests Lands Conservation Act (ANILCA). It was and is and will continue to be a flawed law which was foisted on Alaska by Congress. Most importantly, a "sunset" provision does not address the real problems which have been created in this State by Title VIII of ANILCA. It does nothing to cure the vagueness of certain core federal legislative concepts, like "rural," "customary and traditional," and "barter," which must continue to be implemented under ANILCA.

Legal challenges will continue unabated with the Alaska Department of Fish and Game regulations accorded no presumption of correctness by the courts. In other words, the courts will be free to substitute their judgment for that of the State managers. Subsistence, and more importantly, fish and game management on State, private and Federal lands will continue to be at risk. The resource itself, as well as the resource users, will suffer.

To ask the citizens of Alaska to amend their Constitution to dismantle the common use, equal protection and uniform application provisions of their Constitution to comply with a flawed Federal law, while hoping that somehow someone will amend the Federal law to acceptably define its reach, is clearly unacceptable.

Even John Shively, with NANA Corporation, stated on June 18, 1990, at a meeting with the Resource Development Council in response to a question from Representative Mike Navarre, that he agreed with the assessment that a constitutional amendment with a "sunset" provision was bad. We agree. Amending the Constitution is nothing like changing State law.

The Department of Interior has no authority under ANILCA over subsistence uses on State lands.

The Alaska Outdoor Council recently hired Paul Lenzini, a partner in the Washington, D.C. law firm of Wilkinson, Barker, Knauer & Quinn, to review ANILCA and its legislative history to prepare a legal opinion on whether the Federal Government could extend its jurisdiction beyond the regulation of subsistence on Federal lands. Attached is a copy of his opinion.

For over 20 years, Mr. Lenzini has represented State fish and wildlife agency interests in Federal and State Courts throughout the United States, regarding State authority for the protection and management of fish and resident wildlife within State borders. In the Supreme Court, Mr. Lenzini successfully represented the State of Montana against a constitutional challenge to State authority to prefer residents in licensing requirements relating to recreational elk hunting. Baldwin v. Montana and Fish and Game Commission, 426

U.S. 371 (1978). He is clearly an expert in these matters.

In a nutshell, Mr. Lenzini's opinion is that based on constitutional law, judicial interpretation and on ANILCA and its legislative history, the Federal Government simply does not have authority to extend its jurisdiction beyond the Federal lands to State lands and waters. The federal government agrees, and has not attempted to regulate fisheries, or any other activities on State lands or waters.

Therefore as of July 1, 1990, the State of Alaska retains control over state waters, including commercial fishing, and state lands. For example, that would mean that the Kenaitze case would become a State issue and not Federal. Therefore, the urgency for a State constitutional amendment is gone.

ANILCA is presently being challenged as unconstitutional in the Federal Courts

As you are probably aware, a group of more than two dozen individuals, including Native Alaskans, and organizations, including conservation organizations, have filed suit in Federal Court to directly challenge Title VIII of ANILCA. A copy of that Complaint is attached.

The State of Alaska should join that lawsuit. If the Governor is unwilling to join the lawsuit, the State legislature should join. There are a number of issues which are specific to the State's interest.

A major issue is its interest in ensuring that it cannot be sued in Federal Court. Section 807 of ANILCA gives aggreived subsistence users the right to directly sue the State in Federal Court to enforce a hunt or set a season, but **only** if the State actually enacts a subsistence law. This violates the State's constitutional rights granted to it by the Eleventh Amendment to the United States Constitution. As stated in our earlier letters, the State really has nothing to lose in litigation with the Federal Government and should assert its rights.

Miscellaneous Authorities

We have attached a number of other items. Recently at the National Rifle Association of America Convention, the National Rifle Association overwhelmingly supported and passed a resolution, supporting the common use clause of the State Constitution. It also voted that ANILCA directly inhibited the State of Alaska's ability to properly manage its fish and wildlife resources or to encourage a sustained yield of those resources for all of its citizens. The National Rifle Association specifically supported

the legal challenge which has been filed in the Federal Court and has directed its Executive Vice President to use any appropriate resources at his disposal to assist in securing an appropriate legal ruling. Finally, it voted to encourage Congress to make the appropriate changes in ANILCA.

We have also included a copy of an opinion prepared by Ron Sommerville, formerly a director of ADFG, and now the Executive Director for the Wildlife Legislative Fund of America. We suggest that you read his subsistence analysis and comments. We wholeheartedly agree with those.

Conclusion

In summary, no one has argued that the Alaska Constitution does not allow the legislature to pass legislation to ensure that those persons most dependent on the renewable resources of our State can have continued access to them or a priority of access when those resources are scarce. The Alaska Constitution clearly allows the State legislature to enact legislation protecting those individuals.

However, just as clearly as the Alaska Constitution allows the enactment of such legislation, the Alaska Constitution does not allow it to enact legislation which is in conformity with ANILCA. It cannot allocate access to resources solely on the basis of residency, and this legislature should not pass a resolution placing an amendment on the State Constitution which would remove from the State Constitution the common use provision which has long protected Alaskans from arbitrary and capricious rulings.

This is a very complicated area of the law. Any precipitous action taken by this legislature is likely to do more harm than good, and is likely to cause serious damage to both the right of the State to regulate its own resources and the stability of the resource itself. This on one of those cases where it is much better to do nothing, than to try to do something with virtually no public input and so little time for intelligent consideration and debate. This matter can, and should, await the results of the federal lawsuit, and can be considered between now and the next session of the legislature in any event.

This is precisely what happened after the Madison decision where the Alaska Supreme Court struck down the state regulations. The legislature wisely adjourned without a new law, continued to debate it and passed the 1986 law the next legislative session. Even though the State was threatened with federal take-over, the legislature did not precipitously act.

The State can live with present federal regulations, which

apply only to federal lands. Fishing, both sport and commercial, is not regulated under ANILCA. Any action by the State now will damage both sport and commercial fishing interests, by subjecting them to possible federal regulation.

The best solution at this point is to do nothing, and join the lawsuit or wait for the results of the lawsuit. Also, urge our congressional delegation to amend ANILCA.

ROSS, GINGRAS, BAILEY & MINER
A Professional Corporation

BY: [signature]
CHERI C. JACOBUS

Enclosures
- Lenzini Opinion
- ANILCA lawsuit
- NRA Resolution
- Wildlife Legislative Fund of America Opinion

P.S. **Ahtna Land Closure**

After this letter was completed, I received a call from Ms. Pagano of the Associated Press. She stated to me that Ahtna Corporation had just announced that it has closed its land to hunting by non-corporation shareholders. The Nelchina caribou herd grazes on Ahtna land. Ahtna's action demonstrates how dangerous it is to pass a constitutional amendment when each private landowner can close its land to hunting. While the land belongs to Ahtna, the game does not. The "common use" clause of the state constitution, the very clause the legislature is considering negating, requires that the game resource be available equally to everyone. While Ahtna, like any other private landowner, may restrict hunting on his or her property, the "common use" clause requires that hunting be prohibited equally to all people, including corporation members.

Ahtna's actions demonstrate how much more complex the issues are than what the legislature has been led to believe. They clearly demonstrate that it is improper for the legislature to act precipitously at this time, particularly by trying to amend the Alaska Constitution.

Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

16th Alaska Legislature
First Special Session

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   Subsistence Chronology by USDI (?)

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2. ANILCA Title VIII-"Subsistence Management and Use"
   -Letters (2) from Alaska's Attorney General to Rep. Navarre on ANILCA's constitutionality

3. Alaska Statutes relating to subsistence
   Title 16
   SLA 1986 CH 52 [SCS CS HB288(Res)amS]

4. Court Cases

   Alaska Native Law (contains summary of court cases)

   Alaska Supreme Court Decision, McDowell v. State of Alaska No. 3540, December 22, 1989

   Alaska Superior Court Decision by Judge Cutler, McDowell v. Don Collinsworth, Commissioner Fish and Game, June 20, 1990. (severability case)

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7. Special session legislation creating a subsistence commission

8. Special session legislation for a constitutional amendment
   -Governor's summary entitled "A Constitutional Amendment for Subsistence"

9. Federal Plan

10. General Information and Research on Subsistence:
    "Subsistence in Alaska: A Summary" (2/26/90)
    "Southeast Alaska Subsistence Fishing & Hunting Update" (11/89)
    "Alaska's New Subsistence Law--What It Does and How Does It Work?" (1986)
    Alaska Fish and Game Magazine, "Subsistence, Adapting Ancient Ways to Modern Times," December 1989
    House Research Report on Subsistence Laws in Alaska: 1960 to 1990

end

CHRONOLOGY OF THE STATE'S SUBSISTENCE LAW

1978 **STATE'S FIRST SUBSISTENCE LAW:** The state passes its first subsistence law which, once sustained yield has been unsured, requires that subsistence uses be allowed, with a priority if necessary. The law defines subsistence uses as "customary and traditional uses" of fish and game for specific purposes such as food.

1980 **ANILCA:** Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves and wildlife refuges. Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982 **CONSISTENCY:** The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses, and the Department of Interior certifies the state's consistency with ANILCA.

1982 **REPEAL INITIATIVE:** A statewide effort to repeal the subsistence law fails by a large margin at the polls.

1983 **SUBSISTENCE SUIT:** Several Alaskans file suit against the state subsistence law. In McDowell v. State, they argue that the law denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it, and for that reason the law is unconstitutional.

1985 **MADISON DECISION:** The Alaska supreme court, in the Madison decision, rules that state regulations limiting subsistence to rural residents are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife management on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986 **NEW SUBSISTENCE LAW:** The Alaska Legislature enacts a new law limiting subsistence to rural residents. In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian Tribe also files a suit in federal court under ANILCA to protest the classification of the Kenai Peninsula as an urban area.

1987 **KENAITZES INITIALLY DENIED:** A federal judge rules against the Kenaitzes, saying the state subsistence law's definition of rural agrees with the use of the word "rural" in federal subsistence law.

1987 **MCDOWELL INITIALLY DENIED:** The state superior court holds that the 1986 subsistence law is constitutional.

1988 **KENAITZE DECISION REVERSED:** The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA. The U.S. Supreme Court ultimately denies review.

1989 **KENAITZE NEGOTIATIONS:** Under direction by the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus opinion.

1989 **MCDOWELL DECISION:** On December 22, the Alaska supreme court rules the 1986 state subsistence law is unconstitutional because it excludes urban residents from subsistence activities.

1990 **STAY GRANTED:** On January 5 the Alaska supreme court granted the state a stay in the McDowell decision until July 1 with regard to existing regulations. As a consequence, all existing regulations are in effect and are enforceable until that time.

RESULTS OF MCDOWELL V. STATE RULING ON SUBSISTENCE LAW

COURT DECISION: On December 22, 1989, the Alaska Supreme Court reversed a lower court, ruling that Article VIII of the Alaska Constitution prohibits limiting eligibility for subsistence uses to residents of rural areas (McDowell v. State).

This appears to make it constitutionally impossible for Alaska to enact a law consistent with ANILCA, raising the possibility of federal management on some of the lands in Alaska, unless there is a change to ANILCA or to the Alaska Constitution.

IMMEDIATE IMPLICATIONS: The supreme court remanded the case back to the superior court to issue a declaratory judgment and to work with the state on further action. A judge has not been assigned yet at the lower court, and no date has been set for further action. Until the superior court rules and provides further direction and upon the advice of the Department of Law, ongoing or imminent winter subsistence hunts will be conducted under current Board of Game regulations. The supreme court has granted the state a stay of the decision until July 1 with respect to existing hunting and fishing regulations to allow for an orderly transition in management. As a consequence, existing subsistence regulations will remain valid and enforceable.

The Boards of Fisheries and Game will be continuing their annual regulatory meetings through January and running into April. Action on most subsistence related proposals will probably be deferred until the superior court takes action.

LONG-TERM ISSUES: Title VIII of the Alaska National Interest Lands Conservation ACT (ANILCA) requires federal land managing agencies to provide a preference for the subsistence uses of rural residents on federal public lands, unless the state provides for such subsistence uses and the public participation as required by ANILCA. It is unlikely that the state can continue to meet these requirements now that the state cannot constitutionally provide a rural preference.

OPTIONS: There are several options available to deal with this problem over the long term. These include possibly working out an agreement with federal agencies to allow cooperative decision-making for fishing and hunting regulations on federal lands, or seeking changes in ANILCA, state law, the state constitution, or some combination of all of these. No conclusions have been reached at this time as to which option will provide the best, long-term solution.

by USDI (?)

SUBSISTENCE CHRONOLOGY

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 the Interior.

1978 The State Subsistence law created a priority for subsistence over all other fish and game uses. It did not define subsistence users.

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 V. STATE 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 V. STATE decision was issued by the Federal Appeals Court which said the State's definition of "rural" (the economic nature of community) was not consistent with that of ANILCA (the population of the community).

1989 McDOWELL V. STATE decision issued by the State Supreme Court on December 22, 1989 ruled that the State law (1978, amended in 1986) granting a Subsistence priority based solely on residency is unconstitutional under the Alaska State Constitution.

APRIL 13, 1990: Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a Federal program that minimizes change to the State program consistent with meeting the Federal government's responsibilities under TITLE VIII.

JUNE 8, 1990: Temporary regulations for the federal program published in the Federal Register with a ten day public comment period.

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

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;

43 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

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

Ante, p. 2377.

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

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

DEFINITIONS

16 USC 3113.

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

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

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

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

(B) for other food or for nonedible items other than money

if the exchange is of a limited and noncommercial nature.

PREFERENCE FOR SUBSISTENCE USES

16 USC 3114.

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:

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

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

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

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

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

Regional advisory council, authority.

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

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

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

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

Annual report to Secretary.

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

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

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

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

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

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

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported

EGIONAL PARTICIPATION

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by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

Implementation.

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

Reimbursement to States.

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

Report to Congress.

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

FEDERAL MONITORING

Report to congressional committees.
16 USC 3116.

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions. 16 USC 3117.

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

Hearing.

(b) A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

Subsistence hunting program.

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Program and recommendation implementation.

(b) The Secretary shall promptly implement the program and recommendations submitted to him by each commission unless he finds in writing that such program or recommendations violates recognized principles of wildlife conservation, threatens the conservation of healthy populations of wildlife in the park or park monument, is contrary to the purposes for which the park or park monument is established, or would be detrimental to the satisfaction of subsistence needs of local residents. Upon notification by the Governor, the Secretary shall take no action on a submission of a commission for sixty days during which period he shall consider any proposed changes in the program or recommendations submitted by the commission which the Governor provides him.

(c) Pending the implementation of a program under subsection (a) of this section, the Secretary shall permit subsistence uses by local residents in accordance with the provisions of this title and other applicable Federal and State law.

COOPERATIVE AGREEMENTS

16 USC 3119.

SEC. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title.

SUBSISTENCE AND LAND USE DECISIONS

16 USC 3120.

SEC. 810. (a) In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—

(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 805;

Hearing.

(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and

(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Notice and hearings.
42 USC 4332.

(b) If the Secretary is required to prepare an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

(c) Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

48 USC note prec. 21.
43 USC 1601 note.

(d) After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

ACCESS

16 USC 3121.

SEC. 811. (a) The Secretary shall ensure that rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on the public lands.

(b) Notwithstanding any other provision of this Act or other law, the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.

RESEARCH

16 USC 3122.

SEC. 812. The Secretary, in cooperation with the State and other appropriate Federal agencies, shall undertake research on fish and wildlife and subsistence uses on the public lands; seek data from, consult with and make use of, the special knowledge of local residents engaged in subsistence uses; and make the results of such research available to the State, the local and regional councils established by the Secretary or State pursuant to section 805, and other appropriate persons and organizations.

PERIODIC REPORTS

Submittal to Speaker of House and President of Senate.
16 USC 3123.

SEC. 813. Within four years after the date of enactment of this Act, and within every three-year period thereafter, the Secretary, in consultation with the Secretary of Agriculture, shall prepare and submit a report to the President of the Senate and the Speaker of the House of Representatives on the implementation of this title. The report shall include—

(1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;

(2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;

(3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

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ACCESS

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RESEARCH

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PERIODIC REPORTS

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(4) the role of subsistence uses in the economy and culture of rural Alaska;

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;

(6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and

(7) such other recommendations the Secretary deems appropriate.

A notice of the report shall be published in the Federal Register and the report shall be made available to the public.

Publication in Federal Register.

REGULATIONS

SEC. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title.

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

SEC. 815. Nothing in this title shall be construed as—

16 USC 3125.

(1) granting any property right in any fish or wildlife or other resource of the public lands or as permitting the level of subsistence uses of fish and wildlife within a conservation system unit to be inconsistent with the conservation of healthy populations, and within a national park or monument to be inconsistent with the conservation of natural and healthy populations, of fish and wildlife. No privilege which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

(2) permitting any subsistence use of fish and wildlife on any portion of the public lands (whether or not within any conservation system unit) which was permanently closed to such uses on January 1, 1978, or enlarging or diminishing the Secretary's authority to manipulate habitat on any portion of the public lands;

(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law; or

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd–jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1, 2, 3, 4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531–1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361–1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a–754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703–711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669–669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801–1882), the Federal

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

16 USC 3126.

SEC. 816. (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

Publication in Federal Register.

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

43 USC 1631.

43 USC 1601 note.

SEC. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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☑ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600

May 6, 1990

The Honorable Mike Navarre
Majority Leader, House of Representatives
16th Alaska Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Navarre:

At the House Majority caucus yesterday, you asked me to briefly assess whether the subsistence provisions in ANILCA can be successfully challenged in court. Those provisions require that the federal government take over management of fish and wildlife on federal land unless Alaska enacts a subsistence preference for rural residents, something which the Alaska Supreme Court held in McDowell v. State, 785 P.2d 1 (Alaska 1989), is not permitted by the Alaska Constitution. In my opinion, it is unlikely that the ANILCA subsistence provisions can be successfully challenged.

Two legal questions would be presented in any federal court challenge to ANILCA's subsistence provisions. (Since ANILCA is a federal statute, it would have to be challenged in federal court.) The first is whether the classification between rural residents and urban residents for subsistence purposes satisfies the equal protection guarantee in the United States Constitution. The second is whether, if the rural/urban classification satisfies the federal equal protection guarantee, the threatened federal takeover of fish and wildlife on federal land nonetheless is invalid as an unconstitutional violation of the state's right to manage fish and wildlife.

I. The rural/urban classification for subsistence in ANILCA probably does not violate the federal equal protection guarantee.

When a federal statute is challenged as violating the equal protection guarantee of the United States Constitution, the federal courts apply a very deferential test when no fundamental right (e.g., freedom from racial discrimination) is involved: "[W]e confine our consideration to whether the statutory classification 'is rationally related to a legitimate governmental interest.'" Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation

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Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988) (citation omitted). (That is a substantially more deferential test than the Alaska Supreme Court applies to state legislation challenged under the equal protection guarantee in the Alaska Constitution.) Although the Lyng case involved monetary resources, the Court noted that "our review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to [allocate those finite resources] to improve the general welfare is lodged in Congress rather than the courts." Id. at 373 (citation omitted). This would appear equally applicable to finite nonmonetary resources, like fish and wildlife.

In section 801 of ANILCA, Congress made a number of findings with respect to the importance of subsistence to rural residents. Such findings are not reweighed by the courts, and the courts will not substitute their judgment for that of Congress. See Kleppe v. New Mexico, 426 U.S. 529, 541 n. 10 (1976). (The Kleppe case also is discussed in connection with the second legal question below.) The evidence before Congress, while some may perhaps dispute it, is that there is a difference between rural residents' reliance on fish and wildlife and urban residents' reliance on those resources. Congress' findings with respect to to the importance of subsistence to rural residents would, I believe, be found by the federal courts to support the ANILCA subsistence preference for rural residents.

II. Congress probably has the constitutional authority to authorize a federal takeover of fish and wildlife management on federal land.

In Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976) (footnote omitted), a unanimous United States Supreme Court held that the Property Clause, art. IV, sec. 3, cl. 2, of the United States Constitution gives the United States Congress constitutional authority to regulate fish and wildlife on federal land: "In our view, the 'complete power' that Congress has over public lands [under the Property Clause] necessarily includes the power to regulate and protect the wildlife living there."

The Court also rejected New Mexico's argument that interpreting the Property Clause to give Congress the power to regulate fish and wildlife on federal land impermissibly intrudes on state sovereignty. In the Court's view, "when Congress so acts [under the Property Clause], the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Art. VI, cl.2." 426 U.S. at 543 (case citations omitted).

The rationale for this conclusion is that all states consent to the provisions of the United States Constitution, including the Property Clause and the Supremacy Clause, upon

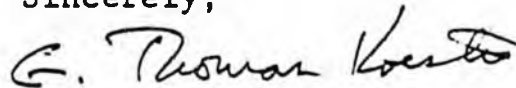
admission to the Union. In art. XII, sec. 13, of the Alaska Constitution, we consented to "[a]ll provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States." These clearly include the specific powers -- such as the Property Clause power over federal land -- which the United States Constitution grants to the national government.

The decision in the Kleppe case was by a unanimous Supreme Court only fourteen years ago. In any action seeking to prevent the federal government from taking over management of fish and wildlife on federal land, the lower federal courts will be bound by the Kleppe decision. They therefore would have to deny any injunction sought to prevent such a takeover unless and until the Supreme Court reverses Kleppe. Because it would take at least three to four years before the case could reach the Supreme Court (assuming it was willing to take it), we would be left with at least that much time during which the federal government would be managing fish and wildlife on federal land.

I have not reached this conclusion lightly. For years, I have been a strong proponent of the state's rights and strenuously resisted attempts by the federal government to diminish those rights. See, e.g., Watt v. Alaska, 451 U.S. 259 (1981) (successful defense of Alaska's entitlement to 90 percent of federal oil and gas leasing revenues from the Kenai National Moose Range); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (author of amicus brief, in which 32 other states joined, in support of Utah's successful equal footing doctrine claim). If the Kleppe decision had not been decided in 1976, I could and would make very strong arguments that the federal government does not have constitutional authority to enact laws governing fish and wildlife in Alaska, even on federal land, with some substantial possibility of success. In light of the Kleppe decision, however, I believe such arguments will not succeed.

I hope this answers your questions. If I can be of further assistance, please contact me at your convenience.

Sincerely,



G. Thomas Koester
Assistant Attorney General

Challenging U.S. on game control futile, state told

By JOE HUNT
Times Writer

Alaska would lose if it challenged in court the imminent federal takeover of fish and wildlife management on federal lands in the state, a state Department of Law opinion says.

The state has no clear right to manage fish and wildlife on federal land despite the transfer of those duties to Alaska shortly after statehood, said Assistant Attorney General G. Thomas Koester in the opinion last week.

The U.S. Supreme Court in 1976 unanimously upheld the U.S. government's right to control fish and wildlife on its land. In that case, New Mexico unsuccessfully argued federal control violated state sovereignty, Koester wrote.

The high court concluded the Property Clause of the U.S. Constitution gives Congress complete power over public land, including regulation and protection of wildlife, Koester said.

The U.S. Supreme Court in 1976 unanimously upheld the U.S. government's right to control fish and wildlife on its land.

The Property Clause is the overriding document in a tangled web of federal and state documents governing how subsistence will be managed in Alaska and, ultimately, by whom.

"The federal government has the right to say what the highest use of resources on federal land is and that's to provide hunting and fishing for subsistence

See Courts, back page

Courts

Continued from page A-1

users," Koester said.

Congress made that decision when it passed the Alaska National Interest Lands Conservation Act in 1980 which, among other things, guaranteed rural residents a priority to hunting and fishing in the state. Lawmakers directed the state to implement a rural priority system or lose the right to manage wildlife on federal lands.

The state tried, writing and rewriting a subsistence law to meet federal requirements. The Alaska Supreme Court, however, overturned the law last year when it declared the rural preference portion unconstitutional.

That put the subsistence issue back in federal hands, forcing the threatened July 1 takeover and prompting vows of lawsuits to fight for the state's rights. The Alaska Outdoor Council has urged Gov. Steve Cowper to seek an injunction blocking the takeover and to seek a permanent remedy through the courts, said Rupe Andrews, a member of the group's board of directors.

"We've maintained all along that subsistence is not the issue here," Andrews said. "The big argument is it's a state rights issue. We feel the state should be managing this program."

Congress passed the Alaska Statehood Act in 1958 which provided for the transfer of fish and wildlife management from federal to state hands. That has been interpreted by some Alaskans as a contract between the state and Congress, a pact recognizing the state has the right to manage and regulate wildlife within its borders.

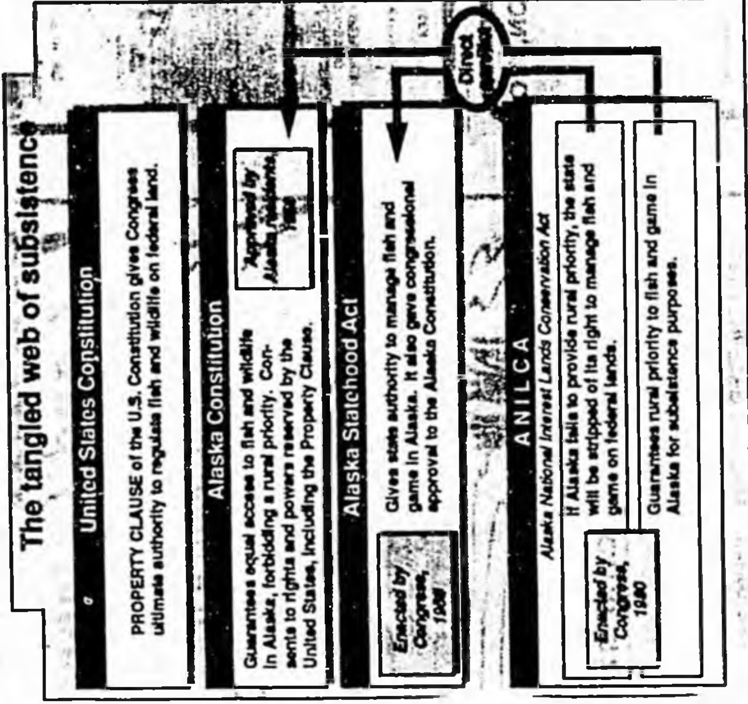
"The federal government accepted Alaska as a state under certain conditions and the federal government should be held to live up to those conditions," said attorney Wayne Anthony Ross, whose law firm successfully sued to have the state subsistence law overturned.

"If we were beginning with a blank slate, I would be the first to say it's a good argument and we ought to dive into the fray and fight it in court," agreed Koester. The problem is that precedence already has been set and, getting the issue back in front of the Supreme Court would take years — if it could be done at all.

Precedence also ties the hands of the U.S. District Court, meaning a judge could not grant an injunction to halt the federal takeover, he said.

"If the Kleppe (vs. New Mexico) decision had not been decided in 1976, I could and would make very strong arguments that the federal government does not have constitutional authority to enact laws governing fish and wildlife in Alaska, even on federal land, with some substantial possibility of success," Koester said.

"In light of the Kleppe decision, however, I believe such arguments will not succeed," he concluded.



Times graphic

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 31, 1990

The Honorable Mike Navarre
Majority Leader
Alaska State Representative
16th Alaska Legislature
34832 Kalifonsky Beach Road
Soldotna, AK 99669

Dear Representative Navarre:

You asked for a short letter outlining what we view as the disadvantages of filing a lawsuit challenging the subsistence provisions in the Alaska National Interest Lands Conservation Act ("ANILCA").

The first disadvantage is that, in our opinion, such a case probably cannot be won.

That is a subject over which lawyers disagree, however, and that is not the only (or most important) reason such a suit should not be filed. There are a number of policy reasons which argue against the filing of such a lawsuit.

During the pendency of any lawsuit, the future management of fish and wildlife in Alaska will be uncertain. Because it is unlikely that a preliminary injunction can be obtained against a federal takeover of fish and wildlife management on federal land, it would be substantially more difficult for the state to regain management later since the federal government, as we all know, is very reluctant to transfer power to the state.

Such a lawsuit would also signal a dramatic reversal of the state's policy for the last ten years of supporting a subsistence preference for rural residents. That state position first emerged during the negotiations which led up to the passage of ANILCA, which embodied a compromise between the state, the oil companies, the Alaska Native community, and the commercial and sport hunting and fishing interests in the state. That policy was further embodied in regulations adopted by the joint Boards of Fish and Game in 1982, and in the 1986 subsistence law passed by the Alaska State Legislature. Recent public opinion polls show that it remains the policy favored by a large majority of Alaskans.

Moreover, challenging ANILCA's subsistence provisions could jeopardize the state's relationship with Congress in the future. Because ANILCA represented a compromise, Congress understandably expected that the state would live with its provisions and not challenge them. If the state were to challenge them now, the state's ability to negotiate meaningful compromises in future negotiations with Congress could be substantially diminished.

Finally, should the state succeed in challenging ANILCA's subsistence provisions, there is no guarantee that Congress would not enact something even more onerous and undesirable from the state's point of view. We have received a copy of a May 8, 1990, letter from Senator Daniel K. Inouye, Chairman of the United States Senate Select Committee on Indian Affairs, to Secretary of Interior Manuel Lujan. In that letter, Senator Inouye offers the following two observations:

> First, because [ANILCA] is Indian legislation purposefully enacted to benefit Alaska Natives, to the extent Title VIII delegates the Secretary of Interior administrative discretion to determine how best to achieve the title's purpose, it is my view that Congress expects that such discretion will at all times be exercised to protect and benefit Alaska Natives. In other words, if reasonable minds may differ as to the intent of Congress embodied in a particular section of the text of Title VIII, Congress clearly intended the ambiguity to be resolved in favor of the policy choice that best advances the protection of Native subsistence hunting and fishing.
>
> Secondly, because of its importance to thousands of Alaska Natives living in isolated villages located across the breadth of Alaska, I can assure you that the implementation of Title VIII is a matter of the utmost importance to the Select Committee on Indian Affairs. For that reason, I would request that the Committee be consulted on an ongoing basis and be kept fully informed of all Department of the Interior Title VIII implementation-related decisions and activities both prior to and during any implementation to be sure that the objectives of the Congress in securing Title VIII are fully achieved.

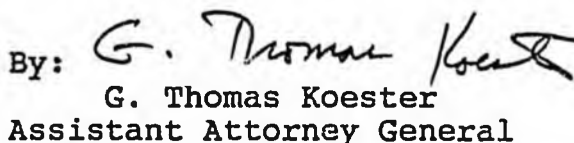
Recent polls continue to show strong public support for a subsistence preference for rural residents. Most Alaskans, however, believe that it would be inappropriate to provide a

subsistence preference only to a select group of Alaskans based on their ethnic heritage. While some might welcome that result, that has not been the state's position and, in my view, probably would be viewed by the majority of Alaskans as being a less desirable result than the current ANILCA subsistence preference for rural residents. If Senator Inouye's letter is any indication, such a result might be the direct consequence of a successful state challenge to ANILCA's rural preference.

Those are some of the policy reasons a lawsuit challenging ANILCA's subsistence preference for rural residents may not be appropriate. If I can answer further questions, please contact me at your convenience.

Sincerely yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
G. Thomas Koester
Assistant Attorney General

GTK:tg

cc: Norman Cohen, Deputy Commissioner
Department of Fish and Game

Denby Lloyd, Special Assistant
Office of the Governor

SECTIONS OF ALASKA STATUTE THAT RELATE TO SUBSISTENCE

AS 16.05.090	AS 16.10.380	AS 16.20.090
.094	.750	.615
.251	.800	.625
.255		
.258		
.259		
.330	AS 16.40.120	
.930		
.940		

Sec. 14.56.030. State library duties. The department shall undertake state library functions that will benefit the state and its citizens, including

(1) coordinating library services of the state with other educational services and agencies to increase effectiveness and eliminate duplication;

(2) providing reference library service to state and other public officials;

(3) providing library services and administering state and other grants-in-aid to public libraries to supplement and improve their services, the grants to be paid from funds appropriated for that purpose, or from other funds available for that purpose;

(4) providing library service directly in areas in which there is not sufficient population or local revenue to support independent library units;

(5) distributing financial aid to public libraries for extension of library service to surrounding areas and to improve inadequate local library service under regulations adopted by the department;

(6) offering consultant service on library matters to state and municipal libraries, community libraries, school libraries, and libraries in unincorporated communities;

(7) serving as a depository for state and federal publications concerning Alaska;

(8) applying for, receiving, and spending, in accordance with AS 37.07 (the Executive Budget Act), federal, state, or private funds available for library purposes;

(9) recording and distributing the election pamphlet provided for by AS 15.58 to libraries throughout the state for use by blind voters;

(10) establishing and charging fees for reproduction or printing costs and for mailing and distributing state publications and research data;

(11) operating and maintaining the Alaska State Archives under AS 40.21. (§ 57 ch 98 SLA 1966; am § 1 ch 10 SLA 1975; am § 25 ch 138 SLA 1986; am E.O. No. 70 § 2 (1988))

Effect of amendments. — The 1988 amendment, effective March 12, 1988, added paragraph (11).

Supplemental

Alaska Statutes

Title 16. Fish and Game.

Chapter

05 Fish and Game Code (§§ 16.05.050, 16.05.251, 16.05.370, 16.05.407, 16.05.710 — 16.05.723, 16.05.786, 16.05.787, 16.05.815, 16.05.925 — 16.05.940)
10 Fisheries and Fishing Regulations (§§ 16.10.265, 16.10.269, 16.10.310, 16.10.400, 16.10.410, 16.10.450, 16.10.480, 16.10.555, 16.10.600 — 16.10.620)
20 Conservation and Protection of Alaskan Wildlife (§§ 16.20.030, 16.20.031, 16.20.037, 16.20.610, 16.20.615)
40 Commercial Use of Fish and Game (§§ 16.40.100 — 16.40.199)
43 Regulation of Entry into Alaska Commercial Fisheries (§§ 16.43.150, 16.43.940)
51 Alaska Seafood Marketing Institute (§ 16.51.180)

Chapter 05. Fish and Game Code.

Article

1 The Department of Fish and Game (§ 16.05.050)
2 Boards of Fisheries and Game (§ 16.05.251)
3 Licensing of Sport Fishing and Hunting (§§ 16.05.370, 16.05.407)
4 Licensing of Commercial Fishing Crewmembers and Vessels (§§ 16.05.710 — 16.05.723)
6 Miscellaneous Provisions (§§ 16.05.786, 16.05.787, 16.05.815)
7 General Provisions (§§ 16.05.925 — 16.05.940)

Article 1. The Department of Fish and Game.

Section

50 Powers and duties of commissioner

Sec. 16.05.050. Powers and duties of commissioner. The commissioner has, but not by way of limitation, the following powers and duties:

(1) to assist the United States Fish and Wildlife Service in the enforcement of federal laws and regulations pertaining to fish and game;

(2) through the appropriate state agency and under the provisions of AS 36.30 (State Procurement Code), to acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights of way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;

Article 2. Boards of Fisheries and Game.

Section
251. Regulations of the Board of Fisheries

Sec. 16.05.221. Boards of Fisheries and Game.

NOTES TO DECISIONS

Regulation governing herring fishing as consistent with conservation and development purposes. — See State v. Hebert, Ct. App. Op. No. 748 (File A 1763), — P.2d — (1987).

Salmon harvest allocation. — The power of the Board of Fisheries to control fishery resource utilization allows it to allocate the salmon harvest between two competing subgroups of commercial users by a regulation requiring a salmon fisherman who wishes to transfer from one district to another in a bay to register in the new district at least 48 hours before transferring, and to cease fishing in any district during the 48-hour period, which burdens mobile driftnetters more than setnetters. Meier v. State, Bd. of Fisheries, Sup. Ct. Op. No. 3195 (File No. S-1706), 739 P.2d 172 (1987).

The duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users. Meier v. State, Bd. of Fisheries, Sup. Ct. Op. No. 3195 (File No. S-1706), 739 P.2d 172 (1987).

Sec. 16.05.251. Regulations of the Board of Fisheries.

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

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

(2) establishing open and closed seasons and areas for the taking of fish; if consistent with resource conservation and development goals, the board may adopt regulations establishing restricted seasons and areas necessary for persons 60 years of age and older to participate in sport, personal use, or subsistence fishing;

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

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

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

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

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

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

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

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

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

(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries;

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an on-board observer program

(A) is the only practical data gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing.

(b) *[Repealed, § 12 ch 52 SLA 1986.]*

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

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

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

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the state;

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

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

(f) Except as expressly provided in AS 16.40.120(e) and 16.40.130, the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980; am §§ 8, 9 ch 132 SLA 1984; am §§ 1 — 3, 12 ch 52 SLA 1986; am § 4 ch 76 SLA 1986; am § 1 ch 33 SLA 1987; am § 2 ch 93 SLA 1988; am § 7 ch 145 SLA 1988)

Revisor's notes. — For 1988, a reference to "AS 16.40.120(d)" was deleted from (f) of this section to correct a manifest error in sec. 7, ch. 145, SLA 1988.

Cross references. — For legislative findings in connection with the 1988 amendment to (a)(2) of this section, see sec. 1, ch. 94, SLA 1988 in the Temporary and Special Acts.

Effect of amendments. — The first 1988 amendment, effective June 3, 1988, in subsection (a), added all of the language at the end of paragraph (2) beginning with "if consistent" and made a series of minor punctuation changes throughout the rest of the subsection.

The second 1988 amendment, effective June 9, 1988, added subsection (f).

While neither amendment gave effect to the other, both have been given effect in this section as set out above.

NOTES TO DECISIONS

Regulation upheld. — In promulgating a regulation governing commercial herring fishing in Norton Sound, the board pursued a permissible objective (allocation of a fishery resource between resident and nonresident fishermen) and employed means within its powers, and the regulation itself was reasonable and nonarbitrary. State v. Hebert, Ct. App. Op. No. 718 (File A-1763), P.2d (1987).

Applied in Meier v. State, Bd. of Fisheries, Sup. Ct. Op. No. 3195 (File No. S-1704), 739 P.2d 172 (1987).

Article 3. Licensing of Sport Fishing and Hunting.

Section
370. Reports by licensees, tag holders, and transporters

Section
407. Nonresident hunting big game animals must be accompanied

Sec. 16.05.340. License and tag fees.

Cross references. — For moratorium until July 1, 1990, and related provisions, on issuance, for construction or operation of a commercial finfish farm, of a fishing license (a)(14) of this section or a collection permit under (b) of this section, see ch. 70, SLA 1987, as amended by sec. 21, ch. 145, SLA 1988, in the Temporary and Special Acts.

Sec. 16.05.346. Permit applications.

Postponed repeal and reenactment. — Section 2, ch. 118, SLA 1984, which repealed and reenacted this section effective August 1, 1989, was repealed by sec. 2, ch. 149, SLA 1988. Consequently, the text of the note following the heading "Postponed repeal and reenactment" in the main pamphlet should be disregarded.

Sec. 16.05.370. Reports by licensees, tag holders, and transporters. (a) The commissioner of fish and game may require a report to be made by each licensee concerning the time, manner, and place of taking fish and game, the kinds and quantity taken, and other information helpful in administering the fish and game resources of the state.

(b) A person who sells big game tags shall give to each buyer a game report form provided by the department, to be completed and returned by the hunter after big game is taken. The department shall pay the cost of return postage for the report. The report must specify the location, amount, and kinds or species of game taken.

(c) A person who transports big game from the field for compensation shall, within seven days after providing the transportation, notify the department of the amount and kinds or species of game transported. (§ 4 art II ch 94 SLA 1959; am § 4 ch 31 SLA 1963; am § 8 ch 160 SLA 1988)

Effect of amendments. — The 1988 amendment, effective June 17, 1988, added subsections (b) and (c).

Sec. 16.05.407. Nonresident hunting big game animals must be accompanied. (a) It is unlawful for a nonresident to hunt, pursue or take brown bear, grizzly bear, polar bear, or sheep in this state, unless personally accompanied by

(1) a person who is licensed as a master guide, registered guide, class A assistant guide or assistant guide by the Guide Board, or

(2) a resident over 19 years of age who is

(A) the spouse of the nonresident; or

(B) is related to the nonresident, within and including the second degree of kindred, by marriage or blood.

(b) An applicant for a nonresident big game tag for the taking of an animal specified in (a) of this section shall first furnish to the state, on a form provided by the state, an affidavit showing that the applicant

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the department examining the probable environmental impact of the action.

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

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes.

(g) AS 16.05.330 — 16.05.720 do not apply to an activity authorized by a permit issued under AS 16.40.100 or 16.40.120, or to a person or vessel employed in an activity authorized by a permit issued under AS 16.40.100 or 16.40.120. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984; am § 8 ch 145 SLA 1988)

Effect of amendments. — The 1988 amendment, effective June 9, 1988, added subsection (g).

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, 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;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish, but does not include processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel; in this paragraph "operate fishing gear" means to deploy or remove gear from state water, remove fish from gear during an open fishing season or period, or possess a gill net containing fish during an open fishing period;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian.

(11) "fish derby" means a contest in which prizes are awarded for catching fish;

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16.43.990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water that is completely enclosed by a generally escape-proof barrier; in this paragraph, "fish" does not include shellfish, as defined in AS 16.40.199;

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

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 - AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(25) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(26) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(27) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(28) "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 gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(29) "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;

(30) "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 nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis;

(31) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(32) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(33) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(34) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959, am § 23 ch 131 SLA 1960, am § 1 ch 160 SLA 1962, am §§ 13, 14 ch 31 SLA 1963, am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970, am § 1 ch 91 SLA 1970, am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972, am § 5 ch 82 SLA 1974, am §§ 26, 82 ch 127 SLA 1974, am §§ 18 — 20 ch 206 SLA 1975, am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978, am § 1 ch 78 SLA 1979, am § 1 ch 24 SLA 1980, § 4 ch 74 SLA 1982, am § 21 ch 132 SLA 1984, am §§ 9 — 11 ch 52 SLA 1986, am § 5 ch 76 SLA 1986, am § 1 ch 114 SLA 1988, am § 9 ch 145 SLA 1988)

Effect of amendments. — The first 1988 amendment substituted all of the language at the end of paragraph (4) beginning with "commercial fisherman includes" for "and the term 'commercial fisherman' includes the crews of tenders or other floating craft used in transporting fish."

The second 1988 amendment, effective June 9, 1988, substituted "that is completely enclosed by a generally escape-proof barrier" in the paragraph; it does not include shellfish as defined in AS 16.40.199" for "which is completely enclosed by a generally escape-proof barrier" in paragraph (14).

While neither amendment gave effect to the other, both have been given effect in this section as set out above.

Legislative history reports. — For legislative letter of intent in connection with the amendment to (4) of this section by sec. 1, ch. 114, SLA 1988 (CSSB 380(Res)), see 1988 Senate Journal 2027.

Chapter 10. Fisheries and Fishing Regulations.

Article

6. Purchase of Fish (§§ 16.10.265 — 16.10.269)
7. Commercial Fishing Loan Act (§ 16.10.310)
8. Salmon Hatcheries (§§ 16.10.400 — 16.10.410, 16.10.430, 16.10.480)
9. Fisheries Enhancement Loan Program (§§ 16.10.555, 16.10.600 — 16.10.620)

Article 6. Purchase of Fish.

Section

265. Purchase of fish from permit holders
269. Limitations

Sec. 16.10.265. Purchase of fish from permit holders. (a) It is unlawful for an individual while acting as a fish processor or primary fish buyer, or as an agent, director, officer, member, or employee of a fish processor, of a primary fish buyer, or of a cooperative corporation organized under AS 10.15 to intentionally or knowingly make an original purchase of fish from a seller who, in violation of AS 16.43, does not hold a landing permit, an entry permit or an interim-use permit.

(b) An individual who violates (a) of this section is

(1) upon a first conviction, guilty of a class B misdemeanor and shall be sentenced to a fine of not less than $1,000 nor more than $5,000, and may be sentenced to a definite term of imprisonment of not more than 90 days;

(2) upon a second conviction, guilty of a class A misdemeanor and shall be sentenced to a fine of not less than $5,000 nor more than $10,000, and may be sentenced to a definite term of imprisonment of not more than one year;

(3) upon a third or subsequent conviction, guilty of a class A misdemeanor and shall be sentenced to a fine of not less than $10,000 nor more than $25,000, and may be sentenced to a definite term of imprisonment of not more than one year.

(c) The commissioner of revenue shall impose upon a fish processor, primary fish buyer, or cooperative corporation organized under AS 10.15, a civil fine equal to the value of fish purchased in violation of this section by

(1) the fish processor or primary fish buyer if the fish processor or primary fish buyer is not a corporation; or

(2) a director, officer, or employee in a policy making position of the fish processor, of the primary fish buyer, or of the cooperative corporation. Value is based on the average price paid to fishermen at the time of the violation.

(d) The commissioner of commerce and economic development may suspend or revoke a business license issued under AS 43.70.020 and the commissioner of revenue may suspend or revoke a license to engage in the business of processing or buying raw fish if the licensee or

and the legislature intends that the land retain its status as mental health trust land, notwithstanding its inclusion in the Dude Creek Critical Habitat Area (§ 1 ch 31 SLA 1988)

Effective dates. — Section 3, ch. 31, SLA 1988, makes this section effective May 13, 1988, in accordance with AS 01.10.070(c).

Editor's notes. — Section 2, ch. 31, SLA 1988 provides that the commissioner of fish and game shall allow public use of the Dude Creek Critical Habitat Area compatible with AS 16.20.610(a) until a management plan has been adopted under AS 16.20.610(e).

Legislative history reports. — For legislative letter of intent on ch. 31, SLA 1988, see the Senate letter of intent on CSSB 362 (Res), 1988 Senate Journal 2691-2692.

Sec. 16.20.615. Tugidak Island critical habitat area. (a) The state land above the mean high tide line within the following described area is established as the Tugidak Island Critical Habitat Area:

(1) Township 41 South, Ranges 33 — 34 West, Seward Meridian

(2) Township 42 South, Range 33 West, Seward Meridian

Sections 1 — 11

Sections 14 — 33

Sections 25 — 26

(3) Township 42 South, Ranges 34 — 35 West, Seward Meridian

(4) Township 43 South, Ranges 34 — 35 West, Seward Meridian

(b) In addition to the area described in (a) of this section, the water and the land below the mean high tide line in the lagoon at the northeast end of Tugidak Island are included within the Tugidak Island Critical Habitat Area.

(c) The Tugidak Island Critical Habitat Area described in (a) and (b) of this section shall be managed under a management plan prepared by the department.

(d) The department shall permit existing cabins to remain, subsistence and recreational uses to continue, and commercial uses such as seal hunting and placer mining to continue, if appropriate under the management plan adopted under (c) of this section to the extent that the activities are compatible with the establishment of the Tugidak Island Critical Habitat Area.

(e) The department shall permit entry within the Tugidak Island Critical Habitat Area for the exploration and development of oil and gas resources when compatible with the purposes for which the critical habitat area was established. An oil and gas lease of state land within the Tugidak Island Critical Habitat Area is valid and continues in full force according to its terms. (§ 2 ch 116 SLA 1988)

Revisor's notes. — Enacted as AS 16.20.618. Renumbered in 1988.

Cross references. — For statement of legislative purpose, see sec. 1, ch. 116, SLA 1988 in the Temporary and Special Acts.

Effective dates. — Section 4, ch. 116, SLA 1988, makes this section effective

June 7, 1988, in accordance with AS 01.10.070(c).

Editor's notes. — Section 3, ch. 116, SLA 1988 provides "After completion of plans for the area including the Tugidak Island Critical Habitat Area as enacted in sec. 2 of this Act, the commissioners of natural resources and fish and game may recommend an adjustment in the boundaries of the critical habitat area to the legislature."

Chapter 40. Commercial Use of Fish and Game.

Article

2. Aquatic Farming (§§ 16.40.100 — 16.40.199)

Article 1. Buffalo and Musk Oxen.

This article heading is set out to incorporate editorial changes made by the Revisor of Statutes.

Article 2. Aquatic Farming.

Section

100. Aquatic farm and hatchery permits
105. Criteria for issuance of permits
110. Permit application, renewal, and transfer
120. Aquatic stock acquisition permits
130. Importation of aquatic plants or shellfish for stock

Section

140. Limitation on sale, transfer of stock, and products
150. Disease control and inspection
160. Regulations
170. Penalty
199. Definitions

Cross references. — For legislative findings and policy in connection with the enactment of AS 16.40.100 — 16.40.199, see sec. 1, ch. 145, SLA 1988 in the Temporary and Special Acts; for applicability to persons operating an aquatic farm or related hatchery on June 9, 1988, see sec. 18, ch. 145, SLA 1988 in the Temporary and Special Acts; for establishment and duties of Alaska Finfish Farming Task Force, see sec. 20, ch. 145, SLA 1988 in the Temporary and Special Acts.

Legislative history reports. — For legislative letter of intent for ch. 145, SLA 1988 (HCS CSSB 514(Res)), which enacted AS 16.40.100 — 16.40.199, see 1988 House Journal 3716.

Sec. 16.40.100. Aquatic farm and hatchery permits. (a) A person may not, without a permit from the commissioner, construct or operate

(1) an aquatic farm; or

(2) a hatchery for the purpose of supplying aquatic plants or shellfish to an aquatic farm.

(b) A permit issued under this section authorizes the permittee, subject to the conditions of AS 03.05 and AS 16.40.100 — 16.40.199, to acquire, purchase, offer to purchase, transfer, possess, sell, and offer to

sell stock and aquatic farm products that are used or reared at the hatchery or aquatic farm. A person who holds a permit under this section may sell or offer to sell shellfish stock to the department or to an aquatic farm or related hatchery outside of the state.

(c) The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources.

(d) Notwithstanding other provisions of law, the commissioner may not issue a permit under this section for the farming of, or hatchery operations involving, Atlantic salmon. (§ 2 ch 145 SLA 1988)

Sec. 16.40.105. Criteria for issuance of permits. The commissioner shall issue permits under AS 16.40.100 on the basis of the following criteria:

(1) the physical and biological characteristics of the proposed farm or hatchery location must be suitable for the farming or the shellfish or aquatic plant proposed;

(2) the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources;

(3) the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner; and

(4) the proposed farm or hatchery plans and staffing plans must demonstrate technical and operational feasibility. (§ 2 ch 145 SLA 1988)

Sec. 16.40.110. Permit application, renewal, and transfer. (a) An applicant for an aquatic farming or hatchery permit required under AS 16.40.100 shall apply on a form prescribed by the commissioner. An application for a permit must include a plan for the development and operation of the aquatic farm or hatchery, which must be approved by the commissioner before the permit is issued.

(b) An application for renewal or transfer of a permit must be accompanied by fees required by the commissioner, a report of the disease history of the farm or hatchery covered by the permit, and evidence that satisfies the commissioner that the applicant has complied with the development plan required under (a) of this section. The commissioner may require a health inspection of the farm or hatchery as a condition of renewal. The department may conduct the inspection or contract with a disease diagnostician to conduct the inspection.

(c) A person to whom a permit is transferred may use the permit only for the purposes for which the permit was authorized to be used by the transferor, and subject to the same conditions and limitations. (§ 2 ch 145 SLA 1988)

Sec. 16.40.120. Aquatic stock acquisition permits. (a) A person may not acquire aquatic plants or shellfish from wild stock in the state for the purpose of supplying stock to an aquatic farm or hatchery required to have a permit under AS 16.40.100 unless the person holds an acquisition permit from the commissioner.

(b) An acquisition permit authorizes the permit holder to acquire the species and quantities of wild stock in the state specified in the permit for the purposes of supplying stock to

(1) an aquatic farm or hatchery required to have a permit under AS 16.40.100;

(2) the department.

(c) The commissioner shall specify the expiration date of an acquisition permit and may attach conditions to an acquisition permit, including conditions relating to the time, place, and manner of harvest. Size, gear, place, time, licensing, and other limitations applicable to sport, commercial, or subsistence harvest of aquatic plants and shellfish do not apply to a harvest with a permit issued under this section. The commissioner of fish and game shall issue or deny a permit within 30 days after receiving an application.

(d) The commissioner shall deny or restrict a permit under this section upon finding that the proposed harvest will impair sustained yield of the species or will unreasonably disrupt established uses of the resources by commercial, sport, personal use, or subsistence users. The commissioner shall inform the Board of Fisheries of any action taken on permit applications for species that support commercial fisheries subject to limited entry under AS 16.43 and of any permits denied because of unreasonable disruption of an established use. A denial of the permit by the commissioner must contain the factual basis for the findings.

(e) The Board of Fisheries may adopt regulations for the conservation, maintenance, and management of species for which an acquisition permit is required.

(f) Except as provided in (d) of this section or in a regulation adopted under (e) of this section, the commissioner shall issue a permit if

(1) wild stock is necessary to meet the initial needs of farm or hatchery stock;

(2) there are technological limitations on the propagation of culture stock for the species sought;

(3) wild stock sought is not fully utilized by commercial, sport, personal use, or subsistence fisheries; or

(4) wild stock is needed to maintain the gene pool of a hatchery or aquatic farm.

(g) Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource. (§ 2 ch 145 SLA 1988)

Title 16 -- Subsistence related statutes

Alaska Statutes

Title 16. Fish and Game.

Chapter
05 Fish and Game Code (§§ 16.05.010 — 16.05.950)
10 Fisheries and Fishing Regulations (§§ 16.10.010 — 16.10.620)
20 Conservation and Protection of Alaskan Wildlife (§§ 16.20.010 — 16.20.690)
25 Stocking of Public Land (§ 16.25.010)
30 Destruction of Big Game Animals and Wild Fowl (§§ 16.30.010 — 16.30.030)
35 Predatory Animals (§§ 16.35.010 — 16.35.200)
40 Commercial Use of Fish and Game (§§ 16.40.010 — 16.40.030)
43 Regulation of Entry into Alaska Commercial Fisheries (§§ 16.43.010 — 16.43.990)
45 Pacific Marine Fisheries Compact (§§ 16.45.010 — 16.45.040)
51 Alaska Seafood Marketing Institute (§§ 16.51.010 — 16.51.180)
52 Fishery Industrial Technology Center (§§ 16.52.010 — 16.52.070)
55 Shooting and Firearm Safety (§§ 16.55.010 — 16.55.040)

Revisor's notes. — The provisions of this title were redrafted in 1983 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982. Other minor word changes were made in this title in 1981, 1983, and 1987.

Collateral references. — 35 Am. Jur. 2d, Fish and Game, § 29 et seq.
36A C.J.S., Fish, §§ 9, 20, 38; C.J.S., Game, §§ 2, 18.

Chapter 05. Fish and Game Code.

Article
1 The Department of Fish and Game (§§ 16.05.010 — 16.05.210)
2 Boards of Fisheries and Game (§§ 16.05.221 — 16.05.320)
3 Licensing of Sport Fishing and Hunting (§§ 16.05.330 — 16.05.430)
4 Licensing of Commercial Fishing Crewmembers and Vessels (§§ 16.05.440 — 16.05.720)
6 Miscellaneous Provisions (§§ 16.05.780 — 16.05.902)
7 General Provisions (§§ 16.05.905 — 16.05.950)

Collateral references. — Entry on private lands in pursuit of wounded game as criminal trespass. 41 ALR4th 806.

is not subject to the Administrative Procedure Act (AS 44.62). (§ 12 art I ch 94 SLA 1959; am § 1 ch 4 SLA 1963)

NOTES TO DECISIONS

Effect of orders. — Authorized by this section, emergency closure orders have the force and effect of law. F/V Am. Eagle, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Vagueness of order. — An emergency order closing a shellfish district was not in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, in violation of the due process rights of a fishing vessel's owners. F/V Am. Eagle, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Area closures. — This section does not prohibit the closure of an entire statistical area of king crab stocks or district thereof. F/V Am. Eagle, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Use to enforce resource management plan. — If the Board of Fisheries properly adopted a plan for the management of state fishery resources, the Commissioner of the Department of Fish and Game could enforce that policy through the emergency order process. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Selective closures. — The Commissioner of the Department of Fish and Game may use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use. Kenai Peninsula Fisherman's Coop. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Sec. 16.05.065. Application extension. (a) The commissioner shall extend the time and dates during which application may be made for fish or game registration if the commissioner finds that

(1) the conservation and management of the fish or game resource will not be affected adversely; and

(2) the failure to timely apply is the result of excusable neglect.

(b) The fee for an extension granted under this section is $45.

(c) As used in this section, "excusable neglect" does not include unfamiliarity with or ignorance of applicable laws and regulations. In order to show excusable neglect, a person must have demonstrated, before the registration deadline, an intent to harvest fish or game. (§ 2 ch 196 SLA 1970; am § 1 ch 105 SLA 1977)

Sec. 16.05.070. Regulations as evidence. Regulations of the boards of fisheries and game and of the commissioner, including emergency openings and closures, are admissible as evidence in the courts of the state in accordance with the Administrative Procedure Act (AS 44.62). (§ 13 art I ch 94 SLA 1959; am § 1 ch 206 SLA 1975)

Sec. 16.05.080. Limitation of power. Nothing in this chapter authorizes the department or the boards of fisheries and game to change the amount of fees or licenses. (§ 14 art I ch 94 SLA 1959; am § 2 ch 206 SLA 1975)

Sec. 16.05.090. Organization of the department. (a) The commissioner may, with the approval of the governor, establish a departmental division of commercial fisheries, a departmental division of sport fisheries, a departmental division of game, and other departmental divisions as are necessary.

(b) The commissioner shall establish a departmental division of fisheries rehabilitation, enhancement and development.

(c) There is established in the department a section of subsistence hunting and fishing. (§ 15 art I ch 94 SLA 1959; am § 1 ch 113 SLA 1971; am § 2 ch 151 SLA 1978)

Editor's notes. — In a memorandum signed April 14, 1981, the governor approved the commissioner's conferral of full division status on the section of subsistence hunting and fishing.

NOTES TO DECISIONS

Cited in State v. Eluska, Ct. App. Op. No. 456 (File No. A-210), 698 P.2d 174 (1985).

Sec. 16.05.092. Duties of division of fisheries rehabilitation, enhancement and development. The division of fisheries rehabilitation, enhancement and development shall

(1) develop and continually maintain a comprehensive, coordinated state plan for the orderly present and long-range rehabilitation, enhancement and development of all aspects of the state's fisheries for the perpetual use, benefit and enjoyment of all citizens and revise and update this plan annually;

(2) encourage the investment by private enterprise in the technological development and economic utilization of the fisheries resources;

(3) through rehabilitation, enhancement and development programs do all things necessary to insure perpetual and increasing production and use of the food resources of Alaska waters and continental shelf areas;

(4) make a comprehensive annual report to the legislature, containing detailed information regarding its accomplishments under this section and proposals of plans and activities for the next fiscal year, not later than 20 days after the convening of each regular session. (§ 2 ch 113 SLA 1971)

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

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

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

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

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

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

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

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

Revisor's notes. — In 1987, "recognize" was substituted for "reorganize" in subsection (7), to correct a manifest error in the original enactment.

Cross references. — For legislative intent, see § 1, ch. 151, SLA 1978, in the Temporary and Special Acts.

Editor's notes. — In a memorandum signed April 14, 1981, the governor approved the commissioner's conferral of full division status on the section of subsistence hunting and fishing.

Legislative history reports. — For letter of intent of the House Special Committee on Subsistence in connection with ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1164.

NOTES TO DECISIONS

Cited in State v. Fluke, Ct. App. Op. No. 456 (File No. A-200), 698 P.2d 176 (1985).

Sec. 16.05.100. Fish and Game Fund established. There is created a revolving "Fish and Game Fund," which shall be used exclusively for the following:

(1) to carry out the purposes and provisions of this title, except AS 16.51 and AS 16.52, or other duties that may be delegated by the legislature to the commissioner or the department; and

(2) to carry out such purposes and objectives within the scope of this title except AS 16.51 and AS 16.52 as may be directed by the donor of any such funds. (§ 17 art I ch 94 SLA 1959; am § 3 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment inserted "for the following" near the beginning of the section and substituted references to "this title, except AS 16.51 and AS 16.52" for "this chapter" in item (1) and "this title except AS 16.51 and AS 16.52" for "the chapter" in item (2).

Opinions of attorney general. — The dedication under this section was created subsequent to the date of the ratification of the Alaska Constitution, art. IX, § 7; hence, there was no protection for the fund under the grandfather clause. However, the fund was protected by the fact that federal law requires dedication of fishing and hunting licenses. 1960 Op. Att'y Gen. No. 14.

The dedication of proceeds of fishing and hunting licenses to the operation of the Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by § 7, art. IX, of the state constitution. November 30, 1982 Op. Att'y Gen.

Sec. 16.05.110. Composition of fund. The fish and game fund shall be made up of the following money and other money the legislature appropriates, which shall be deposited and retained in the fund until expended:

(1) money received from the sale of state sport fishing, hunting, and trapping licenses, special permits, and waterfowl conservation tags purchased by hunters;

(2) proceeds received from the sale of furs, skins, and specimens taken by predator hunters and other employees;

(3) money received in settlement of a claim or loss caused by damage to the fish and game resources of the state;

(4) money received from federal, state, or other governmental unit, or from a private donor for fish and game purposes;

(5) interest earned upon money in the fund;

(6) money from any other source. (§ 17 art I ch 94 SLA 1959; am § 1 ch 41 SLA 1979; am § 1 ch 71 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "special permits, and waterfowl conservation tags purchased by hunters" for "and special permits" in paragraph (1).

Opinions of attorney general. — For discussion of constitutionality under § 7, art. IX of the state constitution of dedication of interest income to the Fish and Game Fund, see November 30, 1982 Op. Att'y Gen.

Sec. 16.05.120. Disbursement of funds. Upon authorization of the commissioner, disbursements from the fish and game fund shall be paid by the proper state officer on presentation of vouchers signed by the commissioner or an authorized representative, and approved by the proper state officer. (§ 17 art I ch 94 SLA 1959)

(b) For purposes of the conservation and development of the game resources of the state, there is created a Board of Game composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state, and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Game, but shall be ex officio secretary. (§ 3 ch 206 SLA 1975; am § 118 ch 218 SLA 1976)

NOTES TO DECISIONS

Liberal construction of fish and game laws. — Conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

The terms "conserving" and "developing" as used in this section both embody concepts of utilization of resources. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

"Conservation" defined. — "Conserving" as used in this section implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

"Development" defined. — "Development" as used in this section connotes management of a resource to make it available for use. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Differential treatment not prohibited. — While Alaska Const., art. VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Establishment of use priorities. — While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 — 44.62.650. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

Stated in State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Sec. 16.05.230. Term of office. [Repealed, § 40 ch 206 SLA 1975.]

Sec. 16.05.240. Powers excluded. [Repealed, § 40 ch 206 SLA 1975.]

Sec. 16.05.241. Powers excluded. The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting or fiscal powers. (§ 3 ch 206 SLA 1975)

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. Kenai Peninsula Fisherman's Coop Ass'n v. State, Sup. Ct. Op. No. 2358 (File No. 5072), 628 P.2d 897 (1981).

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Sec. 16.05.250. Regulations. [Repealed, § 40 ch 206 SLA 1975.]

Sec. 16.05.251. Regulations of the Board of Fisheries. (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

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

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

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

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

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

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

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

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

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

(11) establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed, however, this

paragraph does not apply to permits issued or transferred under AS 16.43;

(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries;

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an on-board observer program

(A) is the only practical data-gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing.

(b) *[Repealed, § 12 ch 52 SLA 1986.]*

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

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

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

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the state;

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

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980; am §§ 8, 9 ch 132 SLA 1984; am §§ 1-3, 12 ch 52 SLA 1986; am § 4 ch 76 SLA 1986; am § 1 ch 33 SLA 1987)

Revisor's notes. — Paragraph (a)(13) was enacted as (a)(12). Renumbered in 1986.

Cross references. — For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38.05.300(a); for validity of regulations of former Board of Fish and Game, see § 41, ch. 206, SLA 1975 in the Temporary and Special Acts; for legislative findings in connection with the enactment of (a)(13) of this section, see § 1, ch. 76, SLA 1986, in the Temporary and Special Acts.

Effect of amendments. — The 1984 amendment in subsection (a), substituted "bag limits, harvest levels, and sex and size limitations" for "and bag limits" in paragraph (3), deleted "engaging in biological research" from the beginning of paragraph (7), substituted "and management, conservation, protection, use, disposal, propagation and stocking of fish" for "fish management, protection, propagation and stocking" in paragraph (7), repealed paragraph (9), and renumbered former paragraphs (10)-(12) as present paragraphs (9)-(11). The amendment also added subsection (c).

The first 1986 amendment in subsection (a) inserted "personal use fish, subsistence fish" in paragraph (6) and added paragraph (12); added subsections (d) and (e), and repealed subsection (b), concerning adoption of regulations.

The second 1986 amendment in subsection (a) added paragraph (13).

The 1987 amendment added subsection (a)(14).

Opinions of attorney general. — For discussion of compatibility of state subsistence use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3116 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2368 (File No. 5072), 628 P.2d 897 (1981).

Authorization for regulations. — In determining whether a regulation is authorized by statute the Court of Appeals of Alaska looks to four things. First, the scope of authority conferred by the authorizing statute; second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law"; third, the extent to which the regulation is consistent with the authorizing statute; and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. Beran v. State, Ct. App. Op. No. 506 (File Nos. A-535, A-629, A-630, A-679), 705 P.2d 1280 (1985).

Differential treatment not prohibited. — While Alaska Const., art. VIII, § 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2368 (File No. 5072), 628 P.2d 897 (1981).

Establishment of use priorities. — While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 — 44.62.650. Kenai Peninsula Fisherman's Coop. Ass'n v. State, Sup. Ct. Op. No. 2368 (File No. 5072), 628 P.2d 897 (1981).

Regulation held invalid because inconsistent with statutes. — Regulation developed by the Board of Fisheries to identify customary and traditional uses of Cook Inlet salmon qualifying for subsistence priority and codified as 5 AAC

61.597 was held invalid because it was inconsistent with former subsection (b) and AS 16.05.940 and contrary to the legislature's intent in enacting the 1978 subsistence law, ch. 151 SLA 1978. Madison v. Alaska Dep't of Fish & Game, Sup. Ct. Op. No. 2911 (File Nos. 6821, 7181, 7410), 696 P.2d 168 (1985).

Cited in Reynolds v. State, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982); Langwater v. State, Ct. App. Op. No. 279 (File No. 7367), 668 P.2d 1359 (1983); State v. Eluska, Ct. App. Op. No. 466 (File No. A-2101), 698 P.2d 174 (1985).

Sec. 16.05.253. Operation of stationary fishing gear. (a) The Board of Fisheries may require a person who holds a limited entry permit or an interim-use permit under AS 16.43 to be physically present at a beach or riparian fishing site during the operation of net gear or other stationary fishing gear at the site, except when the permit holder is at or traveling to or from the location of

(1) a sale of fish caught in the gear; or

(2) other stationary gear of the permit holder.

(b) For purposes of this section, "fishing site" means fishing site as defined by the Board of Fisheries and includes any structure used for providing shelter in support of the operation of the net gear or other stationary fishing gear. (§ 1 ch 94 SLA 1982; am § 1 ch 19 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote the existing language of this section and designated that language subsection (a) and added subsection (b).

Sec. 16.05.255. Regulations of the Board of Game. (a) The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for

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

(2) establishing open and closed seasons and areas for the taking of game;

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

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators or other categories;

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

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits and registrations and the transfer of permits

and registrations between registration areas and game management units or subunits is allowed;

(10) regulating sport hunting and subsistence hunting as needed for the conservation, development, and utilization of game.

(b) *[Repealed, § 12 ch 52 SLA 1986.]*

(c) If the Board of Game denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section shall provide that, consistent with the provisions of AS 16.05.258, the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978; am §§ 10, 11 ch 132 SLA 1984; am §§ 4, 5, 12 ch 52 SLA 1986)

Cross references. — For validity of regulations of former Board of Fish and Game, see § 41, ch. 206, SLA 1975 in the Temporary and Special Acts.

Effect of amendments. — The 1984 amendment in subsection (a), substituted "water or on the land" for "waters or on the lands" in paragraph (1), substituted "bag limits, harvest levels, and sex, age, and size limitations" for "and bag limits" in paragraph (4), rewrote paragraph (6), deleted "engaging in biological research" from the beginning of paragraph (7), substituted "and management, conservation, protection, use, disposal, propagation and stocking of game" for "and game management, protection, propagation and stocking" in paragraph (7), repealed former paragraph (8), and renumbered former paragraphs (9) and (10) as present paragraphs (8) and (9). The amendment also added subsection (c).

The 1986 amendment added paragraph (10) of subsection (a), added subsection (d), and repealed former subsection (b), concerning the adoption of regulations.

Opinions of attorney general. — Neither the Board of Game nor the Department of Fish and Game has jurisdiction over domestic animals. August 29, 1979 Op. Att'y Gen.

Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game. August 29, 1979 Op. Att'y Gen.

For discussion of compatibility of state subsistence use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. § 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

Establishment of quotas must be in accordance with the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3413), 583 P.2d 854 (1978).

Former subsection (b) construed. — Former subsection (b), concerning adoption of regulations by the Board of Game permitting taking of game for subsistence uses, merely established the priority of subsistence uses within the regulatory scheme; the state supreme court found no evidence of an intent to grant any personal right to take or possess game in the absence of such regulations. State v. Eluska, Sup. Ct. Op. No. 3106 (File No. S-991), 724 P.2d 514 (1986).

"Subsistence" defense created where no regulations adopted under

former subsection (b) held contrary to AS 16.05.920(a) mandate. — A "subsistence" defense created by the state court of appeals to "remedy" the Board of Game's failure to adopt separate subsistence regulations under former subsection (b) of this section contradicted the legislative mandate of AS 16.05.920(a). State v. Eluska, Sup. Ct. Op. No. 3106 (File No. S-991), 724 P.2d 514 (1986).

Applied in Gottardi v. State, Sup. Ct. Op. No. 2154 (File No. 4436), 615 P.2d 626 (1980).

Quoted in Jordan v. State, Ct. App. Op. No. 360 (File No. 1182), 681 P.2d 346 (1984).

Sec. 16.05.256. Nonresident and nonresident alien permits. Whenever it is necessary to restrict the taking of big game so that the opportunity for Alaska residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game may, through a permit system, limit the taking of big game by nonresidents and nonresident aliens to accomplish that purpose. (§ 3 ch 74 SLA 1982)

Sec. 16.05.257. Subsistence hunting regulations. [Repealed, § 12 ch 52 SLA 1986.]

Sec. 16.05.258. Subsistence use and allocation of fish and game. (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.

(b) The boards shall determine

(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with sustained yield; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the 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, 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

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not identified under (a) of this section may be taken only under nonsubsistence regulations.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30. (§ 6 ch 52 SLA 1986)

NOTES TO DECISIONS

Regulations adopted under former AS 16.05.257 had to be in accordance with the Administrative Procedure Act (AS 44.62). State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

While former AS 16.05.257, which authorized the Board of Game to adopt regulations providing for subsistence hunting, did not specifically refer to the Administrative Procedure Act (AS 44.62), it appeared clear that it merely set forth an additional purpose for which regulations might be promulgated. State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Issuance of permits based on verbal instructions to agents held improper. — Nothing in the Administrative Procedure Act (AS 44.62) authorizes the Board of Game to impose requirements not contained in written regulations by means of oral instructions to agents. Such verbal additions to regulations involving requirements of substance are unauthorized and unenforceable. State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Reasonable basis for Board of Game's quota of caribou to be killed under former AS 16.05.257. — See State v. Tanana Valley Sportsmen's Ass'n, Sup. Ct. Op. No. 1716 (File No. 3433), 583 P.2d 854 (1978).

Sec. 16.05.259. No subsistence defense. In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses. (§ 7 ch 52 SLA 1986)

Revisor's notes. — Formerly AS 16.05.261. Renumbered in 1987.

Sec. 16.05.260. Advisory committees. The Board of Fisheries and the Board of Game may adopt regulations they consider advisable in accordance with the Administrative Procedure Act (AS 44.62) establishing, at places in the state designated by the individual boards, advisory committees to be composed of persons well informed on the fish or game resources of the locality. The boards shall set the number and terms of each of the members of the advisory committees, shall

Sec. 16.05.315. Joint board meetings. The Board of Fisheries and the Board of Game may hold a joint meeting upon the call of the commissioner or a board to resolve any conflicts in regulations of the boards and to consider matters, as determined by the commissioner or a board, which require the consideration of both boards. (§ 10 ch 206 SLA 1975)

Sec. 16.05.320. Quorum. A majority of the members of a board constitutes a quorum for the transaction of business, for the performance of any duty, and for the exercise of any power. However, a majority of the full board membership is required to carry all motions, regulations and resolutions. A majority of the members of the boards of fisheries and game constitute a quorum for the transaction of business in a joint board meeting. A majority of the membership of the boards is required to carry all joint motions, regulations and resolutions of the boards. (§ 10 art I ch 94 SLA 1959; am § 3 ch 71 SLA 1973; am § 11 ch 206 SLA 1975)

Article 3. Licensing of Sport Fishing and Hunting.

Section
330. Licenses, tags, and subsistence permits
331. Elk farming
335. Complimentary licenses
340. License and tag fees
341. Free license for disabled veterans
346. Permit applications
350. Expiration of licenses and tags
360. Commissioner of revenue charged with license issuance
370. Reports by licensees
380. Commissioner of revenue may appoint agents
390. Fees and compensation for issuance of licenses and tags
400. Persons exempt from license requirement
405. Taking game by proxy for the blind
407. Nonresident hunting big game animals must be accompanied
408. Nonresident alien hunter to be accompanied by guide
410. License forfeiture
420. Violations
430. Penalties

Sec. 16.05.330. Licenses, tags, and subsistence permits. (a) Except as otherwise permitted in this chapter, a person may not engage in sport fishing, including the taking of razor clams; in hunting, trapping, or fur dealing; in the farming of fish, fur, or game; or in taxidermy, without having the appropriate license or tag in actual possession.

(b) When obtaining the appropriate license or tag in (a) of this section, an applicant who asserts residency in the state shall provide the license vendor with the proof of residence that the department requires by regulation.

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users. (§ 1 art II ch 94 SLA 1959; am § 1 ch 61 SLA 1962; am § 1 ch 42 SLA 1968; am § 1 ch 140 SLA 1968; am § 8 ch 52 SLA 1986)

Effect of amendments. — The 1986 amendment added subsection (c).

Opinions of attorney general. — Alaska's fish and game laws are applicable as federal law on military reservations. 1964 Op. Att'y Gen. No. 2.

Hunting or fishing on a military reservation must be in accord with Alaska laws regulating seasons, bag limits, methods of taking, etc., but military personnel are not required to comply with licensing requirements while on reservation. 1964 Op. Att'y Gen. No. 2.

Since AS 16.05.940(14) does not grant special resident privileges to military personnel, which is a requisite for requiring them to purchase licenses for use on military reservations under 10 U.S.C. 2671(a)(2), they cannot be required to do so. 1964 Op. Att'y Gen. No. 2.

Construing this section and AS 16.05.340 against federal law (10 U.S.C. § 2671(a)), a member of the military who does not qualify as a resident under AS 16.05.940(20) is not required to obtain an Alaska trapping license to trap on military lands. 1977 Op. Att'y Gen. No. 21.

NOTES TO DECISIONS

Applied in State v. Greybill, Sup. Ct. Op. No. 2906 (File No. S-172), 695 P.2d 725 (1985).

Collateral references. — 35 Am. Jur. 2d, Fish & Game, § 46.

38 C.J.S., Game, § 15.

Applicability of state fishing license laws or other public regulations to fishing in private lake or pond. 15 ALR2d 754.

Right to kill game in defense of person or property. 93 ALR2d 1366.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR4th 1030.

Sec. 16.05.331. Elk farming. (a) Elk may be raised and bred as domestic stock for commercial purposes, including the sale of meat, by a person who lawfully owns the elk and who holds a current valid game mammal farming license.

(b) The department may issue a game mammal farming license for the farming of elk to a person who applies on a form provided by the department, pays the fee established under AS 16.05.340, and who proves to the satisfaction of the department that the person

(1) intends to raise and breed elk; and

(2) possesses facilities for maintaining the elk under positive control.

(c) Notwithstanding other provisions of law, a license or permit from the department, other than a game mammal farming license, is not required in order to import, export, or possess elk for the purpose of elk farming. A live elk may not be captured from the wild or released into the wild without an appropriate license or permit from the department.

killed a deer in a closed area, had prior convictions for having a loaded gun within the city and reckless driving which resulted from his apparent efforts to run down a dog with his car, revealing an antisocial nature warranting more than the minimum penalties. Gallardo v. State, Sup. Ct. Op. No. 2184 (File No. 4636), 616 P.2d 626 (1980).

Applied in Graybill v. State, Sup. Ct. Op. No. 1214 (File No. 2388), 545 P.2d 629 (1976); Jordan v. State, Ct. App. Op. No. 360 (File No. 7782), 681 P.2d 346 (1984).

Stated in Nelson v. State, Sup. Ct. Op. No. 180 (File No. 383), 387 P.2d 933 (1964).

Cited in Schnabel v. State, Ct. App. Op. No. 280 (File No. 7273), 663 P.2d 960 (1983); Brown v. State, Ct. App. Op. No. 421 (File Nos. 7658, 7659), 693 P.2d 324 (1984).

Sec. 16.05.912. Personnel and equipment used in exploration work. Alaska residents and equipment shall be given preference in exploration work to be done by the department. (§ 1 ch 98 SLA 1969)

Sec. 16.05.903. Big game photography contest. [Repealed, § 29 ch 132 SLA 1984.]

Article 7. General Provisions.

Section
905. Alien activities prohibited
910. Penalty
920. Certain acts made unlawful
925. Penalty for violations

Section
930. Exempted activities
940. Definitions
950. Title of the chapter

Sec. 16.05.905. Alien activities prohibited. Alien persons not lawfully admitted to the United States are prohibited from engaging in commercial fishing activities or taking marine mammals in the territorial waters of the State of Alaska as they presently exist or may be extended in the future. (§ 1 ch 85 SLA 1964)

Collateral references. — 35 Am. Jur. 2d, Fish & Game, §§ 34, 35.
36A C.J.S., Fish, § 20.

Sec. 16.05.910. Penalty. Any alien person who violates AS 16.05.905 is guilty of a misdemeanor, and upon conviction is punishable by a confiscation and forfeiture of the fishing vessel used in such violation, or by imprisonment of any such person for not more than one year, or by fine of not more than $10,000, or by all or any two of the foregoing punishments. (§ 2 ch 85 SLA 1964)

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by AS 16.05 — AS 16.40 or by regulation adopted under AS 16.05 — AS 16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

(b) A person may not knowingly disturb, injure, or destroy a notice, signboard, seal, tag, aircraft, boat, vessel, automobile, paraphernalia, equipment, building or other improvement or property of the department used in the administration or enforcement of this title except AS 16.51 and AS 16.52, or a poster or notice to the public concerning the provisions of this title except AS 16.51 and AS 16.52, or a regulation adopted under this title except AS 16.51 and AS 16.52, or a marker indicating the boundary of an area closed to hunting, trapping, fishing or other special use under this title except AS 16.51 and AS 16.52. A person may not knowingly destroy, remove, tamper with, or imitate a seal or tag issued or used by the department or attached under its authority to a skin, portion, or specimen of fish or game, or other article for the purpose of identification or authentication in accordance with this title except AS 16.51 and AS 16.52 or a regulation adopted under this title except AS 16.51 and AS 16.52.

(c) A person may not import, possess, transport or release in the state live venomous reptiles, live venomous reptile eggs, live venomous insects, or live venomous insect eggs, except in accordance with the terms of a permit issued under (d) of this section. This prohibition does not apply to bees as defined in AS 03.47.040. A person who violates this subsection is guilty of a misdemeanor and may be cited as set out in AS 16.05.165.

(d) A permit required under (c) of this section may be granted only if, in the determination of the commissioner, the applicant demonstrates a valid educational purpose for seeking the permit. A valid educational purpose includes display in educational institutions and in zoos. (§ 28 art I ch 94 SLA 1959; am § 3 ch 110 SLA 1970; am §§ 20, 21 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "AS 16.05 — AS 16.40" for "this chapter" in two places in subsection (a) and "this title except AS 16.51 and AS 16.52" for "this chapter" throughout subsection (b) and added subsections (c) and (d). The amendment also made a minor punctuation insertion in subsection (a) and a minor word insertion in the first sentence of subsection (b).

Opinions of attorney general. — Permitting authority over live game, that is, nondomestic animals, rests with the Board of Game as implemented by the Department of Fish and Game. August 29, 1979 Op. Att'y Gen.

Neither the Board of Game nor the Department of Fish and Game has jurisdiction over domestic animals. August 29, 1979 Op. Att'y Gen.

NOTES TO DECISIONS

"Subsistence" defense created where no regulations adopted under former AS 16.05.255(b) held contrary to mandate of subsection (a). — A "subsistence" defense created by the state court of appeals to "remedy" the Board of Game's failure to adopt separate subsistence regulations under former AS 16.05.255(b) contradicted the legislative subsection (a) of this section. State v. Eluska, Sup. Ct. Op. No. 3106 (File No. S-991), 724 P.2d 514 (1986).

State may regulate extraterritorial fishing. — Paramount rights in the seabed and subsoil beyond the three-mile limit were vested in the federal government. However, that principle of federal exclusivity does not preclude state regula

tion of fishery resources in the waters over that seabed. State v. Sieminski, Sup. Ct. Op. No. 1339 (File No. 2544), 556 P.2d 929 (1976).

Enforcement of the state's regulatory scheme in a case involving scallop fishing activities in extraterritorial waters was within the sphere of the state's prerogative to regulate extraterritorial fishing. State v. Sieminski, Sup. Ct. Op. No. 1339 (File No. 2544), 556 P.2d 929 (1976).

As to constraints on state regulation of extraterritorial fishing efforts, see State v. Sieminski, Sup. Ct. Op. No. 1339 (File No. 2544), 556 P.2d 929 (1976).

Citing this section in an information instead of former AS 16.05.260 was not reversible error. — See Theodore v. State, Sup. Ct. Op. No. 306 (File No. 660), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1570, 16 L. Ed. 2d 547 (1966).

Applied in Bielo v. State, Sup. Ct. Op. No. 87 (File No. 152), 371 P.2d 811 (1962); Graybill v. State, Sup. Ct. Op. No. 1046 (File No. 1919), 522 P.2d 539 (1974); State v. Bundrant, Sup. Ct. Op. No. 1232 (File Nos. 2298, 2438, 2444), 546 P.2d 530 (Alaska), 547 P.2d 838 (Alaska 1976); Graybill v. State, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976); Schuster v. State, Sup. Ct. Op. No. 1305 (File No. 2911), 553 P.2d 925 (1976); Nathensen v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Cited in United States v. Sylvester, 605 F.2d 474 (9th Cir. 1979); Wanner v. State, Sup. Ct. Op. No. 1953 (File No. 3645), 600 P.2d 1359 (1979); Guidry v. State, Sup. Ct. Op. No. 2741 (File No. 6362), 671 P.2d 1277 (1983).

Collateral references. — Possession of game, or of specified hunting equipment, prima facie evidence of violation. 81 ALR2d 1093.

Sec. 16.05.925. Penalty for violations. Except as provided in AS 16.05.430, 16.05.720, 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor. (§ 22 ch 132 SLA 1984; am § 30 ch 14 SLA 1987)

Effect of amendments. — The 1987 amendment substituted "Except as provided in AS 16.05.430, 16.05.720, 16.05.831, and 16.05.860, a" for "A" at the beginning of the section and deleted the last sentence which read "However, a person who violates a regulation adopted under this chapter for the regulation of commercial fisheries is subject to the penalties set out in AS 16.05.720."

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting on game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the department examining the probable environmental impact of the action.

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

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984)

Cross references. — For legislative intent in connection with the enactment of (e) of this section, see § 1, ch. 151, SLA 1978, in the Temporary and Special Acts.

Effect of amendments. — The 1983 amendment added subsection (f).

The 1984 amendment in subsection (e) made a word correction in the first sentence and added the second sentence.

Legislative history reports. — For letter of intent of the House Special Committee on Subsistence in connection with ch. 151, SLA 1978 (HB 960), see 1978 House Journal, p. 1154.

NOTES TO DECISIONS

Quoted in State v. Semaken, Ct. App. Op. No. 107 (File No. 6384), 648 P.2d 114 (1982).

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, 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;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking, and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(11) "fish derby" means a contest in which prizes are awarded for catching fish;

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16.43.990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit

under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

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

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the

state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(25) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(26) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(27) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(28) "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 gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(29) "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;

(30) "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 nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis;

(31) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(32) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(33) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(34) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish

within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959; am § 23 ch 131 SLA 1960; am § 1 ch 160 SLA 1962; am §§ 13, 14 ch 31 SLA 1963; am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970; am § 1 ch 91 SLA 1970; am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972; am § 5 ch 82 SLA 1974; am §§ 26, 82 ch 127 SLA 1974; am §§ 18 — 20 ch 206 SLA 1975; am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978; am § 1 ch 78 SLA 1979; am § 1 ch 24 SLA 1980; § 4 ch 74 SLA 1982; am § 24 ch 132 SLA 1984; am §§ 9 — 11 ch 52 SLA 1986; am § 5 ch 76 SLA 1986)

Revisor's notes. — Reorganized in 1983 and 1984 to alphabetize the defined terms.

Paragraph (12) was enacted as paragraph (28). Renumbered in 1986.

Effect of amendments. — The 1984 amendment substituted "AS 16.05 — AS 16.40" for "this chapter" in the introductory language and paragraphs (14), (16) and (20), in paragraph (9), substituted "invertebrate, or amphibian" for "invertebrates and amphibians" and "its" for "their" preceding "life cycle" and added the language beginning "and includes any part of such aquatic finfish", reworded the contents of paragraph (13), inserted "reptile" near the beginning of paragraph (14), substituted "those chapters" for "it" in paragraph (16), substituted "this paragraph" for "this chapter" in three places in paragraph (19), inserted "of" following "taking" in paragraph (22), deleted "for the purposes of this chapter" preceding "does not include aircraft" in paragraph (27), and repealed paragraph (28), defining "visitor."

The first 1986 amendment in paragraph (28) inserted "by a resident domiciled in a rural area of the state," in paragraph (30) inserted "noncommercial" preceding "customary," deleted "in Alaska" preceding "of wild, renewable," inserted "by a resident domiciled in a rural area of the state," substituted "in" for "for the purposes of" preceding "this paragraph," deleted "all" preceding "persons related," substituted "a" for "any" preceding "person living," and substituted "in" for "within" preceding "the household," and added paragraphs (9), (16), (18), (23), (25), and (29).

The second 1986 amendment added paragraph (12).

Legislative history reports. — For report on ch. 32, SLA 1968 (HCSCSSB 60 am), see 1968 House Journal, p. 160. For report on ch. 127, SLA 1974 (SCSHB 817 am S), see 1974 House Journal, p. 657.

Opinions of attorney general. — Paragraph (14) does not grant special resident privileges to military personnel. 1964 Op. Att'y Gen. No. 2.

Term "customary trade" as used in definition of "subsistence uses" allows for limited exchanges for cash other than for purely personal or family consumption. 1981 Op. Att'y Gen. No. 11.

Definition of "subsistence uses" in terms of "customary and traditional uses" of wild, renewable resources reflects the equating of "subsistence use" with use by rural residents. 1981 Op. Att'y Gen. No. 11.

NOTES TO DECISIONS

For construction of "commercial fisherman" under former law, see Martinsen v. Mullaney, 12 Alaska 455, 85 F. Supp. 76 (D. Alaska 1949).

Regulation held invalid because inconsistent statutory law. — See Madison v. Alaska Dep't of Fish & Game, Sup. Ct. Op. No. 2911 (File Nos. 6824/7181, 7410), 696 P.2d 168 (1985).

Cited in Starry v. Horace Mann Ins. Co., Sup. Ct. Op. No. 2548 (File No. 6472), 649 P.2d 937 (1982); State v. Eluska, Ct. App. Op. No. 456 (File No. A-210), 698 P.2d 174 (1985).

Sec. 16.05.950. Title of the chapter. This chapter may be cited as the Fish and Game Code (§ 1 art I ch 94 SLA 1959)

NOTES TO DECISIONS

Chapter supersedes federal law. — When the various articles of the state law providing for the administration, management and conservation of fish and wildlife became effective, acts of Congress on the same subject were no longer of any force. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup Ct Op No 42 (File Nos 21 – 23), 362 P 2d 901 (1961), vacated and remanded on other grounds, 369 U.S. 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

There is no intimation in the Alaska Statehood Act of an intent that any United States administration under the commercial fishery laws be carried out after the state had been certified as capable of its own management. Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup Ct Op No 42 (File Nos 21 – 23), 362 P 2d 901 (1961), vacated and remanded on other grounds, 369 U.S. 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

Upon Alaska's admission on January 3, 1959, the Alaska game laws and acts regulating commercial fisheries as "territorial laws," continued in force, but were modified by Ordinance No. 3 of the state constitution prohibiting the use of fish traps for the taking of salmon for commercial purposes and by the Alaska Constitution, art. VIII, § 15, providing that "no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state." They were further modified by the enactment by the first state legislature of a law making it unlawful to erect, moor or maintain fish traps (SLA 1959, ch 17), and by a later enactment (SLA 1959, ch 96) making it unlawful to operate fish traps and prescribing penalties therefor. (See AS 16.10.070 – 16.10.110) Metlakatla Indian Community, Annette Island Reserve v. Egan, Sup Ct Op No 42 (File Nos 21 – 23), 362 P 2d 901 (1961), vacated and remanded on other grounds, 369 U.S. 45, 82 S Ct 552, 7 L Ed 2d 562 (1962).

Cited in White v. Alaska Com. Fisheries Entry Comm'n, Sup Ct Op No 2793 (File No 6298), 678 P 2d 1319 (1984).

Chapter 10. Fisheries and Fishing Regulations.

Article
1. Interference with Streams and Waters (§§ 16.10.010 — 16.10.055)
2. Fish Traps and Other Illegal Fishing Devices (§§ 16.10.070 — 16.10.130)
3. Herring Spawn (§§ 16.10.172 — 16.10.175)
4. Migratory Fish and Shellfish (§§ 16.10.180 — 16.10.230)
5. Transportation of Fish and Shellfish (§§ 16.10.240 — 16.10.250)
6. Purchase of Fish (§§ 16.10.265 — 16.10.290)
7. Commercial Fishing Loan Act (§§ 16.10.300 — 16.10.370)
8. Salmon Hatcheries (§§ 16.10.375 — 16.10.476)
9. Fisheries Enhancement Loan Program (§§ 16.10.500 — 16.10.620)

NOTES TO DECISIONS

Cited in State, N.S.E. Regional Aquaculture Ass'n v. Alex, Sup Ct Op No 2488 (File Nos 5065, 5086, 5142), 646 P 2d 203 (1982).

Collateral references. — 36A C.J.S., Fish, § 13 et seq.

Article 1. Interference with Streams and Waters.

Section
10. Interference with salmon spawning streams and waters
20. Grounds for permit or license
30. Violation of AS 16.10.010 — 16.10.055
40. Disposition of money received for fines and penalties
50. Construction of AS 16.10.010 — 16.10.050
55. Interference with commercial fishing gear

Sec. 16.10.010. Interference with salmon spawning streams and waters. A person may not

(1) obstruct, divert or pollute waters of the state, either fresh or salt, utilized by salmon in the propagation of the species, by felling trees or timber in those waters, casting, passing, throwing or dumping any tree limbs or foliage, underbrush, stumps, rubbish, earth, stones, rock or other debris, or passing or dumping sawdust, planer shavings, or other waste or refuse of any kind in those waters;

(2) erect a dam, barricade or obstruction to retard, conserve, impound or divert these waters to prevent, retard or interfere with the free ingress or egress of salmon into these waters in the natural spawning or propagation process;

(3) render the waters inaccessible or uninhabitable for salmon for that purpose without first applying for and obtaining a permit or license from the Department of Environmental Conservation. The application shall set out the name and style of the person or concern, describe the waters and location, and state in particular the plans, purpose and intention for which the application is made. (§ 39-2-31 ACLA 1949; am § 12 ch 117 SLA 1949; am § 6 ch 104 SLA 1971; am § 12 ch 208 SLA 1975)

Opinions of attorney general. — There is no conflict between AS 16.05.870 and this section. March 4, 1982 Op. Att'y Gen.

Collateral references. — 35 Am Jur 2d, Fish and Game, §§ 29-37.
36A C.J.S., Fish, §§ 6-46.

Sec. 16.10.020. Grounds for permit or license. If in the judgment of the Department of Environmental Conservation, the purpose of the applicant for the permit or license is to develop power, obtain water for civic, domestic, irrigation, manufacturing, mining or other purposes tending to develop the natural resources of the state, the department may grant the permit or license and may require the applicant to construct and maintain adequate fish ladders, fishways or other means by which fish may pass over, around or through the dam, obstruction or diversion in the pursuit of the propagation or spawning process. (§ 39-2-32 ACLA 1949; am § 12 ch 117 SLA 1949; am § 6 ch 104 SLA 1971; am § 5 ch 21 SLA 1985)

Sec. 16.10.342. Special account established. (a) There is established as a special account within the commercial fishing revolving loan fund the foreclosure expense account.

(b) [Repealed, § 72 ch 113 SLA 1982.]

(c) The commissioner may expend money credited to the foreclosure expense account when necessary to protect the state's security interest in collateral on loans granted under AS 16.10.300 — 16.10.370 or to defray expenses incurred during foreclosure proceedings after a default by an obligor. (§ 4 ch 83 SLA 1978; am § 72 ch 113 SLA 1982)

Sec. 16.10.350. Administration of fund. The commissioner shall administer the loan fund. (§ 1 ch 134 SLA 1972)

Sec. 16.10.355. Disposal of property acquired by default or foreclosure. The department shall dispose of property acquired through default or foreclosure of a loan made under AS 16.10.300 — 16.10.370 or former AS 16.10.650 — 16.10.720. Disposal shall be made in a manner that serves the best interests of the state, and may include the amortization of payments over a period of years, but may not be by lease. (§ 11 ch 79 SLA 1985)

Sec. 16.10.360. Definitions. In AS 16.10.300 — 16.10.370

(1) "commission" means the Alaska Commercial Fisheries Entry Commission;

(2) "commissioner" means the commissioner of commerce and economic development;

(3) "debtor" means an individual commercial fisherman who either initially contracts for a loan under AS 16.10.333 — 16.10.337 or assumes a loan as provided in those sections;

(4) "department" means the Department of Commerce and Economic Development. (§ 1 ch 134 SLA 1972; am § 5 ch 83 SLA 1978)

Revisor's notes. — Reorganized in 1983 to alphabetize the defined terms.

Cross references. — For further definitions, see AS 16.05.940.

Sec. 16.10.370. Short title. AS 16.10.300 — 16.10.370 may be cited as the Commercial Fishing Loan Act. (§ 1 ch 134 SLA 1972)

Article 8. Salmon Hatcheries.

Section
375 Regional salmon plan
380 Regional associations
400 Permits for salmon hatcheries
410 Hearings before permit issuance
420 Conditions of a permit
430 Alteration, suspension or revocation of permit
440 Regulation
443 Department assistance and cooperation
445 Egg sources
450 Sale of salmon and salmon eggs by hatchery
460 Inspection of hatchery
470 Annual report

Cross references. — For legislative findings and purpose of AS 16.10.375 — 16.10.620, see § 1, ch 59 SLA 1979 in the 1979 Temporary and Special Acts and Resolves.

Sec. 16.10.375. Regional salmon plan. The commissioner shall designate regions of the state for the purpose of salmon production and have developed and amend as necessary a comprehensive salmon plan for each region, including provisions for both public and private nonprofit hatchery systems. Subject to plan approval by the commissioner, comprehensive salmon plans shall be developed by regional planning teams consisting of department personnel and representatives of the appropriate qualified regional associations formed under AS 16.10.380. (§ 2 ch 161 SLA 1976; am § 2 ch 154 SLA 1977)

Sec. 16.10.380. Regional associations. (a) The commissioner shall assist in and encourage the formation of qualified regional associations for the purpose of enhancing salmon production. A regional association is qualified if the commissioner determines that

(1) it is comprised of associations representative of commercial fishermen in the region;

(2) it includes representatives of other user groups interested in fisheries within the region who wish to belong; and

(3) it possesses a board of directors which includes no less than one representative of each user group that belongs to the association.

(b) In this section "user group" includes, but is not limited to, sport fishermen, processors, commercial fishermen, subsistence fishermen, and representatives of local communities.

(c) A qualified regional association, when it becomes a nonprofit corporation under AS 10.20, is established as a service area in the unorganized borough under AS 29.03.020 for the purpose of providing salmon enhancement services. (§ 2 ch 161 SLA 1976; am § 2 ch 59 SLA 1979)

NOTES TO DECISIONS

Cited in State, N.S.E. Regional Aquaculture Ass'n v. Alex, Sup. Ct. Op. No. 2488 (File Nos. 5065, 5086, 5142), 646 P.2d 203 (1982).

Sec. 16.10.400. Permits for salmon hatcheries. (a) The commissioner or a designee may issue a permit, subject to the restrictions imposed by statute or regulation under AS 16.10.400 — 16.10.470, to a nonprofit corporation organized under AS 10.20, after the permit application has been reviewed by the regional planning team, for the construction and operation of a salmon hatchery.

the association has, by resolution, declared there is a need for the authority to function, given it the authority to function and appointed persons to serve as the board of commissioners of the authority. The number of members of the board of commissioners, their terms of office and the filling of vacancies in office shall be determined by resolution of the governing body of the association.

(c) The regional salmon enhancement authority has jurisdiction to operate in all or part of the operating area of the individual association as determined by resolution of the governing body of the association. (§ 17 ch 154 SLA 1977)

Sec. 16.10.610. Tax exemption. (a) A salmon enhancement authority is exempt from payment of taxes or assessments for a period of 20 years from June 24, 1977 on property owned by the authority which is used for salmon enhancement purposes.

(b) All obligations or liabilities of a regional salmon enhancement authority remain its own and are not obligations or liabilities of the state. (§ 17 ch 154 SLA 1977)

Sec. 16.10.620. Powers of the authority. A salmon enhancement authority has the general power to

(1) adopt, alter and use a corporate seal;

(2) prescribe, adopt, amend and repeal bylaws,

(3) sue and be sued in its own name;

(4) appoint officers, agents and employees and vest them with powers and duties and to fix, change and pay compensation for their services as the authority may determine;

(5) borrow money, make and issue notes and other evidences of indebtedness of the authority for any of its corporate purposes and to secure payment of its obligations by pledge of or lien on all or any of its assets, contracts, revenue and income;

(6) make and execute agreements, contracts and other instruments necessary or convenient in the exercise of its powers and functions, including contracts with any person, firm, corporation, government agency or other entity;

(7) receive, administer and comply with the conditions and requirements of an appropriation, gift, grant or donation of property or money,

(8) invest or reinvest money or funds held by the authority in obligations or other securities or investments in which banks or trust companies in the state may legally invest funds held in reserves or sinking funds or funds not required for immediate disbursement, and in certificates of deposits or time deposits,

(9) acquire, hold, use, lease, sell or otherwise dispose of property of any kind, real, personal or mixed or any interest in it,

(10) do all acts and things necessary, convenient or desirable to carry out the powers granted or implied in AS 16.10.600 — 16.10.620;

(11) adopt, amend and repeal regulations necessary. (§ 17 ch 154 SLA 1977)

Secs. 16.10.650 — 16.10.720. Fishermen's mortgage and note program. [Repealed, § 72 ch 113 SLA 1982.]

Chapter 15. Fisheries Experimental Laboratory.

[Repealed, § 29 ch 132 SLA 1984.]

Chapter 20. Conservation and Protection of Alaskan Wildlife.

Article
1. State Game Refuges (§§ 16.20.010 — 16.20.080)
2. Walrus Islands State Game Sanctuary (§§ 16.20.090 — 16.20.140)
3. McNeil River State Game Sanctuary (§§ 16.20.160 — 16.20.170)
4. Endangered Species (§§ 16.20.180 — 16.20.210)
5. State Range Areas (§§ 16.20.300 — 16.20.360)
6. Fish and Game Critical Habitat Areas (§§ 16.20.500 — 16.20.690)

Article 1. State Game Refuges.

Section
10. Legislative recognition
20. Purpose
30. Refuges established
32. Palmer Hay Flats State Game Refuge
34. Mendenhall Wetlands State Game Refuge
36. Susitna Flats State Game Refuge
38. Trading Bay State Game Refuge
39. Creamer's Field Migratory Waterfowl Refuge
40. Regulations
50. Multiple land use
60. Submission of plans and specifications
70. Relationship to other laws
80. Definitions

Opinions of attorney general. — For a discussion of the authority of the Department of Natural Resources and the Department of Fish and Game, see November 8, 1985 Op. Att'y Gen.

Sec. 16.20.010. Legislative recognition. The legislature recognizes that

(1) the state has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control;

(2) the state has not assented to federal control of fish and game in those areas which were set apart as National Bird and Wildlife Refuges while the state was a United States territory;

Sec. 16.20.090. Legislative findings. The legislature recognizes that

(1) the Walrus Islands are the sole remaining place in the state where walruses annually haul out on land and all similar "hauling grounds" in the state which were formerly utilized have been abandoned by walruses due to excessive molestation and slaughter;

(2) the Walrus Islands are uninhabited, and the walruses frequenting them are not required by the state for subsistence utilization;

(3) the Walrus Islands have great importance as a retreat for the Pacific walrus from the standpoints of conservation, scientific value, and tourist interest;

(4) the Department of Natural Resources has taken appropriate action to achieve transfer of title in the Walrus Islands to the state. (§ 1 ch 115 SLA 1960)

Sec. 16.20.100. Purpose. The purpose of AS 16.20.090 — 16.20.140 is to protect the walruses and other game on the Walrus Islands. (§ 1 ch 115 SLA 1960)

Sec. 16.20.110. Sanctuary established. The following land areas in Bristol Bay and adjacent state waters are established as a state game sanctuary to be known as the Walrus Islands State Game Sanctuary:

(1) Round Island;
(2) Crooked Island;
(3) High Island;
(4) Summit Island;
(5) The Twins;
(6) Black Rock. (§ 2 ch 115 SLA 1960)

Sec. 16.20.120. Authority to administer. The boards may adopt regulations governing entry, development, construction, hunting, fishing, and all other uses or activities not in conflict with AS 16.20.130 and 16.20.140 for the purpose of preserving the natural habitat and the fish and game of the Walrus Islands State Game Sanctuary. (§ 3 ch 115 SLA 1960; am § 26 ch 206 SLA 1975)

Sec. 16.20.130. Multiple use. Oil and mineral exploration and development is permitted on the Walrus Islands State Game Sanctuary in accordance with state or federal laws and regulations, subject to the limitations of AS 16.20.140 and to additional limitations jointly determined by the commissioner of natural resources and the commissioner of fish and game to assure compatible multiple land use practices. (§ 4 ch 115 SLA 1960)

Sec. 16.20.140. Sale and lease. Land in the Walrus Islands State Game Sanctuary may not be sold. It may be leased only as mineral land as authorized in regulations of the Department of Natural Resources. (§ 5 ch 115 SLA 1960)

Article 3. McNeil River State Game Sanctuary.

Section
160. Sanctuary established
170. Applicability of other laws

Sec. 16.20.160. Sanctuary established. The following described area and adjacent state waters are established as a state game sanctuary to be known as the McNeil River State Game Sanctuary:

Beginning at the NE corner of Section 13, T 12 S R 30 W, S M, westerly along the section lines to the NW corner of Section 18, T 12 S R 30 W, S M, thence southerly along the township boundary to the SW corner of T 12 S R 30 W, S M, thence westerly along the north boundary of T 13 S R 31 W, S M, to the NW corner of T 13 S R 31 W, S M, thence westerly along the north boundary of T 13 S R 32 W, S M, to the NW corner of T 13 S R 32 W, S M, thence southerly along the west boundary of T 13 S R 32 W, S M, to the SW corner of T 13 S R 32 W, S M, thence southerly along the west boundary of T 14 S R 32 W, S M, to the SW corner of Section 30, T 14 S R 32 W, S M, thence easterly along the section lines to the SE corner of Section 27, T 14 S R 32 W, S M, thence northerly along the section lines to the NE corner of Section 15, T 14 S R 32 W, S M, thence easterly along the section lines to the east boundary of T 14 S R 32 W, S M, thence northerly along the east boundary of T 14 S R 32 W, S M, to the NE corner of T 14 S R 32 W, S M, thence easterly along the south boundary of T 13 S R 31 W, S M, to the SE corner of T 13 S R 31 W, S M, thence northerly along the east boundary of T 13 S R 31 W, S M, to the NE corner of Section 24, T 13 S R 31 W, S M, thence easterly along the section lines to the SE corner of Section 16, T 13 S R 30 W, S M, thence northerly along the section lines to the NE corner of Section 4, T 13 S R 30 W, S M, thence easterly along the south boundary of T 12 S R 30 W, S M, to the SE corner of T 12 S R 30 W, S M, thence easterly along the south boundary of T 12 S R 29 W, S M, to the shoreline of Horseshoe Cove located in Section 32, T 12 S R 29 W, S M, thence northerly, westerly, and northerly along the line of mean high tide to the point of beginning. (§ 2 ch 108 SLA 1967; am § 15 ch 71 SLA 1972)

Editor's notes. — Section 1, ch 108, SLA 1967, provides "PURPOSE. The legislature intends in this Act to provide for the permanent protection of brown bear and other wildlife population and their vital habitat in the area of the McNeil River so that these resources may be preserved for scientific, esthetic and educational purposes."

Legislative history reports. — For report on ch. 71, SLA 1972 (HCSSB 383 am H), see 1972 House Journal, p. 880.

Chapter 35. Predatory Animals.

Section
200. Use of poison by departments and other state agencies

Secs. 16.35.010 — 16.35.180. Employment of hunters and trappers to suppress predatory animals, bounties on wolverines, wolves, coyotes, and hair seals. [Repealed, § 29 ch 132 SLA 1984.]

Sec. 16.35.200. Use of poison by departments and other state agencies. A department, other state agency or person may not use poison to kill predatory animals without first obtaining the written consent of the appropriate board. (§ 1 ch 19 SLA 1968; am § 29 ch 206 SLA 1975)

Chapter 40. Commercial Use of Fish and Game.

Section
10. Disposition of surplus buffalo and musk oxen
Section
20. Sale of meat
30. Information required

Cross references. — For definitions applicable to this chapter, see AS 16.05.940.

Sec. 16.40.010. Disposition of surplus buffalo and musk oxen. Whenever it is determined by the department that a surplus exists in the herds of buffalo and musk oxen under its control, the department may, under regulations adopted by it, grant the surplus or portions of it to persons, groups, associations, partnerships, or corporations for the purpose of raising and breeding the animals as domestic stock for commercial purposes, or for scientific and educational purposes. A person, group, association, partnership, or corporation may receive animals only after proving to the satisfaction of the department

(1) intent to raise and breed the animals, and

(2) possession of facilities for maintaining the animals under positive control. (§ 1 ch 15 SLA 1962)

Collateral references. — 35 Am. Jur. 2d, Fish and Game, § 50.

Sec. 16.40.020. Sale of meat. The sale of buffalo or musk oxen meat resulting from the slaughter of animals obtained under AS 16.40.010, or their offspring is authorized. (§ 2 ch 15 SLA 1962)

Sec. 16.40.030. Information required. The recipient of animals obtained under AS 16.40.010 shall furnish the department the information the department requests regarding the status of the animals or their offspring. (§ 3 ch 15 SLA 1962)

Collateral references. — 36 C.J.S., Fish, § 13 et seq.

Chapter 43. Regulation of Entry into Alaska Commercial Fisheries.

Article
1. Alaska Commercial Fisheries Entry Commission (§§ 16.43.010 — 16.43.120)
2. Entry Permit System (§§ 16.43.140 — 16.43.180)
3. Initial Issuance of Entry Permits (§§ 16.43.200 — 16.43.270)
4. Reduction to Optimum Number of Entry Permits (§§ 16.43.290 — 16.43.330)
5. Educational Entry Permits (§§ 16.43.340 — 16.43.380)
6. Special Harvest Area Entry Permits (§§ 16.43.400 — 16.43.460)
7. General Provisions (§§ 16.43.960 — 16.43.990)

Legislative history reports. — For House Resources Committee report in connection with ch. 79, SLA 1973 (SCS CSHB 126 am S), see 1973 House Journal, p. 603; for Senate Special Committee on Fisheries letter of intent, see 1973 Senate Journal Supplement No. 15.

NOTES TO DECISIONS

Constitutionality. — The entry restrictions of the Limited Entry Act violate neither § 3, art. VIII, nor § 1, art. I, of the state constitution. State v. Ostrosky, Sup. Ct. Op. No. 2702 (File Nos. 6336, 6373), 667 P.2d 1184 (1983), appeal dismissed, 467 U.S. 1201, 104 S. Ct. 2379, 81 L. Ed. 2d 339 (1984).

Adjudicatory reopenings of commission decisions. — Correction of administrative errors cannot be construed to allow an adjudicatory reopening of a commercial fisheries entry commission decision after the time limit for reconsideration, which is a reevaluation of the merits of an adjudicatory decision by the same agency, has expired in the absence of a finding of inadvertent mistake or other special circumstances. Moore v. State, Com. Fisheries Entry Comm'n, Sup. Ct. Op. No. 2870 (File No. 7836), 688 P.2d 602 (1984).

Cited in State, N.S.F. Regional Aquaculture Ass'n v. Alas., Sup. Ct. Op. No. 2480 (File Nos. 6065, 6086, 6142), 646 P.2d 203 (1982); Ross v. Commercial Fisheries Entry Comm'n, Sup. Ct. Op. No. 2516 (File No. 6361), 647 P.2d 164 (1982); Johns v. Commercial Fisheries Entry Comm'n, Sup. Ct. Op. No. 2834 (File No. 139), 699 P.2d 334 (1985).

Collateral references. — 36A C.J.S., Fish, § 13 et seq.

AN ACT

Relating to the taking of fish and game for subsistance and personal use; and providing for an effective date.

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* Section 1. AS 16.05.251(a)(6) is amended to read:

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

* Sec. 2. AS 16.05.251(a) is amended by adding a new paragraph to read:

(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries.

* Sec. 3. AS 16.05.251 is amended by adding new subsections to read:

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include factors such as

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

(2) the number of residents and nonresidents who have

1 participated in each fishery in the past and the number of residents
2 and nonresidents who can reasonably be expected to participate in the
3 future;

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

6 (4) the availability of alternative fisheries resources;

7 (5) the importance of each fishery to the economy of the
8 state;

9 (6) the importance of each fishery to the economy of the
10 region and local area in which the fishery is located;

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

13 * Sec. 4. AS 16.05.255(a) is amended by adding a new paragraph to read:

14 (10) regulating sport hunting and subsistence hunting as
15 needed for the conservation, development, and utilization of game.

16 * Sec. 5. AS 16.05.255 is amended by adding a new subsection to read:

17 (d) Regulations adopted under (a) of this section shall provide
18 that, consistent with the provisions of AS 16.05.258, the taking of
19 moose, deer, elk, and caribou by residents for personal or family
20 consumption has preference over taking by nonresidents.

21 * Sec. 6. AS 16.05 is amended by adding new sections to read:

22 Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME.
23 (a) The Board of Fisheries and the Board of Game shall identify the
24 fish stocks and game populations, or portions of stocks and popu-
25 lations, that are customarily and traditionally used for subsistence
26 in each rural area identified by the boards.

27 (b) The boards shall determine

28 (1) what portion, if any, of the stocks and populations
29 identified under (a) of this section can be harvested consistent with

sustained yield; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the 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, 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

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not identified under (a)

of this section may be taken only under nonsubsistence regulations.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

* Sec. 7. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.261. NO SUBSISTENCE DEFENSE. In a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.

* Sec. 8. AS 16.05.330 is amended by adding a new subsection to read:

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users.

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

(22) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources <u>by a resident domiciled in a rural area of the state</u> for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

* Sec. 10. AS 16.05.940(23) is amended to read:

(23) "subsistence uses" means the <u>noncommercial,</u> customary and traditional uses [IN ALASKA] of wild, renewable resources <u>by a resident domiciled in a rural area of the state</u> for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of

nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in [FOR THE PURPOSES OF] this paragraph, "family" means [ALL] persons related by blood, marriage, or adoption, and a [ANY] person living in [WITHIN] the household on a permanent basis;

* Sec. 11. AS 16.05.940 is amended by adding new paragraphs to read:

(28) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

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

(30) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(31) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(32) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(33) "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. 12. AS 16.05.251(b), 16.05.255(b), and 16.05.257 are repealed.

Chapter 52

* Sec. 13. This Act takes effect June 1, 1986.

ALASKA NATIVE LAW SECTION

1990 SUBSISTENCE UPDATE

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THE LEGAL CONTEXT

I. FEDERAL REGULATION OF NATIVE HUNTING AND FISHING RIGHTS

Federal efforts to regulate Alaska Native hunting and fishing rights can be placed in one of two categories: international treaties governing wildlife resources; and preemptive statutory regulations governing those resources.

A. International Treaties

The United States has adopted a number of treaties whose purposes are to protect migratory wildlife. Some of these enactments have provisions which control the hunting and fishing rights of Alaska Natives. The most important are as follows:

1. Migratory Bird Treaties

The United States government is presently signatory to four migratory bird treaties. Those are the British/Canadian Treaty (Art. II, Treaty of December 7, 1916, 39 Stat. 1702, TS 628); the Mexican Treaty (Art. II(c) and (d), Treaty of March 15, 1937, 50 Stat. 1311, TS 912); the Japanese Treaty (Art. III (1)(3), Treaty of Sept. 19, 1974, 25 UST 3329, TIAS 7990); and the Soviet Treaty (Art. III(c), Treaty of Oct. 13, 1978, 29 UST 4647, TIAS 9073). Because of rapid and substantial policy changes, the treaties are often inconsistent with respect to the provisions relating to the hunting and fishing rights of Alaskan Natives. Generally speaking, the British/Canadian and Mexican treaties prohibit Alaskan Natives from hunting migratory game birds; the Japanese treaty permits Eskimos and Indians to hunt for their own food and clothing; and the Soviet treaty, the most liberal of all, permits Alaskan Natives to hunt for their own nutritional and essential needs. *Id.*

2. The Fur Seal Convention

This convention, signed in 1957 by the United States, Japan, the Soviet Union, and Canada, prohibits open-sea hunting of North Pacific fur seals and establishes a harvesting and profit-sharing arrangement between the four nations. Interim Convention on Conservation of North Pacific Fur Seals, Oct. 14, 1957. This "interim" treaty, repeatedly extended, has received notoriety because it is the source of the government's involvement in the Pribilof Island seal harvest.

3. International Whaling Convention

The convention establishes the International Whaling Commission (IWC) and empowers it to regulate the taking of whales. Convention for the Regulation of

Whaling, entered into force November 10, 1948 (62 Stat. 1716; TIAS 1849); amended effective May 4, 1959 (10 UST 952; TIAS 4228). In 1977, the IWC placed an absolute ban on the taking of bowhead whales, an endangered species. Responding to the ban, Inupiat Eskimos managed, through litigation and political maneuvering, to convince the IWC to replace the 1977 ban with a limited bowhead harvest quota for Alaskan Natives.

Pursuant to the revised regulation, whaling by Alaskan Natives is now governed by the Alaska Eskimo Whaling Commission. This body was formed with the support of the North Slope Borough and represents each of the nine affected whaling villages -- Wales, Kivalina, Point Hope, Wainwright, Barrow, Nuiqsut, Kaktovik, Gambell, and Savoonga.

4. The Polar Bear Convention

The Polar Bear Convention was signed by the United States, Canada, Denmark, Norway, and the Soviet Union. Convention for the Conservation of Polar Bears, entered into force Nov. 1, 1976 (27 UST 3918; TIAS 8409). It generally prohibits the taking of polar bears but permits Alaskan Natives to take some of the animals for limited purposes.

B. Pre-emptive Statutes

A second major set of federal statutes are those which pre-empt the State of Alaska from regulating specific species of fish and wildlife. Four major statutes fit this category: the Reindeer Industry Act of 1937; the Marine Mammal Protection Act of 1972; the Endangered Species Act of 1973; and the Alaska National Interest Lands Conservation Act (ANILCA) of 1980.

1. The Reindeer Industry Act

The Reindeer Industry Act, passed in 1937, directed the Secretary of the Interior to acquire non-Native-owned deer, to distribute them to Natives, and to prevent future alienation of deer to non-Natives. Act of September 1, 1937, 50 Stat. 900 (25 U.S.C.A. §§ 500 *et seq.*). It also established a revolving loan fund to finance the reindeer business and permitted the Secretary of the Interior to delegate the running of the program to Native organizations. The purpose of the statute was to establish a reindeer herding industry under Native control.

2. The Endangered Species Act

The Endangered Species Act (ESA) was enacted in 1973. Act of Oct. 21, 1972, 86 Stat. 1027, Pub. L. No. 92-522, as amended (16 U.S.C.A. §§ 1531 *et seq.*). It directs the Secretaries of Interior, Commerce, and Agriculture to determine what

species are "endangered" or "threatened." It then directs the Secretaries to take appropriate action to remedy the situation.

The Act, which pre-empts any inconsistent state law, contains a subsistence exception. Under this exception, Native as well as non-Native subsistence uses by rural Alaskan residents are not subject to the ESA. The exception permits takings primarily for subsistence purposes and includes a provision for the non-wasteful sale of authentic Native articles, handicrafts, or clothing.

3. The Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) was passed in 1972. Act of Dec. 28, 1973, 87 Stat. 885, Pub. L. No. 93-205, as amended (16 U.S.C.A. §§ 1531 *et seq.*). Although prohibiting the taking or importing of all marine mammals, the Act does contain a somewhat broad exception for Alaskan Native subsistence uses. As amended in 1981, the MMPA permits Alaskan Natives who dwell on the coast of the North Pacific Ocean or the Arctic Ocean to take marine mammals for non-wasteful subsistence purposes, including the creation of authentic Native handicrafts or clothing.

As amended in 1981, the Act also prohibits enforcement of all state laws relating to the taking of marine mammals but requires that the federal government transfer enforcement back to states meeting certain enforcement requirements. This exception specifically requires the State of Alaska to incorporate detailed marine mammal subsistence protections into its fish and game statutes and regulations as a prerequisite for return of jurisdiction over the regulation of the taking of marine mammals. Of some interest here is that the statute indicates that should the State of Alaska resume jurisdiction over marine mammals, the subsistence exception enforcement currently limited by federal law to Native Alaskans would be broadened to include all rural Alaska residents.

4. Title VIII of the Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act (ANILCA) is perhaps best known for its massive land withdrawals and the creation of an integrated set of national parks and wildlife refuges. Act of Dec. 2, 1980, 94 Stat. 2371, 2422. Less well known, but perhaps of more immediate importance to Alaskan Natives, is Title VIII of that Act. Pub. L. No. 96-487 (16 U.S.C.A. §§ 3111 *et seq.*). This title provides significant protections for the subsistence rights of rural Alaskan Natives. It also protects subsistence uses of non-Natives who live in rural areas.

By its terms, Title VIII is intended to carry out the subsistence-related policies and to fulfill the purposes of the Alaska Native Claims Settlement Act. It is in many senses a "settlement" of the Alaskan Native aboriginal hunting and fishing claims

which were extinguished by that Act. Yet, unlike many such settlements, Title VIII does not afford Alaskan Natives off-reservation or other exclusive rights to hunt and fish. In place of such exclusive rights, Title VIII establishes protections for subsistence uses for rural Alaska residents, Native and non-Native alike.

Title VIII is important for four major reasons. First, it establishes an absolute priority for subsistence uses over all other competing consumptive purposes. Second, it guarantees subsistence users access to fish and game on federal land which would otherwise be closed to hunting and fishing. Third, it requires federal land managers to incorporate subsistence uses in their land use decision process. Fourth, it establishes an administrative structure which could potentially serve to increase the representation of Alaskan Native interests in fish and game management.

Priority

The priority for subsistence uses can be found in Section 804 of Title VIII. 16 U.S.C. § 3114. That section states that "Subsistence uses shall be accorded priority over the taking on such lands [public lands] of fish and wildlife for other purposes." The preference, although absolute, has two important qualifications. It only applies to subsistence uses on federal "public lands" as that term is defined by ANILCA and it does not limit non-subsistence uses in the absence of some need to conserve or preserve the biological resource. *Id.* "Rural Alaska residents" are entitled to the priority when they engage in "customary and traditional" subsistence uses. 16 U.S.C. § 3113. Of course, the continued viability of fish stocks or game populations is of paramount importance under the federal law, and protection of those stocks or populations has in that sense a "priority" even over subsistence uses.

Access

The access guarantee of Title VIII is similarly straightforward. Section 809, 16 U.S.C. § 3119, requires that the United States provide "reasonable access" to resources used for subsistence purposes which are located on public lands. *Id.* This section permits Alaskan Natives to hunt and fish on lands which would otherwise be closed to these activities and may place some restraints on land use decisions by pertinent federal agencies.

Land Use

The provision requiring that land use decisions take into account subsistence uses can be found in Section 810 of ANILCA. 16 U.S.C. § 3120. The section consists of two parts: The first requires studies and evaluations of subsistence uses. The second requires detailed findings which incorporate subsistence uses in land use decisions if the federal agency finds that the land use decisions might "significantly restrict" subsistence uses. *Id.*

Structure

Section 805(a) of ANILCA, 16 U.S.C. § 3105, requires the Secretary of the Interior to establish six subsistence resource regions in the State of Alaska. The Act also specifies that each region must have a regional advisory council as well as subsidiary advisory committees. Under the Act, the councils have the power to review and evaluate the Interior Secretary's (or the State's) subsistence management proposals and to provide forums for interested people to express their opinions and recommendations on any matter related to subsistence.

The councils could play an important role in the management of subsistence resources in Alaska. The Secretary of the Interior is required to assign "adequate qualified staff" to the advisory councils. But more importantly, the Secretary (or the State) is required to accept any council management recommendation unless (1) it is not supported by substantial evidence; (2) it violates recognized principles of fish and wildlife conservation; or (3) it would be detrimental to subsistence needs. 16 U.S.C. § 3115(c).

In addition to these specific protections, Title VIII is also important insofar as it encourages the State of Alaska to incorporate similar values in its fish and wildlife management plans. The real purpose behind Title VIII was to encourage the State to incorporate meaningful local and regional participation in State fish and game board subsistence decisions. This purpose is effectuated by Section 805(d) of ANILCA, 16 U.S.C. § 3115(d). That section permits the State to assume management over fish and wildlife on federal lands if the State, through laws of general applicability, implements the ANILCA subsistence definition[1] and preference. The State accepted this invitation and adopted state laws and regulations of general applicability implementing the pertinent provisions of Title VIII. As a consequence, management of fish and game throughout the State of Alaska was generally placed in the hands of the State.

On December 22, 1989, the Alaska Supreme Court ruled that Art. VIII of the Alaska Constitution prohibits limiting the subsistence preference to residents of rural areas. *See McDowell v. Collinsworth, infra* at p. 23. The effect of the decision has been stayed until July 1, 1990, with respect to existing hunting and fishing regulations. Although the Alaska Legislature has not repealed its subsistence law, the Supreme Court's decision in *McDowell*, if carried out, will have the same legal effect. If that decision becomes final and operative, the State of Alaska will be out of compliance with the requirements of ANILCA and will no longer be entitled to

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[1] The State's definition of "subsistence uses," which incorporates a definition of "rural area," was ruled inconsistent with ANILCA by the Court of Appeals for the Ninth Circuit (*See* discussion of *Kenaitze Indian Tribe v. Alaska, infra* at p. 19).

manage fish and wildlife on public (federal) lands in Alaska. On April 13, 1990, the Secretary published in the Federal Register a notice of the federal government's intent, in view of *McDowell*, to assume subsistence management on federal lands in Alaska if the State is unable to come into compliance with Title VIII of ANILCA by July 1, 1990. 55 FED. REG. 13922.

It appears unlikely that the State will be able to bring itself back into compliance by July 1, 1990. Even if the Alaska Legislature succeeds in passing a Constitutional Amendment, the Amendment would have to be approved by the voters in November. Therefore, absent a further stay of the *McDowell* decision, the Secretary of the Interior will assume management authority over fish and wildlife on federal lands in Alaska effective July 1, 1990.

Judicial Enforcement

Section 807 of ANILCA, 16 U.S.C. § 3116, places the responsibility for enforcing the subsistence priority in the hands of subsistence users and the federal courts. Although earlier versions of Title VIII provided that the Secretary of the Interior would enforce the priority through an administrative process, the final version provided for purely private enforcement. Section 807 gives subsistence users a federal private right of action against the State.

Section 807 specifically empowers the federal courts to enjoin state enforcement of a regulatory scheme which fails to provide for the subsistence priority set forth in Section 804 of ANILCA. It also empowers the courts to direct the State to promulgate regulations consistent with the requirements of Section 804. Finally, the Act provides that, once approved by the federal courts, the regulations will be valid for the period of time which state law defines as normal for a regulation.

Enforcement of ANILCA's other provisions is subject to normal judicial review -- federal action is reviewable under the Administrative Procedure Act and state action under the state Administrative Procedure Act.

II. STATE REGULATION

The State regulates Native subsistence rights in the same way that it regulates all hunting and fishing. It has created a Board of Fisheries to regulate all fishing efforts over which it has management responsibility. It has created a Board of Game to regulate all takings of game in all areas over which it has a similar authority.

As indicated above, the State of Alaska accepted the invitation of Title VIII of ANILCA and in 1982 assumed primary responsibility for managing fish and wildlife on federal lands. In accordance with Title VIII's requirement that subsistence uses be given a priority over all other competing uses, the Alaska legislature requires that

subsistence uses be accorded a priority. This purpose is effectuated in AS 16.050.258. The statute requires that the Boards of Fisheries and Game shall accord subsistence fishing and hunting a priority over all other fishing and hunting efforts. As discussed above, the "rural preference" provisions of the 1986 state subsistence-priority law were held unconstitutional by the Alaska Supreme Court in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). On remand, the Superior Court must decide whether the rural preference provisions of the State's subsistence law are severable. If it determines that those provisions are severable, the State's resource managers would be required to accord priority to subsistence uses by Alaska residents on state lands without regard to their rural or urban status. If it determines that those provisions are not severable, subsistence uses would no longer be entitled to preference over other consumptive uses.

Since enactment of the 1986 subsistence law in May, 1986 (Ch. 52, SLA 1986), the Alaska Boards of Fisheries and Game have made a number of revisions to subsistence hunting and fishing regulations. Subsistence hunting regulations are established in separate sections, on a region-by-region basis and can be found at 5 AAC 78 through 5 AAC 88. Statewide provisions, including definitions relating to subsistence, are found in 5 AAC 92. Regulations regarding local fish and game advisory committees and regional councils are found at 5 AAC 96 and 97. Regulations governing development of subsistence regulations and identification of rural areas are found in 5 AAC 99.

RECENT DECISIONS AND ACTIVE CASES

1. ***Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989), *as amended on denial of rehearing, cert. denied*, 110 S. Ct. 204 (1989), *on remand*, No. A85-701 (D. Alaska) (von der Heydt)**

This case was initially filed in December 1985 and involved the interpretation of Section 810 of ANILCA. Its focus was on "when" the Secretary of the Interior had to comply with procedures designed to ensure that use and/or disposition of federal lands would not unnecessarily restrict subsistence uses. The district court held that Interior erred by undertaking such procedures only when the proposed use or disposition had a "probability" of significantly restricting subsistence uses. Citing *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*), the Court held that the procedures had to be followed whenever such use "may" significantly restrict subsistence uses.

The district court's decision was affirmed on appeal. *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986) and the government and the oil companies petitioned for certiorari. Following the Supreme Court's decision in *Amoco Production Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987) (*see* discussion *infra* at p.

14), the Supreme Court granted their petitions, reversed, and remanded for reconsideration in light of *Amoco*, 107 S. Ct. 1598 (1987).

On remand, the tribal villages amended their complaint to allege aboriginal hunting and fishing rights in the lease sale area. The parties then agreed to a stay of all proceedings on the aboriginal title claim pending a decision by the Ninth Circuit in the remand of *Amoco Production Co. v. Gambell.* Meanwhile, the State, the tribal villages, and various environmental organizations sought summary judgment on claims that the lease sale violated the Outer Continental Shelf Lands Act, the National Environmental Policy Act, and the Endangered Species Act. On January 22, 1988, the district court denied the State's claims under the OCSLA and on March 11, 1988 denied the NEPA and ESA claims.

On October 5, 1988, the Court of Appeals upheld the District Court's decision on all counts. It held that the Secretary properly decided not to accept the State's recommendations under OCSLA; that the Secretary could remedy any deficiencies in his Environmental Impact Statement at the exploratory or production stages of development; and that the Secretary's reasons for rejecting recommendations by the National Marine Fisheries Service to implement the ESA were not arbitrary or capricious. *Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989).

Plaintiffs moved for a rehearing, with a suggestion for rehearing *en banc*, together with a request that the sale be stayed pending rehearing. The motion for stay was denied as moot shortly after the lease sale was held in mid-October, 1988; the petition for rehearing was rejected on March 9, 1989, although the Court did modify its opinion in some minor respects on that date. The State of Alaska's petition for certiorari on the OCSLA issues was denied on October 2, 1989. 110 S. Ct. 204. Meanwhile, Congress imposed a one-year moratorium (until September 30, 1990) on exploratory activities pursuant to the leases and directed the Secretary of the Interior to investigate the possibility of buying back the leases.

The tribal villages' claim of aboriginal hunting and fishing rights remains to be decided by the district court.

2. ***Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkel*, 829 F.2d 933 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1290 (1988), *on remand*, No. J84-013 Civ. (D. Alaska) (von der Heydt)**

This case was filed in the Spring of 1984 by the Alaska Fish and Wildlife Federation and Outdoor Council and the Alaska Fish and Wildlife Conservation Fund (Conservation Fund). The plaintiffs sought a declaration that two cooperative agreements (the Hooper Bay Agreement and the 1985 Goose Management Plan) entered into by the Fish & Wildlife Service, the ADF&G, AVCP and the California

Department of Fish and Game violate the Migratory Bird Treaty Act, the notice and comment provisions of the federal Administrative Procedure Act, the National Environmental Policy Act, and provisions of ANILCA, 16 U.S.C. § 668dd, which created the Yukon Delta Wildlife Refuge.

The challenged cooperative agreements grew out of recognition by the federal and state governments that migratory birds represent an important part of the traditional Native diet on the Yukon-Kuskokwim Delta. Even though the Migratory Bird Treaty Act, through the 1978 Fish and Wildlife Improvement Act, permits the Secretary of the Interior to authorize hunting of migratory birds in the spring and summer, it requires that the hunting be consistent with the four migratory bird treaties to which the United States is a party. The 1916 U.S./Canada treaty prohibits harvest of migratory birds in the spring and summer. Even though the Fish and Wildlife Service had long assumed that all harvesting of migratory birds between March 10 and September 1 is prohibited, it adopted a written policy in 1975 stating that subsistence hunting in Alaska during the closed season would not be punished. This enforcement policy was adopted in part because the service recognized the importance of spring waterfowl to Alaska Natives and in part because of the practical problems of enforcing the game laws in the vast reaches of rural Alaska.

Because of the recent decline of four populations of migratory birds, the U.S. Fish and Wildlife Service, the Alaska Department of Fish and Game, the California Department of Fish and Game, and the Association of Village Council Presidents entered into a cooperative agreement under which the harvest of those four species would be minimized in the spring and summer. This plan, known as the Hooper Bay Agreement, prohibited sport hunting of cackling Canada geese and reduced the hunting of white-fronted geese and black brants during the 1985 season. Enforcement was to be a joint effort by the various governmental agencies and local village councils. During 1984, the parties complied with the terms of the agreement. In 1985, the Hooper Bay Agreement was replaced with the 1985 Goose Management Plan.

The Conservation Fund initially sought an injunction to prohibit the Fish and Wildlife Service from agreeing to the taking of migratory birds during the 1984 closed season. Shortly thereafter, the intervenors (AVCP) filed a cross-claim against the Fish and Wildlife Service alleging that the 1925 Alaska Game Law rather than the Migratory Bird Treaty Act governed the subsistence hunting of migratory game birds in Alaska and until the agency promulgated regulations under the 1978 Wildlife Improvement Act, Interior had no authority to enforce the Migratory Bird Treaty Act's closed seasons. The district court denied the preliminary injunction for the 1984 season. It subsequently ruled that the 1925 Alaska Game Law repealed the Migratory Bird Treaty Act insofar as it applied to Alaska. The court dismissed all of the other claims as moot. *Memorandum and Order* (Jan. 24, 1985).

On appeal, the Ninth Circuit reversed with respect to the 1925 Game Act, pointing out that the 1916 U.S./Canadian treaty did not provide for spring and summer hunting, and thus it could not be authorized under the 1978 Fish and Wildlife Improvement Act. The court remanded the case to the district court on all of the original challenges to the plan under the Migratory Bird Treaty Act, the migratory bird treaties, the federal Administrative Procedure Act, NEPA and the section of ANILCA creating the Yukon Delta National Wildlife Refuge. 829 F.2d 933 (9th Cir. 1987). The Supreme Court denied AVCP's petition for certiorari. 108 S. Ct. 1290 (1988).

On remand, the district court found that by agreeing to language in the Hooper Bay Agreements which indicated that subsistence hunting for certain species was "OK" during parts of the period closed to hunting by treaty, the U.S.F.W.S. adopted a "substantive rule" in violation of the notice and comment procedures mandated by the APA, 5 U.S.C. § 553. The Court also found that the failure of U.S.F.W.S. to prepare an environmental assessment of its "substantive rule" violated the requirements of NEPA. Finally, the Court found that by adopting a substantive rule authorizing hunting during a period closed to hunting by treaty, the Secretary acted beyond the scope of his authority and thus violated the Migratory Bird Treaty Act. *Memorandum and Order* (June 29, 1988).

Meanwhile, on April 22, 1988, the Regional Director for the Fish and Wildlife Service announced a new policy on migratory bird hunting in Alaska. The policy is intended to prevent hunting of cackling Canada or emperor geese at any time; hunting Pacific white-fronted geese or black brant when they are nesting, raising young, or are flightless; taking eggs from any of the above four species of geese; using private or charter aircraft for purposes of hunting migratory birds during closed seasons; hunting other waterfowl (ducks, geese, swans) when they are nesting, raising young or are flightless;, or taking eggs of other waterfowl. The policy states that *limited harvest of migratory birds for food in unforeseen emergency situations will not be prosecuted* and enforcement of the policy will concentrate on "violations that have the greatest impact on waterfowl resources." As an adjunct to this policy, the Service has announced that it continues to view the Yukon-Kuskokwim Delta Goose Management Plan as an important element in the conservation of the four species.

On April 29, 1988, the Yukon-Kuskokwim Delta Goose Management Plan for 1988, which corresponds with the Service's recently adopted policy on migratory bird hunting in Alaska, was signed by the Service and Native Groups in the Yukon-Kuskokwim Delta. The state fish and game departments from both Alaska and California also signed the plan. The plan lists priorities the signatories will observe to enforce the closed season on migratory birds in spring and summer. It calls for a cooperative effort in monitoring compliance. Reports of violations will be coordinated with local village governments, which will assist in investigations conducted by the

Service. The Service also agreed to make a "good faith effort to reach agreement with Canada" on an amendment to the Migratory Bird Treaty. As noted above, that treaty, signed in 1916, makes most hunting for migratory birds, even for subsistence, illegal.

3. *Bobby v. Alaska*, No. A84-544 Civ. (D. Alaska) (Holland)

This case was filed in November, 1984, by Wasilie Bobby, Sr., individually and on behalf of the people of Lime Village, a community of about 40 people. He alleged that the then-existing moose and caribou regulations applicable to the Lime Village area did not adequately accommodate subsistence uses. Since that time, the Board of Game modified the regulations in several steps. The regulations ultimately reviewed by the Court imposed two closed seasons on moose (spring through mid-summer, and in the late fall) and one closed season on caribou (spring through mid-summer). The bag limits for residents of Lime Village reviewed by the court were 2 moose and 5 caribou per person.

Plaintiff argued that individual bag limits are not necessary for any conservation or management purpose in the case of Lime Village and are not consistent with the village's historic hunting patterns. Plaintiff asserted that several good hunters may supply the entire community with meat over the course of the year, rather than each household hunting for itself. Plaintiff also argued that the then-existing closed seasons for moose and caribou harvest were not consistent with ANILCA. Plaintiff asserted that under ANILCA, there should be no closed season unless necessary to protect the resource. The State's position was that ANILCA requires it to provide a "reasonable opportunity" for subsistence uses, but not necessarily year-round seasons.

Another issue raised in this case was whether people can harvest game or fish outside the existing regulations and then successfully defend in a criminal case by asserting that the regulations did not adequately accommodate subsistence uses. This "subsistence defense" was originally created by the Alaska Court of Appeals in *State v. Eluska*, 698 P.2d 174 (Alaska App. 1985), but its use was prohibited by the Alaska Supreme Court in *State v. Eluska*, 724 P.2d 514 (Alaska 1986). The Supreme Court held that AS 16.05.920(a), which prohibits taking fish and game unless authorized, is controlling and is necessary in order to adhere to the constitutionally mandated sustained yield standard. The court's ruling followed, but did not refer to, the legislature's articulation in May 1986 of that same principle with respect to subsistence fishing and hunting in AS 16.05.261. The State's position was that neither the legislature nor the Alaska Supreme Court prevented people from requesting the Boards of Fish and Game to change regulations or prohibited people from challenging existing regulations in civil cases, based on a perceived lack of reasonable opportunity for subsistence.

The court ruled on pending motions for summary judgment on February 14, 1989, holding that seasons and bag limits are permissible under the State's subsistence law, but only when those seasons and bag limits are consistent with customary and traditional uses. The Judge indicated that he would normally defer to the Board of Game's determinations, but refused to do so in this instance, in part because the Board lacked the necessary data. Due to the constantly changing ground rules governing the Board of Game at that time, the Board did not perform the analysis required by the State's 1986 subsistence law with respect to moose and caribou subsistence uses in the Lime Village area. The Court also found that the Board's available data failed to support its conclusions. The seasons imposed by the regulations were inconsistent with a specific finding by the Board of Game that residents of Lime Village had historically harvested moose and caribou opportunistically throughout the year. The bag limits were not reconciled with the evidence in the record that the best hunters from Lime Village did most of the hunting and shared with the other villagers. The Judge also interpreted the State's "no subsistence defense" statute as only precluding a defendant in a criminal proceeding from claiming a subsistence right in gross, outside of and apart from validly enacted subsistence regulations.

Judge Holland declined to issue a preliminary injunction, but ordered the State to submit revised regulations by June 15, 1989. The Game Board met on April 27 to review the regulations. As a result of the meeting, the regulations were amended to: (1) lift the individual bag limits; (2) establish a quota of 100 caribou for the entire village, and allow year round season on caribou, except that cows and calves may not be taken in the spring or summer; and (3) not impose a moose quota, but retain closed moose seasons.

The parties agreed to a procedure whereby the plaintiffs could submit proposals to the Board of Game for consideration and decision at its spring 1990 meeting, for the purpose of providing the Board a further opportunity to review its regulatory decisions of April 27, 1989, and resolve plaintiffs' remaining objections to the Board's action. Because of the *McDowell* decision, the Board has deferred consideration of plaintiffs' proposals. The Court has retained jurisdiction over the matter until June 30, 1990.

4. *Didrickson v. United States Department of Interior,* No. A85-336 Civ. (D. Alaska) (Holland)

This case, formerly captioned in the name of the original plaintiff, Katelnikoff, was brought pursuant to the Marine Mammal Protection Act of 1972 (MMPA). Both Marina Katelnikoff and Didrickson sought the return of a number of articles they had fashioned out of sea otter pelts. The articles were confiscated by federal enforcement agents on the ground that they were not "authentic native articles of handicrafts and

clothing" within the meaning of the Native handicraft exemption to the MMPA, 16 U.S.C. § 1371(b), as defined by controlling federal regulations.

At stake is the proper interpretation of the Alaska Native exemption to the MMPA and its regulations. The MMPA, enacted in 1972, established a comprehensive moratorium on the taking of marine mammals but created an exception for the taking of marine mammals by Alaska Natives for subsistence purposes and for making "authentic native articles of handicrafts and clothing." 16 U.S.C. § 1371(b). The regulation implementing this exemption defines "authentic native articles of handicrafts and clothing" to include only those items which "were commonly produced on or before December 21, 1972." 50 C.F.R. § 18.3.

Plaintiffs argued that the limitation in the regulation was inconsistent with the MMPA in that it focuses on whether the final craft *item* produced was traditional rather than whether the production *technique* was traditional. Plaintiffs argued that an item can be "authentic" even if it was not commonly produced prior to 1972.

In July 1986, Judge Holland rejected these arguments and upheld the validity of the regulation largely based on deference to agency interpretation. Ms. Katelnikoff was subsequently dismissed from the lawsuit to pursue her administrative remedies. After (Ms. (Katelnikoff) Beck lost her administrative hearing as to all items crafted from sea otter pelts except hats, she moved to intervene in the federal court litigation.

Judge Holland's decision upholding the regulation as consistent with the MMPA led Didrickson to amend his complaint to allege that the regulation is unconstitutionally vague because no one, not even the enforcement agents, can determine what is permitted by the regulation. Sea otter use by Natives has been limited since the mid-1700's due to bans imposed by the Russians and then by the United States and also due to population declines caused by Russian overhunting, and it is difficult or impossible to determine exactly what use Natives made of sea otter at that time.

Didrickson moved for summary judgment on the constitutional claim, and the government moved to dismiss. In denying the government's motion to dismiss, Judge Holland indicated that problems with the regulation and its enforcement call for an administrative resolution. In response, the Fish and Wildlife Service instituted a formal rulemaking proceeding on November 11, 1988, 53 Fed. Reg. 45788, proposing to change its regulatory definition to totally prohibit Native use of sea otter for handicrafts and clothing based upon its conclusion that there had been no recent use of sea otters by Natives and no recent sales of sea otter items. Public hearings were held in several coastal villages in October, 1989, and the comment period was extended until November 30, 1989.

Despite over a thousand written comments opposing the proposed rule, the Fish & Wildlife Service issued an interim rule on April 20, 1990, amending 50 C.F.R. § 18.3 to prohibit the take of sea otters for the purpose of creating and selling handicrafts and clothing. 55 Fed. Reg. 14973. The Service has stated that it will initiate another rulemaking process for the purpose of replacing the interim rule with a final rule after a management plan for the northern sea otter has been completed. It projects completion of such a plan in 1992.

Meanwhile, Judge Holland has requested status reports from the parties by May 21, 1990.

5. ***Gambell v. Lujan,* 869 F.2d 1273 (9th Cir. 1989), *petition for rehearing denied, on remand,* No. 85-184 (D. Alaska) (von der Heydt)**

On March 4, 1983, the tribal villages of Gambell and Stebbins sued the Secretary of the Interior alleging that he had violated either their aboriginal hunting and fishing rights or Section 810 of ANILCA in holding Outer Continental Shelf Lease Sale 57. Oil companies interested in bidding on the sale intervened.

The Tribes' principal claim was that ANCSA and Title VIII of ANILCA had to be consistently interpreted by the Secretary. ANCSA extinguished Native hunting and fishing rights "in Alaska." Title VIII applies to Native hunting and fishing rights "in Alaska." The Tribes argued that the two acts had the same geographic scope. If both acts applied only within the territorial boundaries of the State, then they retained their aboriginal hunting and fishing rights outside the territorial boundaries. Alternatively, if both acts applied outside the territorial boundaries of the State, then the Secretary had violated Section 810 in holding the sale.

Judge von der Heydt granted summary judgment to the government and the intervening oil companies and dismissed the suit. The Ninth Circuit reversed in part and affirmed in part. It held that ANCSA applies to the OCS and operated to extinguish aboriginal hunting and fishing rights in this area. It also held that ANILCA applied to the OCS and since the Secretary had not complied with Section 810 of ANILCA, the court reversed and remanded for a determination as to whether the sale should be voided. *Gambell v. Clark,* 746 F.2d 572 (9th Cir. 1984) (*Gambell I*).

In April, 1985, a companion case, *Gambell v. Hodel,* was filed challenging OCS Lease Sale 83 in the Navarin Basin, alleging both that the Secretary had failed to comply with Section 810 of ANILCA in holding the sale as well as that the Secretary's decision to lease the area violated his trust responsibilities to protect subsistence uses and resources.

The plaintiffs in both cases moved the district court for a preliminary injunction against exploratory drilling pending the district court's determination on

the merits. The motions were consolidated. Although the district court found that the Department of the Interior did not comply with Title VIII of ANILCA in holding the lease sales, it ruled that a preliminary injunction was not warranted. The court reasoned that the nation's quest for new oil and gas resources and energy independence outweighed the harm that might result to subsistence users from continued exploratory activities on the leases.

On appeal the Ninth Circuit reversed the district court, finding that the tribal villages had a certainty of prevailing on the merits and ordered the oil companies to immediately cease all operations in the leased areas. Its ruling rested on the principle that under Section 810 the national interest in the subsistence lifestyle of Alaskan Natives outweighs the competing interest in the rapid development of OCS oil leasing in Alaska. *Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*).

The government and the oil companies petitioned for certiorari. The tribal villages cross-petitioned on the aboriginal title issue decided in *Gambell I*. The Supreme Court granted both petitions and reversed the lower court's holding that ANILCA applied to the OCS, vacated the ruling that ANCSA applied to the same area, and remanded the case for further proceedings on the aboriginal title claim. *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987).

On remand, the Court of Appeals reversed the district court's original judgment in *Gambell I*, holding that aboriginal subsistence rights of Alaska Natives in the OCS were not extinguished by ANCSA. It also rejected the Secretary's and the oil companies' arguments that (1) the federal government's paramount interests in the OCS extinguished aboriginal rights; (2) that the United States had not assumed sufficient control over the OCS so as to constitute sovereignty which requires recognition of aboriginal rights; and (3) that recognition of aboriginal rights would be inconsistent with principles of international law.

On remand, the district court must decide (1) whether the Villages possess aboriginal rights in the OCS; (2) if so, whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise of those rights; and (3) whether the Outer Continental Shelf Lands Act extinguished aboriginal subsistence rights in the OCS. *Gambell v. Lujan*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*). Preliminary discovery is proceeding on these issues.

6. *Hanlon v. Barton*, No. J88-025 Civ. (D. Alaska) (von der Heydt)

This case was filed in July 1988 on behalf of six Native residents of Hoonah and one non-Native resident of Angoon, all of whom hunt near Hoonah. Two of the Hoonah-area Tlingit clans are represented in this action, one by its chief and the other by a senior clan member. All depend for their subsistence food needs on the resources,

particularly the deer, of the Tongass National Forest. Plaintiffs suit, which has proceeded in two phases, initially attacked a Forest Service decision to authorize four years of clearcut logging and roadbuilding on public lands near Hoonah without first holding the hearings and making the findings required by Section 810 of ANILCA, 16 U.S.C. § 3120. That statute requires Federal agencies to consider the effects of major land use decisions on subsistence. If a proposed action may impose significant restrictions on subsistence uses of the public lands, the Federal agency involved must make specific findings that the action is necessary consistent with sound management of public lands, that it involves the minimal amount of public lands, and that measures will be taken to minimize the adverse effects on subsistence resources and uses.

In July, 1988, plaintiffs filed a motion for preliminary injunction. The Alaska Pulp Corporation, the principal beneficiary of the logging program, intervened in the case. Plaintiffs argued that the Forest Service applied the wrong legal standard to determine whether the timber development in the Hoonah area may significantly restrict plaintiffs' subsistence uses. They also asserted that the agency failed to consider the impacts of related actions, and, on the basis of information available to it, was compelled to conclude that its logging program would result in significant restrictions to subsistence uses, thus invoking the findings requirements of ANILCA, Section 810(a)(1)(3). Plaintiffs also alleged violations of the National Environmental Policy Act, the National Historic Preservation Act, and the Administrative Procedure Act.

On November 14, 1988, the district court denied the plaintiffs' request for a preliminary injunction. Although the court ruled that plaintiffs were likely to prevail on the merits of four of six claims, it found insufficient proof of irreparable harm. The Court suggested comprise on the terms of an injunction pending Forest Service compliance with ANILCA and NEPA. Unable to reach agreement, the plaintiffs filed an appeal and moved the district court for an injunction pending appeal. Prior to the hearing on plaintiffs' motion, the parties agreed to the entry of an injunction.

The injunction required the Forest Service to hold subsistence hearings in Hoonah and to prepare a supplemental environmental impact statement. Pending the hearings and supplemental analysis, the injunction prohibited timber cutting, road building and the creation of a log dump in important subsistence areas near Hoonah. In August 1989, during the height of the Hoonah subsistence season, the agency held the subsistence hearings in Hoonah and other villages throughout northern, southeast Alaska.

In November 1989, the Forest Service issued its supplemental environmental analysis and decision. The agency's supplemental EIS documents that timber development activities around Hoonah may significantly restrict plaintiffs' subsistence uses of all species in one area near Hoonah and of deer, brown bear, and marten in

another area. The agency then found that its long-term timber contract with Alaska Pulp Corporation makes it necessary to continue intensive timber development in areas it agreed are important to meet plaintiffs' subsistence food needs. It also found that the development involved the minimal amount of public lands and that closure of new spur roads, pre-commercial thinning, and recommendations to the Alaska Board of Game to reduce the sport bag limits for deer were adequate mitigation measures. The decision also authorized APC to cut more timber during 1990 than it has ever cut in a single year since operations began under its contract in 1961.

On March 2, 1990, plaintiffs filed a motion for a preliminary injunction. They allege that the Forest Service's necessity and mitigation findings fail to comply with ANILCA, Section 810(a)(1)-(3). They request that the court enjoin all activities in areas close to Hoonah until the agency makes the proper findings and requires uniform 100 foot buffer strips on most anadramous fish streams. The court consolidated this case with *Tenakee Springs v. Clough* (*see* p. 32 *infra*), and ordered the parties to negotiate. They were unable to reach agreement. In mid-April, plaintiffs moved for a temporary restraining order. On April 26, 1990, the court heard oral argument on the requests for a preliminary injunction and temporary restraining order. Following oral argument, the court denied the request for a T.R.O., but stated its intention to issue a decision on the consolidated requests for preliminary injunction in the near future.

7. *John v. Alaska*, No. A85-698 Civ. (D. Alaska) (Ho[illegible]nd)

This case was filed in December, 1985, by Katie John, Doris Charles, and the Mentasta Village Council. Since 1964, the State limited subsistence fishing in the Copper River Basin to that portion of the Copper River below its confluence with the Slana River. In 1984, Katie John and Doris Charles, residents of Mentasta and Dot Lake, respectively, requested the Board of Fisheries to open a subsistence fishery at the old village site of Batzulnetas, where the proponents have pending and patented (respectively) Native allotments. The board rejected the proposal, voicing concerns about fishing on stocks of fish at or near their spawning grounds ("terminal fisheries"). This lawsuit followed.

Plaintiffs claim that the Batzulnetas site is a customary and traditional subsistence salmon fishing site and that closure of this area is not required to protect sustained yield. The case involves a complex river system (the Copper River, in which there are at least 124 separate sockeye salmon stocks).

Questions are raised regarding what constitutes a "reasonable opportunity" to obtain subsistence salmon and whether this is the applicable standard under ANILCA, what steps the State must take to determine whether a fishery can be conducted without jeopardizing sustained yield, and what standard of review the federal court

should apply in reviewing State subsistence regulations, among others. There is also a question of whether the State of Alaska has jurisdiction to regulate fish uses on a Native allotment.

After completion of extensive discovery and filing by plaintiffs of a motion for summary judgment, the parties entered into a stipulation in 1987 to stay the case pending the Board of Fisheries' review of a new proposal from plaintiffs for a subsistence fishery. The State agreed to allow plaintiffs a carefully structured interim subsistence fishery for the 1987 season.

In its winter 1987-88 meeting, the board acted on plaintiffs' proposal and found that the existing subsistence fishery for the Copper River provided a "reasonable opportunity" for plaintiffs to meet their subsistence uses; however, the board also found that a subsistence fishery in excess of "reasonable opportunity" could be authorized at Batzulnetas without jeopardizing sustained yield. The board adopted a regulation establishing a subsistence fishery at Batzulnetas and setting the season, methods of take, and scope of this new fishery.

Plaintiffs filed a motion for a preliminary injunction seeking more fishing opportunities for the summer of 1989 than the 2-3 1/2 days provided for in the regulations. On June 6, 1989, Judge Holland granted the plaintiffs' request for a preliminary injunction by enjoining the enforcement of the existing regulations and in lieu thereof, ordered that plaintiffs could take salmon from June 1 through September 1 or until 1,000 sockeye salmon were taken, whichever occurred first. The State was further ordered to undertake studies of the subsistence fishery at Tanada Creek and plaintiffs' subsistence use of salmon so as to be in a position to perform the subsistence fisheries analysis required by AS 16.05.258 with respect to the Tanada Creek/Batzulnetas fishery.

Cross motions for summary judgment were also filed on whether the new regulations are adequate under ANILCA. On January 19, 1990, the Court ruled that in refusing to permit the subsistence fishery, the Board of Fisheries 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 state law. The State took the position that because of *McDowell*, the Board of Fisheries could not adopt new regulations and suggested that the parties agree to another preliminary injunction for the 1990 fishing season. When the parties were unable to reach agreement on the terms of an injunction, the plaintiffs moved for a preliminary injunction. The motion is still pending.

8. ***Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3187 (1989), *on remand*, No. A86-367 Civ. (D. Alaska) (Holland).**

This case was filed on July 15, 1986, under § 807 of ANILCA by the Kenaitze Indian Tribe. The plaintiff members consist of the descendants of aboriginal inhabitants of the Cook Inlet area. The Tribe alleged that the State's definition of "rural area" in its 1986 subsistence law, Ch. 52, SLA 1986, was inconsistent with the meaning of the term "rural" in Title VIII of ANILCA. Sections 803 and 804 of ANILCA provide an absolute hunting and fishing priority for rural Alaska residents. The State's definition of "rural area" extended the priority only to those who live in "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." Plaintiff claimed that the term "rural" had to be given its ordinary meaning -- that of a geographic area with a small population -- and that it could not be defined so as to restrict the priority to only those who live in an area where subsistence activities are a principal component of the economy. It was their position that tribal members living on the Kenai Peninsula are rural residents and their customary and traditional harvests of fish and game for subsistence uses are entitled to preference over competing non-subsistence uses.

Plaintiff filed a motion for preliminary injunction in July 1986. On August 14, 1986, the State of Alaska filed a motion to dismiss, arguing that Section 807 of ANILCA does not confer jurisdiction upon the federal court to hear a challenge to the State's "laws of general applicability" (i.e., statutory provisions that comply with Section 805 and allow the State to have management jurisdiction over subsistence uses on federal lands). The State argued that § 807 only grants jurisdiction to challenge the State's implementing regulations. The court denied the State's motion to dismiss. *Memorandum of Decision*, February 13, 1987.

In the meantime, the Tribe filed a motion for partial summary judgment and the State filed a cross motion for summary judgment on the underlying question of whether the state statutory definition of "rural area" complied with ANILCA. On July 9, 1987, Judge Holland denied the Tribe's request for a preliminary injunction and granted the State's motion for partial summary judgment. Essentially deferring to the State's interpretation of the term "rural" (and the Department of the Interior's "approval" of the State's 1986 subsistence law), the court found that the State's definition of "rural area" was not inconsistent with Section 804 of ANILCA.

On October 24, 1988, the Court of Appeals reversed the lower court's denial of the Tribe's request for a preliminary injunction. The court first concluded that it owed no deference to the interpretation adopted by the Department of the Interior or the State of Alaska. Interpreting the statute's meaning *de novo*, it found that Congress

used the term "rural" in its plain and ordinary sense to refer to areas of Alaska that are "sparsely populated." It noted that adopting the State's "contorted definition" of rural would "materially change the sweep of the statute . . . and lead to an inconsistency within the statute." Relying on *Amoco Production Co. v. Gambell*, 107 S. Ct. 1396 (1987), the court refused to resort to the legislative history of ANILCA in search of a contrary meaning. Concluding that the State's definition of rural was inconsistent with ANILCA, the court reversed and remanded the case to the district court for entry of a preliminary injunction.

On denial of the State's petition for rehearing, the Court of Appeals amended its decision on January 4, 1989, to specifically address the State's argument that article IV, § 4 of the U.S. Constitution and the Tenth Amendment preclude a federal court from ordering a state to amend its laws to make them consistent with ANILCA. The Court noted that this proposition had no application since the court did not purport to be directing the state to amend its laws: "it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA." The Supreme Court denied the State's petition for certiorari on June 19, 1989. 109 S. Ct. 3187 (1989).

Following remand of the case, Judge Holland entered a preliminary injunction ordering the State "to elect, on or before May 15, 1989, whether it will or will not afford plaintiff on an interim basis priority over all other consumptive uses for the subsistence use of hooligan and all species of salmon on the Kenai Peninsula." *Preliminary Injunction*, April 26, 1989, at 10. Assuming it elected to continue to comply with ANILCA, the court ordered the State to afford the Kenaitze a priority over all other consumptive uses, for the subsistence use of hooligan and all species of salmon. To that end, the Board of Fisheries was directed to adopt emergency regulations to effect such priority. The court gave the parties the alternative of entering into a consent preliminary injunction to the same general effect.

On May 31, 1989, Judge Holland approved a "Consent Preliminary Injunction" which allowed members of the Tribe domiciled on the Kenai Peninsula to fish with a single net for all species of salmon between June 15 and September 15, 1989, and for hooligan between October 1, 1989 and November 30, 1989. The fishery was confined to the Kenai River 1/4 mile upstream from the Warren Ames Bridge, including Birch Island, downstream to the mouth, and including those waters normally closed to commercial salmon fishing adjacent to the mouth of the river. The Tribe was given a quota of 5,000 salmon, not to include more than 600 chinook. Judge Holland subsequently rejected two challenges to the consent preliminary injunction. *Alaska Fish and Wildlife Conservation Fund and Alaska Fish and Wildlife Federation and Outdoor Council v. State of Alaska*, No. J89-008 Civ. (D. Alaska) and *Mills v. Kenaitze IRA Council*, No. A89-268 Civ. (D. Alaska).

In the meantime, the Governor sought an amendment to ANILCA which would have inserted the State's definition of "rural" into ANILCA. The House Interior and Insular Affairs Committee was scheduled to consider the merits of the legislation on May 24, 1989, but opposition from the Native community caused Congressman Young to pull the bill before any action could be taken. Discussions between representatives from the Governor's office and Native leaders on a possible legislative solution were halted when the Supreme Court of Alaska rendered its decision in *McDowell*.

On April 27, 1990, Judge Holland approved another preliminary injunction allowing the Kenaitze to operate a single tribal subsistence fishing net during the 1990 fishing season. In a separate order, he found that the Court of Appeals did not hold that the entire Kenai Peninsula is rural as a matter of law, but rather provided its definition of the term "rural" as employed by Congress in ANILCA. Judge Holland concluded that it was up to the court and the Alaska fisheries regulators to apply that definition. As between the Board of Fisheries (or Joint Boards) and the court, Judge Holland held that it was the job of the Boards and not the court to determine what portions of the Kenai Peninsula are rural in accordance with the interpretation of the term "rural" by the court of appeals.

With respect to whether the Kenaitze have customary and traditional uses of salmon on the Kenai Peninsula, Judge Holland found that the Board of Fisheries had never accomplished the analysis of specific Kenai Peninsula salmon stocks required by AS 16.05.258. He concluded that should the matter be referred back to the Board of Fisheries for enactment of appropriate regulations, the Board would be ordered "to effect the analysis required by AS 16.05.258 for those portions of the Kenai Peninsula which are determined to be rural in accordance with the then-operative definition of 'rural'." *Order*, April 17, 1990, at 10-11. All further proceedings in the case have been stayed until July 1, 1990.

9. *Kitka v. State of Alaska*, No. A89-276 Civ. (D. Alaska) (Holland)

In January, February and March, 1989, the Board of Fisheries found that Sitka residents had not engaged in customary and traditional uses of fish and shellfish species, other than sockeye salmon and herring, including herring roe and promulgated regulations which deny priority for subsistence uses of shellfish, ground fish (including halibut), the remaining 4 species of Pacific salmon and all varieties of other finfish. On June 30, 1989, a class composed of all residents of the unified City and Borough of Sitka, Alaska, filed suit challenging the regulations as arbitrary, capricious and unreasonable and violative of Section 804 of ANILCA. They also allege that these restrictions are unconstitutional under the federal Constitution.

In denying the plaintiffs' motion for class certification, the Court -- on its own initiative -- indicated that it might find parts of the City and Borough of Sitka to be non-"rural." Subsequently, again on its own initiative, the Court issued an order stating that in view of the *McDowell* decision it would take no further action in this case until July 1, 1990.

10. *Kwethluk IRA Council v. State of Alaska*, No. A90-107 (D. Alaska) (Holland)

This case was filed after the Board of Game in March, 1990, rejected an emergency petition form the Kwethluk Tribe for an immediate, limited subsistence hunt of the Kilbuck Mountain caribou herd. The Board attempted to base its decision on the sustained yield principle. On April 4, 1990, 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.

11. *Morry v. State & Wilson*, No. 2BA-87-83 (Superior Court) (Jeffery) (jury trial demanded)

This civil rights action was filed on July 9, 1987 in Superior Court at Barrow, seeking declaratory relief and damages for abuse of process, malicious prosecution, breach of duty under the federal and state subsistence laws, racial discrimination, and denial of due process. Plaintiff, a resident of Anaktuvuk Pass, alleges that Wilson, a state game warden, wrongfully filed a criminal complaint against plaintiff charging him with four technical game violations related to his taking of a grizzly bear for subsistence uses. A state prosecutor declined to prosecute the case and dismissed the charges. Plaintiff also challenged, under both ANILCA and the State Subsistence law, the $25 tag fee and the hide and skull sealing requirements as applied to the subsistence hunting of grizzly bears.

Defendants filed a motion to change venue from Barrow to Fairbanks, on the ground that a Fairbanks trial would be less expensive and more convenient. Plaintiff opposed the motion, arguing that he had a right to trial before a jury drawn from his general community. By memorandum decision of March 14, 1988, Judge Jeffery denied the motion for change of venue. Among other things, he held that "the

presence of Anaktuvuk Pass in the Second Judicial District expresses long-standing cultural and political realities" and was not, as defendants suggested, merely the "flick of some cartographer's pen." The judge concluded that Barrow "include[s] significant elements of the community of Anaktuvuk Pass because of the large number of Inupiat Eskimo subsistence hunters in Barrow. A jury drawn from the Fairbanks community would not meet this standard."

Plaintiff has filed a motion for partial summary judgment on the validity of the grizzly bear regulations. On October 6, 1989, the Kwethluk IRA moved to intervene with respect to the challenge to the tag and sealing requirements.

12. ***McDowell v. Collinsworth*, 785 P.2d 1 (Alaska 1989), *on remand*, No. 3AN-83-1592 Civ. (Alaska Superior Court) (Carlson)**

On December 22, 1989, the Alaska Supreme Court ruled that Article VIII of the Alaska Constitution prohibits limiting eligibility for subsistence uses to residents of rural areas. Specifically, the Court held that providing rural Alaska residents special subsistence privileges violates Article VIII, §§ 3, 15, and 17 of the Alaska Constitution. Section 3 reserves fish and wildlife in their "natural state" to the people of Alaska for "common use." Section 15 prohibits the Legislature from creating a fishery allocation system that results in an "exclusive right or special privilege of fishery." Section 17 requires statutes governing hunting and fishing to "apply equally to all persons similarly situated." The case was remanded to the Superior Court "with instructions to issue a declaratory judgment that the rural preference of ch. 52 SLA 1986 is unconstitutional and to take such further action as may be appropriate." 785 P.2d at 12.

The Supreme Court stayed the effect of its decision until July 1, 1990, with respect to existing hunting and fishing regulations. It subsequently denied AFN's and the State's petitions for rehearing.

On remand, the State of Alaska has asked the Superior Court to decide whether the Supreme Court intended to invalidate the entire subsistence priority or only the rural residency limitation. Both the State and the plaintiffs have taken the position that the "rural preference" provisions of the 1986 law are not severable, and that the Supreme Court invalidated the entire subsistence law. Plaintiffs in various cases pending in federal district court have moved to file an amicus brief on the severability issue, arguing that the "rural preference" provisions of the State's Subsistence law are severable, and that the law continues to have legal effect, i.e., that the State's resource managers are required to accord priority to subsistence uses by Alaska residents without regard to their rural or urban status The Court has been urged to resolve this issue no later than mid-May since in February the Board of Game deferred approximately 100 subsistence proposals from its scheduled March meeting

to be taken up in May or June, depending on the Court's ruling on the severability issue.

The effect of the Supreme Court's decision is to place state law out of compliance with the rural subsistence priority mandated by Title VIII of ANILCA. If no remedy is found by July 1, 1990, the Secretary of the Interior will assume fish and game management on all federal public lands and waters in Alaska. The geographical extent of the Secretary's jurisdiction and the details of his management system remain to be decided.

13. *Native Village of Dot Lake v. State of Alaska*, No. 4FA-89-997 (Superior Court) (Steinkruger)

In April, 1989, the plaintiff submitted a petition to the Board of Game asking that its members be allowed to take 3 moose between then and September to meet their subsistence needs. On April 27, 1989, at a meeting in Anchorage previously scheduled to comply with the federal court order in *Bobby v. Alaska*, No. A84-544 Civ. (D. Alaska, Feb. 14, 1989), the Board of Game discussed plaintiff's petition and received testimony from plaintiff's president, but refused to consider the petition on the merits. The petition was rejected on the grounds that it did not qualify as an "emergency" under 5 AAC 96.625(f).

Plaintiff filed suit on June 15, 1989, challenging the Board's anti-petition policy on two grounds. First, plaintiff argues that the policy conflicts with the Administrative Procedure Act, AS 44.62.220 and -.230, which gives plaintiff and any other "interested persons" the right to petition the Board for the adoption or repeal of a regulation at any time, regardless of the existence of an emergency. Second, plaintiff argues that the regulation is inconsistent with the Board's statutory duty to accord priority to subsistence uses, and especially to respond to subsistence-deprivation emergencies. In addition to the anti-petition policy, plaintiff has challenged the validity of the regulations which govern the subsistence needs of plaintiff's members with regard to the taking of moose. Those regulations impose seasons and bag limits for subsistence hunters which are identical to those governing sport/trophy hunters.

On September 19, 1989, the plaintiff moved for summary judgment, asking the court to issue a declaratory judgment invalidating 5 AAC 96.625(f) (the anti-petition policy) and 5 AAC 88.045(3) (season and bag-limit restrictions on subsistence moose hunting by Dot Lake residents in Game Management Unit 20(D).

14. *Native Village of Dot Lake v. Alaska*, No. A90-001 Civ. (D. Alaska) and *Kluti Haah Native Village of Copper Center v. Alaska*, No. A90-004 Civ. (D. Alaska) (Holland)

These cases were filed the first week of January, 1990, when the Alaska Department of Fish and Game, after the *McDowell* decision, 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, 1990. 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.

15. *Native Village of Tanana v. Cowper*, No. F83-034 Civ., and *Tanana Chiefs Conference, Inc. v. Cowper*, No. F83-402 Civ. (D. Alaska) (Kleinfeld)

These cases were filed in 1983 and present the issue of whether the State's prosecution of five residents of Tanana and two residents of Ruby for taking a moose during closed season violates Section 804 of ANILCA. The cases were consolidated by the court, and both parties filed summary judgment motions. The motions focused on whether the areas involved were Indian country; whether there were exemptions from State authority over fish and game for Native activities sponsored by a Native council; whether P.L. No. 280 precludes State regulation of Native fishing and hunting; and whether there was any interference with subsistence rights under ANILCA or with First Amendment rights.

On November 6, 1987, the court ruled as follows:

1) That ANILCA'S subsistence protections are limited to direct personal or family consumption or barter or customary trade; and plaintiffs presented no evidence that the taking was for one of these reasons. Judge Kleinfeld also found that there was no evidence that the takings took place on the lands to which ANILCA applies.

2) The court declined to rule on whether Tanana or Louden are Indian country because plaintiff failed to present any evidence about where the takings took place. Also, the court declined to rule on whether State authority may be exercised within Indian country, until the predicate -- a showing of where the events took place -- was made. Judge Kleinfeld noted that based upon the record, he was inclined to think that Tanana was not Indian country and not a dependent Indian community, but it was not necessary for the court to reach that issue.

3) The court found that Tanana Chiefs has standing to assert the rights of individual Natives, citing *UAW v. Brock*, 106 S. Ct. 2523 (1986).

4) As to P.L. 280, Judge Kleinfeld held that the exemption from state criminal laws contained in 18 U.S.C. § 1162(b) for hunting and fishing rights of Natives under "Federal treaty, agreement, or statute" does not apply where there is no treaty or statute. He concluded that the State may exercise jurisdiction over fish and game offenses even in Indian country in the Tanana area. The court based its ruling in part on *Kake v. Egan*, 369 U.S. 60 (1962) which it construed to hold that off-reservation hunting and fishing is subject to state regulation. The court further held that *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), did not apply because this case involved criminal offenses, unlike the regulatory bingo offenses at issue in *Cabazon*.

5) The judge denied plaintiffs' motion for summary judgment on the freedom of religion issue, finding that proof was lacking of several essential elements of the claim, in particular the religious nature and necessity of memorial potlatches.

In 1989, *Native Village of Tanana* was dismissed by stipulation. The village submitted a proposal to the Board of Game, asking that subsistence regulations be adopted allowing the community to take moose for a traditional festival, Nuchalwoyya. During its March 1989 meeting, the board found that the community had a customary and traditional use of moose for that purpose, and adopted the requested regulation.

In 1988, the state filed a motion for summary judgment in *Tanana Chiefs Conference* on the outstanding equal protection and due process claims. At issue was the lack of regulations allowing memorial potlatches. Tanana Chiefs Conference never petitioned the Board of Game to authorize that use as a subsistence use. In response to the state's motion, TCC again raised the freedom of religion issue, basically contending that the equal protection and due process arguments must be viewed with strict scrutiny by the court because of the first amendment. The state's position is that plaintiff still has not demonstrated the religious nature and necessity of memorial (as contrasted to funeral) potlatches. Following oral argument in June, 1989, Judge Kleinfeld dismissed all of the outstanding constitutional claims with the exception of the religious freedom claim and requested cross-motions for Summary Judgment on that issue. On March 15, 1990, Judge Kleinfeld entered final judgment in favor of the State on the religious freedom claim, based largely on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988).

16. *Natural Resources Defense Council, et al., v. Lujan*, Civ. No. 89-2345-JHG and *Gwich'in Steering Committee v. Lujan*, Civ. No. 89-2393-JHG (D.D.C. filed August 28, 1989) (Cases consolidated by order of Judge Joyce Green on December 18, 1989)

This is an action by the Natural Resources Defense Council, a coalition of environmental organizations, and the Gwich'in Steering Committee, an incorporated

association of Gwich'in Athabascan tribes in Alaska and Canada, challenging the legal adequacy of a Legislative Environmental Impact Statement and Report to Congress (LEIS) regarding whether to allow oil and gas development in the 1.5 million acre coastal plain of the Arctic National Wildlife Refuge ("the coastal plain") prepared by the Secretary of the Interior ("the Secretary"). Plaintiffs seek a declaration that: (1) this document does not comply with Sections 810 and 1002 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, 3142, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4331, *et. seq;* and (2) that the Secretary's conclusions in the LEIS, recommending that Congress allow full oil and gas leasing in the coastal plain, were arbitrary and capricious and not supported by the evidence presented in the body of the LEIS, in violation of the Administrative Procedure Act. Plaintiffs further seek an injunction requiring the Secretary to revise the LEIS to correct his violations of law.

Plaintiffs seek to protect the use rights of their members in ANWR. The Gwich'in tribes' claims center on subsistence use of the Porcupine Caribou Herd as it may be impacted by ANWR development. NRDC's members claim subsistence and recreational use impacts. Both plaintiffs allege harm to their public participation rights in that the LEIS was supposed to enable the public to participate meaningfully in the ANWR development debate. Plaintiffs allege that flawed and incomplete data and analyses produced in the LEIS frustrated the plaintiffs' participation rights.

17. *Payton v. State*, 3AN-88-12223 Civil (Alaska Superior Court) (Ripley), *appeal pending*, No. S-3377 (Alaska Supreme Court)

This case was filed in 1988 and challenged the finding by the Board of Fisheries that residents of the Skwetna area (a rural area across Cook Inlet from Anchorage) did not have customary and traditional uses of salmon, and consequent failure to adopt subsistence regulations for that area.

Plaintiffs alleged a number of violations: (1) that the finding was arbitrary and capricious, because the Board of Game had authorized subsistence moose hunting there, (2) that the finding was not supported by the record; (3) that the action violated ANILCA (though the case was filed in state court); (4) that the board used an impermissible durational residency requirement; (5) that the board applied its criteria in a way that discriminates on the basis of race (in favor of Alaska Natives); and, (6) that the composition of the board violated due process, because of the presence of commercial and sport fishermen.

The court awarded summary judgment to the State on March 15, 1989. A final judgment was entered in early April, and plaintiffs have appealed. By Agreement, the appeal has been stayed until July 1, 1990.

18. ***Peninsula Marketing Association v. State of Alaska***, **3AN-88-12324 Civil (Alaska Superior Court) (Hunt)**

The False Pass commercial fishery occurs near the Alaska Peninsula in June, targeting mainly sockeye salmon. Along with the sockeye salmon are incidentally harvested chum salmon, five to ten percent of which (at most) may be Yukon fall chum salmon.

In May, 1987, a class action was filed against the Alaska Board of Fish and Commissioner of Fish and Game. *Association of Village Council Presidents, Tanana Chiefs Conference, Paul Philip, and Jonathon Solomon v. Alaska Board of Fish and Commissioner of Fish and Game*, No. 4BE-87-155 Civ. The plaintiffs asserted that the information presented to the Board of Fisheries indicated that not enough fall chum salmon would return to the Yukon in 1987 to provide for both escapement and subsistence fisheries. They argued that the federal and state subsistence laws required that the False Pass commercial fishery be closed.

The State and intervenors (Concerned Area M Fishermen and Peninsula Marketing Association) argued that the information before the Board of Fisheries justified the board's conclusion that there was no need to close the False Pass fishery. The board did not believe it was likely that there would not be enough fall chum salmon to provide for escapement and subsistence fishing at historical levels in the Yukon. Plaintiff's request for a preliminary injunction was denied. Plaintiffs sought review by the state supreme court *via* a petition for review, which was also denied.

The Board of Fisheries imposed a chum salmon cap on the False Pass fishery for the 1988 season. The case was subsequently dismissed when ADF&G's estimate of fish returning proved to be inaccurate and more than enough fish returned.

This case was filed in the late fall of 1988, challenging the False Pass chum salmon cap which the Board of Fisheries had imposed, beginning in June 1988. Plaintiffs in this case include the intervenors in that case. The chum cap is challenged on a number of grounds. The Yukon-Kuskokwim Fisheries Task Force and four (4) residents of western Alaska have intervened on the State's side to support the cap, and have filed a cross claim against the State, arguing for the same reasons put forward in Peninsula Marketing Association that the False Pass fishery should be closed. Cross motions for summary judgment were filed on plaintiffs' claims (not intervenors). Following argument on those motions in early June, the Court ruled in favor of the State and Intervenors. Intervenors are now conducting discovery on their cross claim, putting the State and the plaintiffs on the same side. The Intervenors are seeking to close the False Pass fishery for the same reasons advanced in *Association of Village Council Presidents, et al. vs. Alaska Board of Fish and Commissioner of Fish and Game.*

19. *Sierra Club v. Penfold* , 857 F.2d 1307 (9th Cir. 1988), *on remand,* A86-083 Civ. (D. Alaska) (von der Heydt)

This case challenges BLM 's approval of placer mining plans. In addition to claims under NEPA and BLM's regulations on the procedure for approving and receiving notice of mining activities on BLM administered lands, plaintiffs asserted claims under Section 810 of ANILCA. The subsistence issues of interest include the following:

a) *Subsistence Reviews Must Evaluate Cumulative Impacts*

In a published decision on May 28, 1987, the federal district court held for the first time that Section 810 of ANILCA, 16 U.S.C. § 3120, requires a federal land management agency to consider cumulative impacts when determining whether a federal action may significantly restrict subsistence uses. *Sierra Club v. Penfold*, 664 F. Supp. 1299, 1307 (D. Alaska 1987). The court drew an analogy to NEPA law and held that the "common-sense principles" of NEPA, which require analysis of cumulative impacts when agencies determine the environmental significance of federal actions, would be applied to subsistence evaluations too.

On the facts of the case, the court then held that the cumulative impacts of multiple placer mines on subsistence uses of Birch Creek were "significant" and triggered the notice and hearing requirements of Section 810(a)(1)-(3). The court specifically found that mineral development "severely degrade[d]" Birch Creek Village's subsistence fishery and "interfere[d] with use of river water for drinking by village residents." The court also held that the cumulative impacts of placer mining on Minto had been unlawfully ignored and remanded the case to the BLM for a determination of the significance of these impacts.

b) *Mining Regulations Invalid for Failure to Consider Subsistence Impacts*

In a subsequent unpublished decision of November 6, 1987, the court invalidated 1983 amendments to BLM's mining regulations because, among other reasons, the amendments were promulgated without a Section 810 evaluation. *Memorandum and Order* at 31-34 (Nov. 6, 1987). These amendments had the effect of allowing mines on "withdrawn lands" (lands closed to new mineral entry) to operate under "notices" without subsistence review if the mines kept their operations under five acres.

On motion for reconsideration, the court also excused the failure of the subsistence plaintiffs to exhaust administrative remedies, relying on the point that the failure to exhaust could be attributed to the agency's failure to provide the notice required by Section 810. *Minute Order* (Nov. 12, 1987) ("the Secretary cannot shield his complete failure to comply with Section 810 by arguing that the very groups

intended to benefit indirectly from the notice provisions of the statute should have reminded him of his statutory duty").

c) *Village Councils Have Parens Patriae Standing*

A final decision of note is the unpublished decision of November 21, 1986, where the court considered and rejected a BLM argument that th· ʾA and village council plaintiffs in the case lacked standing to sue on behalf ˬ neir residents. *Memorandum and Order* at 24-26 (Nov. 21, 1986). The court held that *parens patriae* standing is appropriate when a sovereign entity sues "to prevent a violation of federal laws by federal agencies." *Id.* at 25. The court then went on to assume that IRA and village councils have sovereign attributes, without deciding the question. *Id.* at 26. Finally, the court ruled that environmental organizations do not have standing to bring Section 810 actions.

On September 21, 1988, the Court of Appeals affirmed the lower court in all respects. Of primary importance was its conclusion that BLM violated NEPA and Section 810 of ANILCA by failing to prepare EISs addressing the cumulative impact and effect on subsistence uses of all placer mines in each of the four watersheds involved in the litigation (Birch Creek, Beaver Creek, Fortymile River and Minto Flats). The Appeals Court left in place the district court's injunctions prohibiting approval of any placer mines in the four watersheds pending completion of the EIS's.

Following the Court of Appeals decision, BLM completed its final Environmental Impact Statements for all four drainages and then moved to lift the injunctions. At plaintiff's request, the district court agreed to delay its ruling on the motion until BLM issued its final decisions. Final decisions were issued implementing the preferred alternative in all four drainages and imposing more protective measures for reclamation. After evaluating the adequacy of the EISs and the final decisions, plaintiffs decided not to oppose the government's motion to lift the injunctions. The injunctions were subsequently lifted and the agency is proceeding with the program as set out in the final decisions. Plaintiffs are monitoring the implementation of the program.

20. *Stein v. Barton*, J89-016 Civ. (D. Alaska) (von der Heydt)

On August 30, 1989, commercial fishermen and Alaska Natives in Southeast Alaska who use areas on Prince of Wales Island for fishing, hunting and gathering sued the United States Forest Service alleging that salmon habitat and subsistence resources on Prince of Wales Island will be irreparably harmed unless the federal defendants are enjoined from logging and road building within 100 feet of all anadromous streams and their tributaries. The plaintiffs alleged violations of NEPA,

Section 810 of ANILCA, and the Clean Water Act, and sought declaratory, injunctive and temporary relief.

On September 29, 1989, Judge von der Heydt issued a temporary restraining order. In doing so he found (1) that plaintiffs had raised serious questions whether the federal defendants had complied with NEPA, ANILCA and the Clean Water Act when they approved the 1989-94 Operating Plan for the Ketchikan Pulp Company's Long-Term Sale Area; (2) that the balance of hardships tipped in favor of granting temporary relief; (3) that partial temporary relief was necessary to preserve the status quo pending disposition of the plaintiffs' motion for preliminary relief; and (4) that such relief would be narrowly tailored to have only *de minimis* impact on logging in the affected area. Based on these conclusions, the Court enjoined federal defendants from authorizing logging and road building within 100 feet of all streams within the Ketchikan Pulp Company's long-term sale area that are classified as "Class I" streams, and all streams classified as "Class II" streams that are tributaries of Class I streams.

Of interest here is the fact that the Forest Service argued that the subsistence users of Wrangell lacked standing to raise the subsistence fisheries issue because of a finding by the Board of Fisheries in late February, 1989, that Wrangell is ineligible for subsistence fisheries. The eight criteria the Board applied to determine Wrangell's status as a subsistence community are the subject of litigation in *Kitka v. State of Alaska*, (*see* discussion *supra* at p. 21). The Forest Service also attempted to minimize its duties under Section 810 of ANILCA by characterizing Section 810 of ANILCA as purely a procedural statute. The plaintiffs, citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 544 (1987), (*see* discussion *supra* at p. 14) and *Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989) argued that insofar as the procedural failures of the Forest Service in this case led to an improper choice of mitigation measures to minimize adverse impacts on subsistence resources, the Court may require the agency to choose a new action.

On March 1, 1990, the court entered an Order and Preliminary Injunction enjoining timber development within 100 feet of anadromous streams throughout the Ketchikan Pulp Corporation long-term sale area. In an opinion issued on March 6, the court found that plaintiffs were likely to prevail on their claim that the Forest Service's mitigation measures were arbitrary, capricious, and otherwise no in accordance with law. The court's ruling was based on its interpretation of the Administrative Procedures Act and the National Environmental Policy Act. The Court did not rule on the ANILCA claims. The parties are briefing the remaining issues on summary judgment.

21. ***Sumner Strait Advisory Committee v. State of Alaska*, No. A90-040 Civ. (D. Alaska) (Holland)**

This case was filed on February 8, 1990, by a local advisory committee and non-Native residents of Port Protection and Port Baker (on the northwest tip of Prince of Wales Island). They 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 which called for recognition of and a priority for customary and traditional subsistence uses of finfish and shellfish by residents of Point Baker and Port Protection.

22. ***Tanana Fish and Game Association v. State of Alaska*, No. A90-117 Civ. (D. Alaska) (Kleinfeld)**

This case was filed on April 20, 1990, by the Tanana Fish and Game Association, an unincorporated association organized to represent and advance the interests of users of fish and wildlife resources in and around the Village of Tanana. Plaintiff alleges that its members have been selling the roe from their subsistence harvests of Yukon River (fall chum) for at least 20 years. Currently the sale of roe from subsistence taken salmon is illegal under 5 AAC § 1.010 (d).

Plaintiff asserts that the regulation violates Section 804 of ANILCA, which mandates that customary and traditional subsistence uses, including customary trade, be given priority over competing non-subsistence uses. Based on the fact that the definition of "subsistence uses" in both state and federal law contains a "customary trade" component which has been interpreted to mean limited exchanges for cash not amounting to a significant commercial enterprise, plaintiff seeks to have the State recognize the right of the residents of Fishing District 5 of the Yukon River to engage in customary trade of Yukon River salmon roe. The association developed a program to regulate and limit the roe trade, which was unanimously endorsed by the local advisory committee. Following hearings in 1988, the proposal was rejected by the Board of Fisheries.

The issue of whether the Yukon River subsistence salmon fisheries should be managed by the state or the federal government has been raised in this case.

23. ***Tenakee Springs v. Clough*, J86-024 Civ (D. Alaska) (von der Heydt)**

This case involves challenges to Forest Service timber cutting plans for the Alaska Pulp Corporation (APC) on Chichagof, Baranof and Kuiu Islands. This case

has proceeded in two phases, challenging the Environmental Impact Statements and associated ANILCA findings for two separate operating plans.

In the first phase, the plaintiffs challenged the five year operating plan for 1981-86 under both NEPA and ANILCA. The plaintiffs were the Sierra Club, Southeast Alaska Conservation Council, the Wilderness Society, and the City of Tenakee Springs.

The case raised two issues relative to ANILCA: what entities have standing to bring actions for a violation of Section 810, and the applicability of Section 810 to the 5-year harvest plan, since it was adopted prior to ANILCA, but implemented afterwards. The government argued that mere implementation of the decision to "withdraw, reserve, lease or otherwise permit the use, occupancy, or disposal" of public lands did not trigger Section 810. It argued that the determination to authorize the roads and harvest units was made prior to the passage of ANILCA in 1980 when the Forest Service approved the 5-year plan.

The federal government argued that state-created municipalities could not sue *parens patriae*, therefore the City of Tenakee Springs had no standing to bring Section 810 actions. The plaintiffs, relying upon cases giving municipalities standing in NEPA cases, claimed they had standing by virtue of Section 802(3) which declares that it shall be a policy of Congress for federal land managing agencies to cooperate with adjacent land owners. They also argued that the City had standing because it performed land planning functions relating to subsistence with which the Forest Service actions conflicted.

Judge von der Heydt (decision June 26, 1987) agreed with the federal government and ruled that the City of Tenakee Springs had no standing to raise a cause of action under Section 810. Citing *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), the court reasoned that the City does not engage in subsistence and its indirect interest in the economic well-being of the taxpayer base was not sufficient to confer standing. The court made no finding as to whether the Forest Service had complied with Section 810, but cautioned "[s]ince other plaintiff[illegible]rties to this suit could raise the Section 810 issue at a later time, prudence would dictate that the Forest Service reevaluate whether it has complied with the section."

On the NEPA issues, the court enjoined further roading and harvest beyond the existing roads in a given area pending preparation of a supplemental EIS. Completion of the Supplemental EIS.

The second phase of the case involves a challenge to the supplemental EIS, released in November 1989, for the 1981-86 and 1986-90 operating periods. In the

record of decision for that EIS, the Forest Service authorized the cutting of over 400 million board feet of timber in 1990, more than APC had cut in the prior four years combined. In so doing, the agency found that there would likely be a significant restriction on subsistence, but that it was "necessary" due to the 50 year timber contract with APC.

A large number of subsistence users joined the original plaintiffs in the challenge to the supplemental EIS, including Natives and non-Natives from Tenakee Springs, Angoon and Kake, the Kake Tribal Corporation, the Organized Villages of Kake and the Angoon Community Association. The plaintiffs moved for preliminary injunctions on January 8, 1990 and February 2, 1990, alleging that the Forest Service's Subsistence analyses and findings fail to comply with ANILCA, § 810. The preliminary injunction motions also raise issues under NEPA and the Clean Water Act. The motions request protection of selected timber harvest sites around Tenakee Springs, Angoon and Kake, 100 foot no-cut buffer strips on important fish streams, and a water quality monitoring program.

The court consolidated this case with *Hanlon v. Barton (see* p. 15 *infra* or *supra)*, which challenged the same Forest Service decision on behalf of residents of Hoonah. The court ordered the parties to negotiate but they were unable to reach agreement. In mid-April, plaintiffs moved for a temporary restraining order. On April 26, 1990, the court heard oral argument on the requests for preliminary injunction and temporary restraining order. The court denied the request for T.R.O. but stated its intention to issue a decision on the consolidated requests for preliminary injunction in the near future.

24. Tlingit and Haida Central Council v. State of Alaska, No. 1JU-90-373 CIV. (Superior Court)

This case was filed on April 8, 1990, by individual Tlingit and Haida Indians and the Tlingit and Haida Central Council. They challenge the State's management of sea cucumber 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.

Plaintiffs seek a declaration that the defendants are managing the fishery in violation of Article VIII, Section 4 of the Alaska Constitution, AS 16.05.258, 5 AAC 99.010, AS 16.43.010, 16.43.240, and AS 16.05.092. They also seek a permanent injunction preventing the State from granting permits, and directing them to rescind all outstanding permits, for commercial harvest of sea cucumbers, until such time as they have assessed the biological status of sea cucumbers, determined the portion of those stocks that may be harvested consistent with sustained yield, determined the

portion needed to satisfy subsistence needs, and otherwise complied with the requirements of State law.

25. ***Tukisarmute Native Community Council v. Conquergood*, A85-604 Civ. (D. Alaska) (Holland)**

This case involves a challenge to a gold dredging permit and mining plan on the Tuluksak River. Defendants are the Corps of Engineers and the BLM. The Corps of Engineers is the agency responsible for the issuance of dredge and fill permits (commonly known as 404 permits, *see* 33 U.S.C. § 1344) involving navigable waters. The Bureau of Land Management approves mining plans involving more than five acres of public land.

The plaintiff claims that BLM failed to comply with its statutory responsibilities under both NEPA and Section 810 of ANILCA. Specifically, they claim that the BLM erroneously concluded that it need not prepare a full environmental impact statement in conjunction with its permit authorizing Northland Gold to relocate a 1½ mile stretch of the Tuluksak River across BLM lands in order to dredge the main channel of the river. While BLM did an 810 analysis before approving the mining plans, plaintiffs argue that BLM erroneously found that the dredging activity and channel diversion would not significantly restrict subsistence uses within the meaning of Section 810.

On October 17, 1989, Judge Holland granted in part plaintiffs' motion for partial summary judgment on their NEPA and ANILCA claims. He found that BLM's conclusion not to prepare an EIS or to comply with the full ANILCA section 810 procedures was not reasonable, due to a failure to analyze fully the downstream impacts of the mining operation; but instead of ordering an EIS or compliance with Section 810, he remanded the matter to BLM to analyze those impacts and decide whether to prepare an EIS or comply with the Section 810 procedures. At the same time, he granted defendants' motion for partial summary judgment as to the remaining counts, which seems to have in effect upheld BLM's permit on the merits. Plaintiffs moved to amend the judgment to vacate the decision in favor of defendants, which the Court denied on January 9, 1989.

Plaintiffs have filed an appeal of the grant of summary judgment to defendants and defendants have moved to dismiss the appeal for lack of jurisdiction. The Court has consolidated that motion with the merits of the appeal. The case is currently tied up in the Conference Program, however, due to the possibility that the appeal may be rendered moot.

26. *United States v. Sakurai*, No. A88-026 Cr. (D. Alaska) (Consuelo B. Marshall, visiting judge)

Grant Boe and Lavina Grey were indicted on charges of taking herring roe on kelp "for other than subsistence purposes," allegedly in violation of 5 AAC §§ 01.010, 01.730, 39.002. Specifically, they were charged with taking and possessing herring roe for commercial sale in the State of Washington in violation of various sections of the Lacey Act, 16 U.S.C. § 3372 (a)(2)(A) and § 3373 (d)(1)(B) and for conspiracy under 18 U.S.C. § 371. The Lacey Act incorporates state law fish and game offenses.

On September 12, 1988, Boe and Grey moved to dismiss the indictments against them on the ground that the sale of roe on kelp in the State of Washington is consistent with the definition of subsistence uses under both Alaska and federal law. In addition, they alleged that Alaska's regulations failed to apply the policies mandated by Title VIII of ANILCA.

The matter was referred to Magistrate Roberts, who issued a Report and Recommendation on October 11, 1988. He concluded that "[t]he large scale interstate commercial sales of roe on kelp that defendants are alleged to have undertaken clearly are not the type of "customary trade" that Congress or the Alaska legislature intended to protect." *Magistrate's Report* at 28. Judge Kleinfeld accepted the magistrate's report, noting that neither of the defendants had presented sufficient factual support for the predicate of their argument, and therefore denied the motions to dismiss.

On May 11, 1989, the parties stipulated to reopening defendants' motion to dismiss for the purpose of allowing the court to consider additional evidence offered by the defendants. At a hearing on May 15, 1989, the defendants presented evidence demonstrating that they had earned approximately $8,700 from the harvest and sale of roe on kelp in 1988 and approximately $7,600 in 1987. The Court concluded that the exchange of roe on kelp for currency is customary trade within the native community, and that the income received from the defendants' sale of roe on kelp was not sufficient for the Court to conclude that they were engaged in a "significant commercial enterprise." The Court dismissed the counts involving violations of the Lacey Act and the Government voluntarily dismissed the conspiracy count.

Although the Government took an appeal from Judge Marshall's dismissal of the Lacey Act violations, the appeal was subsequently dismissed on September 29, 1989, at the Government's request.

27. *United States v. Skinna*, No. CR-88-026 (D. Alaska) (Fitzgerald), appeal pending, No. 88-3286 (9th Cir.)

Byron Skinna was convicted following a jury trial of one count of unlawful transportation in Interstate Commerce of illegally taken herring spawn on kelp in

violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(2)(A) and 3373 (d)(1)(B). On appeal Skinna argues that the State of Alaska's regulations restricting the commercial harvest of herring roe on kelp conflict with the "customary trade" provisions of ANILCA and are therefore invalid.

MISCELLANEOUS NATIVE INITIATIVES

Alaska Sea Otter Commission

The Alaska Sea Otter Commission was founded in December 1988 for the purposes of managing, protecting, and regulating sea otter hunting. In addition, the Commission intends to educate and inform the public about this long-established way of life.

The immediate impetus for organization of the Commission was the initiation by the U. S. Fish and Wildlife Service of a formal rulemaking proceeding proposing to prohibit Alaska Native use of sea otters for making handicrafts and clothing. The Commission took a lead role in coordinating participation by coastal Alaska Natives in the public hearings regarding the proposed rule which were held in October, 1989.

The Commission, made up of representatives from each of the six affected coastal Native regions in Alaska, also plans to take an active role in management and conservation of the sea otter population in general, but in the Prince William Sound area in particular, due to the damage to the sea otter population caused by the Exxon Valdez oil spill. The long-term goal of the Commission is to develop a comprehensive management plan in cooperation with the Fish and Wildlife Service and the Department of Fish and Game.

Eskimo Whaling Commission

The Alaska Eskimo Whaling Commission (AEWC) is organized as a state non-profit association for the purpose of actively representing the interests of Native whalers before the International Whaling Commission. As noted above, the AEWC was successful in convincing the International Whaling Commission to relax its ban on bowhead whaling.

International Porcupine Caribou Commission

The International Porcupine Caribou Commission (IPCC) was initially formed to resist oil development in the Arctic National Wildlife Refuge. It has subsequently become a trans-boundary commission of Athabascan and Inuit people who seek an international accord protecting the Porcupine Caribou herd. The IPCC has focused efforts on two different fronts. Internationally, the IPCC has attempted to influence the treaty negotiations between the United States and Canada concerning the herd

population and the protection which should be given to the herd's habitat. Domestically, the IPCC represents Native users who are concerned that substantial development in the Arctic National Wildlife Refuge will significantly and adversely affect the size of the herd.

The Eskimo Walrus Commission

The Eskimo Walrus Commission was founded in 1978 in response to negative publicity about Eskimo walrus hunting. The Commission has representatives from 18 villages whose residents secure a significant proportion of their food from walrus hunting. The Commission was founded for the purpose of managing, protecting and regulating walrus hunting. In addition, the Commission sought to educate and inform the public about this long-established way of life.

After years of working together, the Commission, the Department of Fish & Game and the Fish & Wildlife Service formalized their mutual interest in the welfare of Pacific Walrus by signing a Memorandum of Agreement on May 21, 1987. The Agreement outlines management responsibilities and conservation obligations and recognizes the need for ongoing cooperation to maintain a healthy walrus population.

RECENT ARTICLES AND PUBLICATIONS

1. Conn and Garber, *State Enforcement of Alaska Native Tribe Law:* The Congressional Mandate of the Alaska National Interest Lands Conservation Act, 1989 HARV. INDIAN L. SYMP. 99 (1990).

2. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U COLO. L. REV. 1009 (1989).

3. Berger, *Conflict in Alaska*, 28 Nat. Resources J. 43 (1988).

4. Frost, *Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 ALASKA L REV. 15 (June, 1988).

5. *Amoco v. Gambell: Aboriginal Rights on the Outer Continental Shelf: Reopening Alaska Native Claims*, 28 NATURAL RESOURCES JOURNAL 623 (Spring, 1988).

6. Jones, *Black Gold and the Tlingit Indian Village of Yakutat, Alaska: A Case Study of the Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility of Native Alaskans*, 24 WILLAMETTE L. REV. 565 (Summer 1988).

7. *Amoco Production Co. v. Village of Gambell: Federal Subsistence Protection Ends at Alaska's Border*, 18 ENVTL. L. 635 (Spring 1988).

8. *Final Subsistence Management and Use: Implementation of Title VIII of ANILCA*, U.S. Department of the Interior, Fish & Wildlife Service (1988).

9. *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 OR. L. REV. 195 (1987).

10. *Amoco Production v. Village of Gambell: The Limits of Federal Protection of Native Alaskan Subsistence*, 7 VA. J. NAT. RESOURCES L. 143 (Fall 1987).

11. Note, *Preliminary Injunctions as Relief for Substantial Procedural Violations of Environmental Statutes: Amoco Production Co. v. Village of Gambell*, 4 ALASKA L. REV. 105 (June, 1987).

12. Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 ALASKA L. REV. 223 (1987).

13. Note, *The Alaska National Interest Lands Conservation Act: Striking the Balance in Favor of "Customary and Traditional" Subsistence Uses By Alaska Natives*, 27 NATURAL RESOURCES JOURNAL 421 (1987).

14. Note, *Development of Alaska's Outer Continental Shelf Oil and Gas Resources and the Federal Trust Responsibility to Native Alaskans*, 6 VA. J. NAT. RESOURCES 53 (1986).

McDowell Case

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THE SUPREME COURT OF THE STATE OF ALASKA

SAM E. McDOWELL, DALE E. BONDURANT, RONALD MAHLE and HAROLD EASTWOOD,

Appellants,

v.

STATE OF ALASKA, ALASKA DEPARTMENT OF FISH AND GAME, ALASKA BOARD OF FISHERIES, ALASKA BOARD OF GAME and DON W. COLLINSWORTH, Commissioner of Fish and Game,

Appellees,

THE ALASKA FEDERATION OF NATIVES, PROTECTORS OF THE LAND d/b/a NUNAM KITLUTSISTI, TONY VASKA and WALTER CHARLEY, on behalf of himself and all other persons similarly situated,

Intervenors/ Appellees.

Supreme Court File No. S-2732

Trial Court File No. 3AN-83-1592 Civil

O P I N I O N

[No. 3540 - December 22, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Douglas J. Serdahely, Judge.

Appearances: Cheri C. Jacobus, Ross, Gingras, Bailey & Miner, P.C., Anchorage, for Appellants. Larri Irene Spengler, Assistant Attorney General, Grace Berg Schaible, Attorney General, Juneau, for Appellees. Donald Craig Mitchell, Anchorage, for Intervenors/Appellees.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

MATTHEWS, Chief Justice.
COMPTON, Justice, concurring.
MOORE, Justice, concurring.
RABINOWITZ, Justice, dissenting.

INTRODUCTION

This case challenges chapter 52 SLA 1986 which grants a preference to rural residents to take fish and game for subsistence purposes. The only requirement to be met by a subsistence fisherman or hunter is residency in a rural area of the state.

The rural preference is challenged under several provisions of the Alaska Constitution: the common use clause, article VIII, section 3; the no exclusive right of fishery clause, article VIII, section 15; the uniform application clause, article VIII, section 17; the equal rights clause, article I, section 1; and the due process clause, article I, section 7. In addition, violation of the equal protection and due process clauses of the United States Constitution is claimed. For the reasons that follow, we hold that the rural preference violates article VIII, sections 3, 15 and 17 of the Alaska Constitution.

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FACTUAL AND PROCEDURAL SETTING

The 1986 act[1] defines subsistence fishing and hunting as activities which can be undertaken only "by a resident domiciled in a rural area of the state . . . ." Subsistence uses are also defined in terms of residency in rural areas:

> "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, and for the customary trade, barter, or sharing for personal or family consumption.

AS 16.05.940(30). A "rural area" is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05.940(25).

Appellants are Alaska residents who have engaged in subsistence hunting and fishing in the past and wish to continue to do so. Under the 1986 act, they are disqualified as subsistence users because they reside in areas classified as non-rural by the joint Boards of Fisheries and Game. Appellants McDowell and Mahle reside in Anchorage, Bondurant resides in

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1. For ease of reference, citations to chapter 52 SLA 1986 in this opinion will be to the appropriate section of the Alaska Statutes where that act is codified.

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Cooper Landing, and Eastwood resides in the community of McKinley Park.

The 1986 act requires the Board of Fisheries and the Board of Game to decide what portion of each fish stock and game population can be harvested consistent with the principle of sustained yield. Next the Boards must determine how much of the harvestable portion is needed to satisfy subsistence needs. If the harvestable portion of any stock or population is not sufficient to accommodate all consumptive uses -- sport, personal use, and commercial -- then subsistence uses

> shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the 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.

AS 16.05.258(c). If the harvestable portion of a stock or population is insufficient to satisfy all subsistence needs, all non-subsistence uses are barred, and the Boards are required to distinguish among subsistence users by applying three criteria: "(1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources." Id.

This case was brought in 1983 as a challenge to the 1978 subsistence statute, chapter 151, section 4 SLA 1978. The 1978 statute established that subsistence hunting and fishing had priority over other uses of fish and game stocks. Like the 1986

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statute, it provided for two tiers of subsistence users. In the first tier were those who could take fish or game for subsistence purposes when populations were adequate to satisfy all subsistence needs. The second tier was limited to those who could take fish and game for subsistence purposes when populations were inadequate to supply all subsistence needs. The 1978 statute distinguished the second tier of subsistence users from the first tier on the basis of the same three factors utilized in the 1986 statute, namely, customary and direct dependence, local residency, and availability of alternative resources. Id. However, unlike the 1986 statute, the 1978 statute did not impose a rural residency requirement as a condition to becoming a first-tier subsistence user.

The appellants' initial complaint challenged the second-tier subsistence priority of the 1978 statute. The complaint was amended several times to expand on the original theory and add challenges to various regulations. All parties submitted motions for summary judgment. The superior court granted some of these motions and deferred others on October 24, 1984. Before the deferred motions could be ruled on, this court decided Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), which struck down, as inconsistent with the 1978 statute, subsistence fishing regulations which imposed a rural residency requirement on first-tier subsistence users. Id. at 178.

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The next event of significance was the passage in 1986 of chapter 52 SLA 1986, which, as noted, provides that only rural residents can be first- or second-tier subsistence users. Following passage of this act, the appellants again amended their complaint, challenging the rural preference on constitutional grounds. Both the appellants and the state moved for summary judgment. The superior court granted the motion of the state and denied the motion of the appellants. Judgment was entered on the basis of this ruling.

The setting of this case would not be complete without mention of the Alaska National Interest Lands Conservation Act (ANILCA), enacted by Congress in 1980.[2] Section 3114 of this act requires that on federal public lands in Alaska, subsistence uses are to be given priority over the taking of fish and wildlife for other purposes. Under ANILCA, only rural Alaska residents are entitled to a subsistence priority.[3] ANILCA requires federal

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2. 16 U.S.C.A. §§ 3101-3233 (West 1985).

3. ANILCA § 804, 16 U.S.C.A. § 3114, states:

> 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

(Footnote Continued)

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management of public lands in Alaska in order to ensure the subsistence priority.[4] However, federal management may be supplanted by the state so long as the state enacts and implements subsistence laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA.[5]

(Footnote Continued)

> implemented through appropriate limitations based on the application of the following criteria:
>
> (1) customary and direct dependence upon the populations as the mainstay of livelihood;
>
> (2) local residency; and
>
> (3) the availability of alternative resources.

(Emphasis added).

ANILCA § 803, 16 U.S.C.A. § 3113, defines the term "subsistence uses" as used in ANILCA to mean

> 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.

(Emphasis added.)

4. 16 U.S.C.A. § 3115(c).

5. 16 U.S.C.A. § 3115(d).

After this court's Madison decision, the Secretary of the Interior notified the state that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 105 L. Ed. 2d 695 (1989). With the passage of the 1986 act, the Interior Department has stated that Alaska is once again in compliance with ANILCA. Id.

After final judgment was entered by the superior court, the 9th Circuit Court of Appeals ruled that the definition of "rural" in the 1986 act does not comply with § 3113 of ANILCA. Id. at 318. "Rural," in ANILCA, according to the court, refers to "sparsely populated" areas; "rural is the antonym of urban and includes all areas in between cities and towns of a particular size." Id. at 316-17. The court referred to Census Bureau standards under which "the urban population consists of people living in communities of 2,500 or more, while the rural population comprises everyone else." Id. at 317. Thus, the 1986 act's subsistence-oriented definition was held inconsistent with ANILCA.

Bondurant and Eastwood both reside in rural areas as Kenaitze has interpreted ANILCA's use of that term. They are thus probably entitled to injunctive relief under ANILCA, 16

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U.S.C.A. § 3117(a).[6] However, the Kenaitze decision does not change the issues presented in this appeal because the 1986 statute remains fully applicable to all non-federal lands.

Background and Purpose of the 1986 Statute

Prior to 1978, urban residents could engage in subsistence hunting and fishing. However, there was no statutory preference given to subsistence over sport or commercial fishing or sport hunting. With the enactment of chapter 151 SLA 1978, subsistence hunting and fishing was given such a priority. Madison, 696 P.2d at 174 n.12. The 1978 statute did not bar urban residents from eligibility as first-tier subsistence users. Madison, 696 P.2d at 176. However, a regulation adopted by the Board of Fish and Game did exclude urban residents. 5 AAC 01.597. Madison held that this regulation violated the 1978 statute. Id.

In 1985 the Alaska House of Representatives adopted a letter of intent which accompanied the bill that became the 1986 subsistence act. 1985 House Journal 1246. The letter explained the rural preference of the 1986 act as follows:

> This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependent upon participation by the residents of these communities in the

6. Such relief has not been requested in this case, and the question whether the § 3117(a) remedy is available only in federal courts has not been briefed.

> taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.

Id. at 1229-30. In making this determination, the legislature sounded a theme that was also expressed by Congress in enacting ANILCA. The House Committee on Interior and Insular Affairs determined that:

> After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of federal, state, academic, and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. Reliable evidence was given to the Committee demonstrating that fifty percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40 percent of such families spend an average of 6 to 7 months of the year in subsistence activities . . . .

H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978). The intervenors in this appeal similarly expressed the purpose of the rural preference as follows:

> If village access to fish and game is overwhelmed by competition from the tens of thousands of sportsmen who Alaska's fortuitous oil wealth has drawn to the urban centers, the effect on the rural village economy would be adverse, and the effect on the health and welfare of rural residents would be even more so.

An additional purpose of the 1986 subsistence law is to retain state management of fish and game on federal lands by meeting the requirements of ANILCA.[7]

Urban-Rural Subsistence Patterns

Appellants' basic objection to the 1986 act is that by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, the act unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing. Appellants claim, in other words, that the urban/rural criterion is both unfairly under-inclusive, because it excludes deserving urban residents, and over-inclusive, because it includes undeserving rural residents. Appellants instead suggest that the right to subsistence should depend upon individual needs and traditions, not on one's place of residence.

The record supports the appellants' claim that there are substantial numbers of urban subsistence users. A state

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7. Senator Fisher, a member of the Senate Resource Committee, noted in the Senate floor debate: "[T]his legislation will provide the boards the tools to solve the problems in harvest disruption that followed Madison, and will assure the state will retain management of fish and game throughout Alaska by meeting the requirements of the federal subsistence law."

study of subsistence use patterns[8] found that of some 255 holders of subsistence salmon permits for the 1980 Tanana River fishery, approximately 20% exhibited the attributes commonly associated with a traditional subsistence lifestyle, even though they all resided in the urban Fairbanks area. The report states:

> Despite their residence in or near populated areas of the Fairbanks North Star Borough, these households generally participated in the wage economy on a seasonal basis and had longer histories of participation in the fishery, lower cash incomes, and somewhat larger household sizes than the majority of users. Some of these households have long-standing cultural ties to the subsistence fishery. For these more intensive users, fishing in sub-district Y-6C was less a recreational outing than an integral component of their way of life in Interior Alaska. Their residence in an area which is currently defined by regulation as urban, coupled with escalating demands upon the resource base, however, raise questions about whether these more intensive uses can continue in the future.

Study at 12. Similarly, in the city of Homer, an urban area under the regulations,[9] the study reports that 38.2% of the city residents obtained at least one-half of their meat and fish supply from personal hunting and fishing activities. Id. at 162.

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8. R.J. Wolfe and L.J. Ellanna Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, Technical Paper Number 61, Alaska Department of Fish and Game, Division of Subsistence, Juneau, March, 1983 (hereinafter "Study").

9. 5 AAC 99.014.

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Likewise, the study documents the fact that numerous Alaskans who live in areas classified by the regulations as rural do not engage in subsistence activities. For example, in the City of Sitka, which is classified as rural, although it has a population of 7,803, some 26% of the households sampled did no hunting and 7% did no fishing. Id. at 235. Similarly, in the City of Nome, population 3,249, which is also rural under the regulations, id. at 93, some 5% of all households use no locally taken fish or game. Id. at 111.

The study also amply supports the critical importance of subsistence hunting and fishing to residents of the numerous small and remote villages of our state. For example, in the Wade Hampton census area of Western Alaska, the average annual per capita cash income was only $2,737 (1979),[10] id. at 30, and the average household harvested 4,597, dressed weight, pounds of fish and game each year. Id. at 42.

The Article VIII Clauses - History and Analysis

A.

Section 15 of article VIII of the Alaska Constitution provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to

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10. The 1979 statewide average was $11,152. Study at 30.

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> limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 3 of article VIII provides:

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

Section 17 of article VIII provides:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited. Section 15 states this explicitly with respect to fisheries. The proceedings of our Constitutional Convention show that the same meaning was intended with respect to sections 3 and 17.

A memorandum of the Constitutional Convention Committee on Resources expresses the view that the common use clause has as one of its purposes a prohibition on exclusive grants or special privileges. The memorandum states: "The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition." Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee on Resources, entitled "Terms."

The Committee on Resources commentary with respect to the uniform application clause states:

> This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state.

6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).

In Owsichek v. State, 763 P.2d 488 (Alaska 1988), we observed that the article VIII provisions were designed to ensure to the public the broadest possible access to wildlife. We noted that "the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Id. at 495 (emphasis added). "[A] minimum requirement of this duty is a prohibition against any . . . special privileges." Id. at 496. In State v. Ostrosky, 667 P.2d 1184, 1191 (Alaska 1983), we observed that the common use and no exclusive right of fishery clauses reflected "anti-exclusionist values."

Appellants contend that the rural residency requirement amounts to an exclusive or special privilege prohibited explicitly by section 15 and implicitly by sections 3 and 17. They focus on Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), a case which interpreted section 1 of the White Act, former 48 U.S.C. §§ 220-224 (1941), under which Alaska fisheries were regulated before statehood. In Hynes, the Supreme Court held that the White Act prohibited granting a preferential right to fish to Native residents of the Karluk Reservation. Id. at 123.

This case is of precedential importance, they contend, because section 15 was based on section 1 of the White Act.

In response, the state agrees that the first sentence of section 15 is based on section 1 of the White Act. However, the state distinguishes Hynes on the grounds that the exclusive right to fish there was available to "a closed class." In contrast, it argues there is no closed class here because "people may become eligible to participate in subsistence uses by establishing their domicile in a rural area." Further, the state relies on Kenai Peninsula Fishermen's Cooperative Association v. State, 628 P.2d 897, 904 (Alaska 1981) which held that section 15 does not bar differential treatment between commercial, sport, and subsistance fishermen. The intervenors' argument in response relies exclusively on this case.

The parties correctly agree that the no exclusive right of fishery clause is based on section 1 of the White Act. The commentary concerning the exclusive right of fishery clause prepared by the Committee on Resources of the Constitutional Convention states:

> This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that Act the purposes sought by it are given expression in a prohibition of exclusive right or special privileges of any person to the fisheries of the state.

6 Proceedings of the Alaska Constitutional Convention Proceedings at 87 (Alaska Legislative Council).

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The language of the White Act, for which the no exclusive right clause is meant to be a substitute, is as follows:

> Provided, that every such regulation made by the Secretary of the Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

Act of June 6, 1924, ch. 272, § 1, 43 stat. 464.

The appellants' reliance on Hynes as an explanation of the meaning of the bar on exclusive rights and special privileges is apt. At issue in Hynes was a regulation of the Secretary of the Interior[11] prohibiting commercial salmon fishing in all waters within 3,000 feet of the shores of the Karluk Reservation. 337 U.S. at 92. The Secretarial Order made an exception which allowed Natives residing on the Reservation and their licensees to fish in these waters. Id. The Supreme Court held that this exception in favor of the Native residents and their licensees violated section 1 of the White Act. The court stated:

> [W]e think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by Natives equally with

11. Regulatory jurisdiction over the administration of the White Act was transferred from the Department of Commerce to the Department of the Interior, effective July 1, 1939; Hynes, 337 U.S. at 92 n.4.

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> fishing companies, nonresidents of Alaska or other American citizens and so applies whether those Natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. . . . "Exclusive," as used in Section 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people. The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in § 1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations.

337 U.S. at 122.[12]

As noted above, the state seeks to distinguish Hynes on the ground that Hynes involved a closed class of recipients of a special privilege, whereas the 1986 subsistence law does not because anyone who wants to hunt and fish for subsistence purposes can move to a rural area. We find this argument unpersuasive. If it were valid, virtually any discrimination based on residence would be justified - the residents of the disfavored area could simply move. Such a rationale is inconsistent with the prevailing approach in territorial

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12. We do not agree with Justice Rabinowitz's statement in dissent that the limitation struck down in Hynes was predicated solely on the fact that the users were Indians. Infra at 50. Both ethnic status and local residency were required as the regulation in question applied to "natives in possession of [the Karluk] reservation." 337 U.S. at 92. In any case, the quote in the text makes it clear that if the exception had been based solely on residence, rather than on residence and race, it would also have been struck down.

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discrimination cases, which is to subject territorial classifications to scrutiny under the equal protection clause. Gilman v. Martin, 662 P.2d 120, 125 (Alaska 1983); Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U. Pa. L. Rev. 261, 274-75 (1987).

The state's and the intervenors' reliance on Kenai Peninsula is also off the mark. That case merely affirmed what article VIII, section 4[13] says explicitly - that preferences among beneficial uses of fish and game may be legislatively or administratively established. We stated in Kenai Peninsula:

> While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species must also be allowed, would be to go far beyond the purpose of the section.

628 P.2d at 904 (footnote omitted). The state may, indeed must, make allocation decisions between sport, commercial, and

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13. Article VIII, section 4 of the Alaska Constitution provides:

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

subsistence users. That authority, however, does not imply a power to limit admission to a user group.[14]

Section 1 of the White Act guaranteed equal access to fisheries regardless of residence. The language of the Act and Hynes make this clear.[15] Alaska's constitutional framers were

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14. The foregoing also answers Justice Rabinowitz's contention that our interpretation of the equal access clauses of article VIII is in conflict with article VIII section 4. We have consistently taken the position that limits on admission to user groups are subject to scrutiny under the article VIII equal access clauses. See State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v. State, 763 P.2d 488, 492 (Alaska 1988).

15. The legislative history of the White Act is in accord. Congressional debate at the time the White Act was proposed demonstrated concern that Alaska residents and non-residents alike were being excluded from Alaska fisheries. The debate also demonstrated Congress' desire that Alaska fisheries be equally accessible to everyone:

> Mr. Robinson. The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan water, and out of this attempt to give exclusive rights to fish, thus depriving a large number of the people the right to pursue their usual vocation, great complaint arose. This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and requires him to give everyone equal rights within the areas where fishing is permitted.
>
> . . . . .
>
> Mr. Jones of Washington. The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce. . . . Within the two reservations [of restricted fishing areas] that were created by Executive Order a year or two ago the Secretary of Commerce has seen

(Footnote Continued)

(Footnote Continued)

> fit to make regulations under which outsiders might not go in order to fish. In other words, those who are already located there, if [the Secretary] thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.
>
> Mr. King: They were given exclusive rights.
>
> Mr. Jones of Washington. They may be called exclusive rights, but I want to say this in justice to the Secretary of Commerce:
>
> When I came back this fall, and came down here, and we were considering matters of this kind, the Delegate from Alaska and I talked over the matter with reference to those exclusive rights, and I saw the Secretary of Commerce, and the Secretary of Commerce himself said that he would be glad to have that discretion taken away, that certainly he was not in favor of that policy, but those who were on the ground and who had been dealing with the matter especially and who might be considered to be experts had recommended and urged that that policy be pursued. I will say, in justice to him, that he said frankly that he would prefer not to have that absolute power, so I can say for him that he is glad that this provision is put in the bill prohibiting him from granting exclusive rights within the fishing areas up there.
>
> . . . .
>
> Mr. Robinson. I have been unable to find any authority for [the Secretary] to grant exclusive rights of fishery. It was about that alleged abuse of authority that most of the complaints arose; namely, that the Secretary in some instances had created reservations, and in others had granted in certain waters the exclusive right to fish, usually to large corporations or packing concerns, which deprived the fishermen of the

(Footnote Continued)

aware of Hynes.[16] As noted, section 15 of article VIII was meant to be a substitute for section 1 of the White Act and to further

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(Footnote Continued)

> opportunity to pursue their occupations; and they desired very much the provision that is in this bill, which secures to every citizen of the United States the right to fish in Alaskan waters upon equal terms and without discrimination. The bill deprives the Secretary of any power . . . to grant exclusive rights to fish in Alaskan waters.

65 Cong. Rec. 9520-21 1924) (emphasis added).

Based in part upon the Congressional debate identified above, Hynes concluded that

> [T]he legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.

Hynes, 337 U.S. at 120 (footnote omitted).

16. A memo of the Committee on Resources defining terms states the following under "White Act Provisions 48 U.S.C.A. 222:"

> That every such regulation made by the Secretary shall be of general application within the particular area to which it applies, and that no exclusive or general right of fishery shall be granted therein, nor shall any citizen of the U.S. be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary. . . . The word "exclusive" forbids not only a grant to a single person or corporation, but to any special group or number of people. (Hynes-Grimes Karluk Reservation)

Alaska Constitutional Convention Papers, Folder 210.

its purposes.[17] It follows that section 15 likewise was meant to ensure an equal right to participate in fisheries, regardless of where one resides.

Although section 15 pertains only to fisheries, the prevention of grants of exclusive or special privileges with respect to fish and game is also one purpose of the common use and the uniform application clauses.[18] It follows that the grant of special privileges with respect to game based on one's residence is also prohibited.

We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.[19]

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17. Commentary on Article on State Lands and Natural Resources, 6 Proceedings of the Alaska Constitutional Convention at 87.

18. See supra pages 14 and 15.

19. Justice Rabinowitz states in his dissenting opinion that he does not interpret the statute to mean that "eligibility to participate in subsistence uses is determined solely with reference to where an individual lives." Infra at 47. That, however, clearly is the case with respect to first-tier subsistence users. Urban resident may not be subsistence users because subsistence uses are by definition limited to rural residents. AS 16.05.940(30), quoted supra at pp.2-3. Yet all rural residents may be first-tier subsistence users without regard to their individual characteristics. The regulation on which Justice Rabinowitz relies, 5 AAC 99.010(b), defines customary and traditional uses but does not state that first-tier subsistence rights can be limited to customary and

(Footnote Continued)

B.

The conclusion we have reached does not mean that everyone can engage in subsistence hunting or fishing. We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons. We hold only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional.

We are not called upon in this case to rule on what selection criteria might be constitutional. It seems appropriate, however, to note that any system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII. In such cases, assuming that the exclusionary criterion is not per se impermissible, our decisions suggest that demanding scrutiny is appropriate.

We alluded to this in State v. Ostrosky, 667 P.2d 1184 (Alaska 1983) in discussing the interplay between the constitutionally allowed limited entry system, which was permitted by

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(Footnote Continued)

traditional users. As we stated in Madison "the phrase 'customary and traditional' modifies the word 'uses' . . . it does not refer to users." 696 P.2d at 174. The state acknowledges that only in the second-tier subsistence context may individual characteristics separate those rural residents who may be second-tier subsistence users from those who are ineligible. Brief of Appellees, p. 8. The state also notes that the need for a second-tier limitation has, to date, not arisen. Id.

amendment to article VIII, section 15, and the common use and no exclusive right of fisheries clauses. We stated:

> [S]ince the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause. The argument concludes that free transferability does not entail the least possible impingement on the anti-exclusionist values which these provisions reflect.
>
> . . . [T]he premise of this argument is logical.

Id. at 1191. We expressed the same theme in Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256 (Alaska 1988) concerning the obligation of the Commercial Fisheries Entry Commission to establish an optimum number of entry permits. We stated in Johns:

> In [Ostrosky], we noted that there is a tension between the limited entry clause of the state constitution and the clauses of the constitution which guarantee open fisheries. We suggested that to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation. Ostrosky . . . . The optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes. Without this mechanism, limited entry has the potential to be a system which has the effect of creating an exclusive fishery to ensure the wealth of permit holders and permit values, while exceeding the constitutional purposes of limited entry. Because this risk of unconstitutionality

> exists, the [Commercial Fisheries Entry Commission] should not delay in embarking on the optimum number process, except where there is a substantial reason for doing so.

Id., 758 P.2d at 1266 (footnote omitted).

Most recently in Owsichek, we suggested that section 17 of article VIII, the uniform application clause, "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources." Owsichek, 763 P.2d at 498 n.17 (quoting Gilman v. Martin, 662 P.2d 120, 126 (Alaska 1983)). We also cited with approval Justice Rabinowitz's dissent in Ostrosky, 667 P.2d at 1196 which employs a least restrictive alternative approach in view of the "highly important interest running to each person within the state" by virtue of the common use clause. 763 P.2d at 492 n.10.

In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values. Ostrosky, supra at 1191, Johns, supra at 1266.

We employ this method of analysis in the present case as an alternative ground of decision. Using this approach, we conclude that the rural-urban residency criterion is unconstitutional for the reasons that follow.

One purpose of the 1986 act is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so.

This is an important interest.[20] However, the means used to accomplish this purpose are extremely crude. There are, as noted above, substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural who have no legitimate claims. A classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion.

We note that several other jurisdictions have struck down intrastate residential preferences in fish and game statutes. These authorities support our view that the equal access clauses of article VIII, which are a special type of equal

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20. Another expressed purpose is to aid communities whose residents are dependent on subsistence, as distinct from aiding the individual residents. This is not a purpose separate from aid to individual community members where the aid goes directly to the individuals. As we stated in State v. Enserch, ___ P.2d ___, Slip Op. No. 3539 at 31 (Alaska, December 18, 1989): "It would not make sense to conclude that a statute may not discriminate between residents of two areas in order to aid the residents of the more disadvantaged area, but that such a statute could discriminate between residents of two areas in order to aid the communities in the more disadvantaged area. The communities are merely the collective sum of the residents."

A third purpose is to comply with ANILCA in order to retain state fish and game control on federal lands. It is difficult to view this as a sufficiently important purpose. ANILCA does not require state compliance. State control merely for the sake of control is a questionable goal when the terms infringe upon the open access values of article VIII.

protection guaranty, bar the residential discrimination imposed in this case.[21] Lewis v. State, 161 S.W. 154 (Ark. 1913) contains an excellent historical statement:

> When it becomes necessary for the propagation and preservation of wild game and fish for the use of the public, the people acting in their sovereign capacity, through their lawmaking power, may pass laws to regulate the right of each individual which he enjoys in common with every other member of the community to use of same. But when

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21. See State v. Bryan, 99 So. 327, 330 (Fla. 1924) (state law levying $10 and $50 license tax on state residents who are non-residents of certain counties, as a prerequisite to hunting in those counties, when residents of those counties pay only $1 or $1.25, violates equal protection); State v. Barkley, 134 S.E. 454, 455 (N.C. 1926) (state law levying $3 hunting fee on non-resident hunters in the county, and a $1 fee on residents of the county, held invalid in that it taxed inhabitants unequally); Harper v. Galloway, 51 So. 226, 229 (Fla. 1910) (state law that required citizens of the state of Florida who were not residents of Marion County to give a previous notice of intention to hunt and to pay a special license tax for the privilege of hunting game in Marion County, while no notice or license tax was required of residents of Marion County, denied equal protection of the laws); Bruce v. Director, Dep't of Chesapeake Bay Affairs, 276 A.2d 200, 208 (Md. 1971) (statutes prohibiting crabber from crabbing in waters of county other than his county of residence and prohibiting oystermen from going to waters of another county invalid); Power, More About Oysters Than You Wanted To Know, 30 Maryland L. Rev. 199, 218 (1970) ("A county non-resident represents no peculiar threat to the fishery but merely the same threat as represented by a county resident.").

But see Commonwealth v. Hilton, 54 N.E. 362, 364 (Mass. 1899) (selectmen of a town may prohibit the digging of clams by nonresidents of the town); State v. Norton, 335 A.2d 607, 615 (Me. 1975) (state had compelled governmental interest in conservation of its clams and its attempt to achieve that purpose by, in part, authorizing municipalities to apply a resident-nonresident standard in licensing shell fisheries did not unconstitutionally discriminate against nonresidents).

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the sovereign undertakes to regulate or restrain the individual in its right as a member of the community to enjoy the right to take and use this common property of all, it must do so upon the same terms to all members of the community alike. The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, ferae naturae, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. "The rights," says Green, "which the barons claimed for themselves they claimed for the nation at large." Green's History of the English People, vol. 4, pp. 252-254.

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people. See Parker v. People, 111 Ill. 581, 53 Am. Rep. 643. Also Geer v. Conn., 161 U.S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; Martin v. Waddell, 16 Pet. 412, 10 L. Ed. 997. The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting the same from extinction, and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had from time immemorial. While the state, holding the title to game and fish, so to speak, in trust for every individual member of the community, may pass laws to regulate the rights of each individual in the manner of taking and using the common property, yet, as we have already stated, this must be done, under the

Constitution, upon the same terms to all the people. No special privileges or immunities can be conferred.

Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation. Hayes v. Territory, 2 Wash. T. 286, 5 Pac. 927. In the cases of State v. Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561, and Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N.S.) 794, 19 Ann. Cas. 235, the question here involved was considered and determined in accord with the doctrine we have announced.

Id. at 155-156 (footnote omitted, emphasis added).

CONCLUSION

Our disposition of this case makes it unnecessary to discuss the other grounds advanced by appellants. For the above reasons, the judgment of the superior court is reversed. This case is remanded to the superior court with instructions to issue a declaratory judgment that the rural preference of ch. 52 SLA 1985 is unconstitutional and to take such further action as may be appropriate.

REVERSED and REMANDED.

COMPTON, Justice, concurring.

I agree with Part A of the opinion, holding that this preferential scheme violates art. VIII, sections 3, 15 and 17 of the Alaska Constitution.

I express no opinion regarding Part B as it is superfluous to the decision.

MOORE, Justice, Concurring.

The court correctly concludes that chapter 52, SLA 1986 ("the Act") violates the Alaska Constitution. I write separately to explain my understanding of the court's holding in part B of the section entitled "The Article VIII Clauses - History and Analysis," which I join, and because I disagree with the court's analysis in part A.

Equal Protection

The Act is motivated by a compelling purpose, ensuring that persons who are dependent upon subsistence hunting and fishing have access to wildlife. However, the Act's geographical classification scheme is only loosely related to that purpose. This is an equal protection case, and an easy one at that.

Article I, section 1 of the Alaska Constitution provides that "all persons are . . . entitled to equal rights, opportunities, and protection under the law . . . ." We have decided many cases interpreting this provision, most recently, State v. Enserch Alaska Construction, Inc., ___ P.2d ___, Op. No. 3539, (Alaska, December 18, 1989). The Alaska Constitution has a similar clause specifically concerning natural resources. Article VIII, section 17, the uniform application clause, provides that "[l]aws and

regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

When applying the equal protection clause of article I, we determine the importance of the individual interest affected by the enactment. The importance of the individual interest determines the level of scrutiny we apply to both the state's interest in the enactment and the nexus between that interest and the enactment. Enserch, Op. No. 3539, at 22-24; Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984). Without explicitly acknowledging it, the court's opinion employs the same analysis under the uniform application clause of article VIII. See supra pp. 26-27. Since the principle of equality underlies both clauses, the use of our equal protection analysis in the uniform application context is proper.

I believe that the individual interest impaired by the Act, access to wildlife for subsistence purposes, is a species of the important right to engage in economic endeavor at issue in Enserch, Op. No. 3539, at 25-28. See also Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980). The challenged enactment

therefore should receive close scrutiny.[1] The Act then at least must be closely related to an important state interest. Enserch, Op. No. 3539, at 28.

The state's interest, ensuring that those who must engage in subsistence hunting and fishing are able to do so, is undoubtedly important. Indeed, I believe it is compelling. However, the Act's classification scheme for deciding who is entitled to engage in subsistence hunting and fishing and its implementing regulations are not closely related to the purpose of the Act. As the court's opinion describes, large numbers of residents of areas classified as urban under the Act are dependent upon subsistence hunting and fishing. Conversely, some of the state's larger cities, where many people are not dependent upon subsistence hunting and fishing, are classified as rural. Supra pp. 11-12. There is only a modest correlation between the set of people who reside in areas designated as rural under the Act and the set of people who are dependent upon subsistence hunting and fishing. The fit between the Act and the state's interest does not even approach that required to withstand

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1. Enserch, Op. No. 3539, at 28; Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1379 (Alaska 1988). It may be that the enactment should receive even greater scrutiny under the uniform application clause; however, the court has not decided that question. Gwaichak v. State, 763 P.2d 488, 498 n.17 (Alaska 1988).

close scrutiny. Therefore, the Act violates the equal protection and uniform application clauses of the Alaska Constitution.

This is not to say that all subsistence preference laws would be unconstitutional. I simply believe that for such a law to pass constitutional muster, it must be closely related to its compelling purpose. A law providing for individual determinations of eligibility would in my view be sufficiently tailored to the state's interest to withstand a constitutional challenge.

Common Use and Exclusive Right of Fishery

The court's holding in Part A of the section entitled "The Article VIII Clauses - History and Analysis" is not altogether clear. I agree with the court to the extent that it holds that an intrastate geographical preference for the taking of wildlife violates sections 3 and 15 of article VIII of the Alaska Constitution. I reject any implication that all preferences, especially all subsistence preferences, would violate these sections. I do not believe that the court can find a violation of article VIII, section 17

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without a full equal protection analysis. I do not join part A of the court's opinion, but I concur in its result.[2]

Section 15 of article VIII provides that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Alaska Const., art. VIII, § 15 (emphasis added). Section 4 of article VIII provides that the use of resources shall be "subject to preferences among beneficial uses." On the surface, there appears to be some conflict between these provisions. To the greatest extent possible, we must interpret the provisions of Article VIII consistent with each other. See Abrams v. State, 534 P.2d 91, 95 (Alaska 1975).

Section 4 clearly authorizes some preferences based upon uses. The court recognized a parallel exception to section 15 in Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897 (Alaska 1981), where we wrote that section 15 "was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen." 628 P.2d at 904. The Act distinguishes subsistence uses from commercial and sport uses in name only. As discussed above, its classification

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2. I would not, however, reach this question, because I believe that such geographical preferences violate the equal protection and uniform application clauses of the Alaska Constitution.

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is in fact a fairly arbitrary one based upon residence." It is not the type of classification we have previously held permissible under section 15.

We are left with the question whether geographical preferences are permissible under section 15. For the reasons given in the court's opinion, see supra pp. 15-19, I believe that reliance upon Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), which interpreted the federal statute upon which section 15 was based, is appropriate. In Hynes, the Court invalidated regulations prohibiting fishing off the shores of the Karluk Reservation. While I do not believe that Hynes is determinative since it involved an exclusive right to fish in a particular area and not a mere preference, 337 U.S. at 92, section 15 proscribes "special privilege[s]" as well as exclusive rights. Like the court, I do not read Hynes as being based on the fact that the exclusive right was granted to Natives rather than some other group. Nor do I believe that Hynes can be distinguished by the ability of people to move to rural areas and thus qualify under the Act. See supra pp. 18-19 & n.12. For these reasons, I agree with the court that geographical preferences for the taking of fish are not permissible under section 15. The Act thus violates section 15. Although section 15 is facially applicable only to fishing, I would have no difficulty finding a corresponding

prohibition of geographical hunting preferences in the common use clause of article VIII, section 3. *See supra* p. 23.

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RABINOWITZ, Justice, dissenting.

I dissent from the court's holding that ch. 52 SLA 1986 is unconstitutional.[1] In my view Alaska's subsistence laws are not violative of either section 3 ("common use"), section 15 ("no exclusive right of fisheries"), or section 17 ("equal application of laws") of article VIII of the Alaska Constitution.

Article VIII, section 4 explicitly provides for "preferences among beneficial uses." In Kenai Pen. Fisherman's Co-op Ass'n v. State, 628 P.2d 897, 904 (Alaska 1981), we said in part: "[w]hile section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen." The subsistence laws at issue here do not exclude individuals from access to wildlife; rather, wildlife resources are allocated on a preferential basis. Nor do these laws create an exclusive right of fishery in any class. Rather, the effect of these laws is to provide for a subsistence preference among benefical users of the resource. No exclusive, monopolistic, or otherwise closed classes of resource users are established.

I would further hold that ch. 52 SLA 1986 is not violative of the equal protection provisions of the Alaska

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1. Hereinafter state subsistence laws.

Constitution (article I, section 1, article VIII, section 17). In my view adoption of the strict scrutiny and least restrictive alternative standards is inappropriate. Given the nature of the interest at stake I would apply a lesser standard for purposes of equal protection analysis. This subsistence legislation is substantially related to legitimate legislative goals. I conclude that the fit between the legislature's goal of furthering the health and welfare of subsistence users, and the subsistence preference system it devised to carry out this objective, is sufficiently close to withstand scrutiny under Alaska's equal protection provisions.

INTRODUCTION.

In response to the impact the state's population growth has had upon subsistence lifestyles, Congress in 1980 enacted the Alaska National Interest Lands Conservation Act (hereinafter ANILCA or federal subsistence law).[2] ANILCA was designed to protect subsistence hunting and fishing by giving such uses priority over commercial and sport uses in rural areas.[3]

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2. Pub. L. No. 96-487, 94 Stat. 2371 (1980); 16 U.S.C. §§ 3101-3233 (West 1985). Congress prefaced Title VIII of ANILCA with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence . . . ." 16 U.S.C. § 3111(1).

3. See 16 U.S.C. §§ 3111-3126 (1982 & Supp. IV 1986).

The federal subsistence law specified that subsistence uses must be "customary and traditional uses by rural Alaska residents." ANILCA § 803; 16 U.S.C. § 3113 (emphasis added). Thus, under ANILCA, eligibility for subsistence permits was dependent in part upon one's geographic place of residence. ANILCA § 804; 16 U.S.C. § 3114.[4]

ANILCA authorized the state to continue managing fish and game inhabiting Alaska's federal lands and waters if the state established regulations maintaining the definition of and preference for subsistence uses articulated in the federal subsistence law. ANILCA § 805(d); 16 U.S.C. § 3115(d). The state legislature complied, and thereby retained managerial control over federal lands located within the state—by authorizing the Joint Boards of Fish and Game to promulgate regulations defining "rural" use.

In enacting ch. 52 SLA 1986 the Alaska House of Representatives adopted a letter of intent.[5] The letter articulated the subsistence-rural preference of the act in the following terms:

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4. "Rural" areas are those with sparse populations, and the term "rural" as used in ANILCA is not a term of art. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1988), cert. denied, 103 L. Ed. 2d 835 (1989), (term "rural" is to be given its ordinary significance, meaning "sparsely populated").

5. 1985 House Journal 1246.

> This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependant upon participation by the residents of the communities in the taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.6/

The subsistence statutes challenged here define "rural area" as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05.940(25).

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6. *See also* the House Committee on Interior and Insular Affairs Report issued in conjunction with the passage of ANILCA.

> After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of federal, state, academic, and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. Reliable evidence was given to the Committee demonstrating that fifty percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40% of such families spend an average of 6 to 7 months of the year in subsistence activities. . . .

H.R. Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

1) 4 !

Appellants' basic contention here is that "by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, it unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing." The linchpin of this dispute, then, is whether the challenged subsistence law constitutes an unconstitutionally imperfect attempt to fulfill the legislature's purpose of protecting subsistence uses.

I. DO ALASKA'S SUBSISTENCE LAWS VIOLATE ARTICLE VIII OF THE ALASKA CONSTITUTION?

Appellants challenge the constitutionality of the state subsistence laws under three clauses of article VIII of the Alaska Constitution, sections 3 ("common use"), 15 ("no exclusive right of fisheries"), and 17 ("equal application of laws").[7] The court attributes a "shared meaning" to these three constitutional

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7. Section 3 of article VIII provides:

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

Section 15 of article VIII provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural

(footnote continued)

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provisions: that "exclusive or special privileges to take fish and wildlife are prohibited." The court then concludes that the subsistence statute's preference for rural residents violates each of the aforementioned clauses and offends the shared meaning of article VIII. I disagree.

A. Section Three: The "Common Use" Clause.

Article VIII, section 3 (the "common use" clause) is derived from laws designed to guarantee the common citizen participation in wildlife harvest, and to divest the Crown of exclusive entitlement to those resources.[8] It is said that this

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(footnote continued)

> waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.
>
> Section 17 of article VIII provides:
>
> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

8. In Lewis v. State, 161 S.W. 154 (Ark. 1913), the court described the history of the common use principle in the following terms:

> [A]lthough at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclu-

(footnote continued)

"public trust" doctrine[9] "impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988) (citations omitted); see also Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), aff'd, 369 U.S. 45 (1962); Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1003 (Alaska 1977).

In State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), reh'g denied, 468 U.S. 1204 (1984), we accepted the view that the common use clause reflects "anti-exclusionist values." Id. at 1191. Thereafter, in Owsichek v. State, 763 P.2d 488 (Alaska 1988), a case involving an exclusive right to conduct guided hunting in particular areas of wilderness, we reiterated this

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(footnote continued)

> sion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John.
>
> . . .
>
> These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to use from the laws of England and may be regarded as a common heritage of the English-speaking people.

Id. at 155 (citations omitted).

9. The public trust doctrine maintains that government holds untaken wildlife in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary. See Owsichek v. State, 763 P.2d 488, 493-95 (Alaska 1988).

theme stating that section 3 is fundamentally "anti-monopoly" in its thrust. Id. at 493 ("Because an EGA [exclusive guide area] is clearly a type of monopoly . . . [legislative] history strongly suggests that the statutes at issue here are unconstitutional."). Critical to our holding that the guide licensing system at issue in Owsichek was unconstitutional under the common use clause were the following characteristics of the scheme: it permitted a single guide permanently to exclude all other guides from leading hunts professionally on specific lands; it favored established guides at the expense of new entrants in the guiding market; it created a salable, property-like interest in the license; and it established exclusivity of an unlimited duration. Id. at 496.

In the case at bar the challenged subsistence laws exhibit none of these characteristics. The state subsistence laws establish a subsistence preference, not an exclusive, monopolistic, or otherwise closed class. Anyone may join subsistence users by moving to a sector of the state which has been designated as a "rural area." Further, these laws do not establish subsistence hunting and fishing as an exclusive use, even in rural areas, except during periods of extreme resource scarcity.[10] In regard to this issue I think the court's reliance

10. Alaska Statute 16.05.258(c) authorizes complete (footnote continued)

on *Owsichek* and *Ostrosky* is misplaced. Both *Owsichek* and *Ostrosky* emphasize that the primary thrust of article VIII is anti-exclusionist or anti-monopolistic, not anti-preferential.

I do not read the statutes in question as providing that eligibility to participate in subsistence uses is determined solely with reference to where an individual lives. That is not the case. The subsistence laws at issue here are implemented by multi-factoral regulations which focus not only on place of residence, but also upon particular stocks and populations of fish and game, and particular patterns of subsistence usage.[11] Moreover, individual characteristics are always considered under the state subsistence law during lean periods when it becomes necessary to restrict even certain subsistence uses. In those periods, the determination as to which individuals among those normally eligible for a subsistence permit may continue harvesting is made on the basis of an analysis of individuals' characteristics under the following criteria: (1) customary and

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(footnote continued)

prohibition of non-subsistence uses during periods of famine when the state's total harvest is insufficient to support even normal subsistence uses.

11. Subsistence uses must be "customary and traditional" uses as determined by the separate Boards after evaluation of a particular fish or game stock in light of eight criteria. 5 AAC 99.010(b). These eight criteria include examination of individual populations' patterns of use, methods and efficiency of use, consistency of use, and methods of food storage, as well as the nexus between the asserted subsistence use and the maintenance of individuals' cultural heritage. *Id.*

direct dependence on the resource as the mainstay of livelihood; (2) local residence; and (3) availability of alternative resources. AS 16.05.258(c).

The court's interpretation of the common use clause would prohibit the legislature from making any differential allocation of natural resources whatsoever, an outcome precluded by our holding in Kenai Peninsula, 628 P.2d 897 (Alaska 1981) and the language of article VIII, section 4, which explicitly provides for "preferences among beneficial uses." In Kenai, we held that "[w]hile section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fisherman." 628 P.2d at 904 (emphasis added).

Moreover, it is axiomatic that the provisions of article VIII of the Alaska Constitution should be interpreted so as to avoid internal contradictions. Abrams v. State, 534 P.2d 91, 95 (Alaska 1975) ("It is an undisputed maxim of constitutional construction that the different provisions of the document shall be read so as to avoid conflict whenever possible"); Park v. State, 528 P.2d 785, 786-87 (Alaska 1974) ("It is a well accepted principle of judicial construction that, whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized."). In my view the court's reading of article VIII, section 3 as prohibiting preferences among beneficial uses

of Alaska's resources plainly conflicts with article VIII, section 4. That section provides, in full:

> Fish, forests, wildlife, grasslands, and all other replenishible resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

(Emphasis added.) The intent of section 4 is that persons situated differently can be treated differently and that some users of a resource may legitimately be given preference over others.

In brief, the common use clause constitutionalized the doctrine that wild fish and game are held in trust by the state for the benefit of the public as a whole, rather than by the sovereign in exclusive possession. That principle is consistent with the view that the sovereign state may manage wildlife for the common good, including certain beneficial preferences. Thus I conclude that the challenged subsistence laws do not offend the anti-monopolistic, anti-exclusionist values underpinning the public trust and common use doctrines embodied in section 3 of article VIII of Alaska's constitution.

B. Section 15: the "No Exclusive Right" Clause.

I also disagree with the court's holding that the state subsistence law violates article VIII, section 15 (the "no exclusive right" clause).

The court relies for its interpretation of the no exclusive right clause upon Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), a case in which the United States Supreme Court interpreted the federal legislation which governed Alaska's fisheries before statehood, former 48 U.S.C. §§ 220-224 (1941) (hereinafter "The White Act"). The White Act did include language seemingly prohibitive of the kind of geographic distinction at issue here. Section 1 of the White Act provides, in relevant part:

> [N]o exclusive or several right of fishery shall be granted . . . nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

Act of June 6, 1924, Ch. 272, § 1, 43 stat. 464 (emphasis added). On the other hand, I disagree with the court's view that insofar as the White Act was expressly anti-geographic, section 15 should be given a similar construction. For in my opinion Hynes is distinguishable in several important respects.

First, Hynes did not involve an allocation of fish and game on the basis of residence; rather, the exemption at issue there applied only to fish, and was predicated upon the users' status as Indians, not their place of residence. 337 U.S. at 89-97. Second, Hynes involved an exclusive right of access which had been made available only to a closed class of fishermen. At issue in Hynes was a regulation of the Secretary of the Interior completely prohibiting commercial salmon fishing in all waters.

within 3,000 feet of the shores of the Karluk reservation, but exempting Native fishermen from this otherwise comprehensive ban. Id. Therefore, Hynes, like Owsichek, is distinguishable from the classification scheme at issue in the present case, since in the case at bar one may become eligible for subsistence permits by moving into a rural area. Finally, as noted previously, both article VIII, section 4 and Kenai Fishermen establish that section 15 cannot be read to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence users.

C. Section 17: the "Equal Application" Clause.

Although section 17 (the "equal application clause") is a component of article VIII, it is essentially, as the court states, a "'more stringent . . .' equal protection clause [for] . . . cases involving natural resources." I will address these issues together.

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II. DO THE 1986 STATE SUBSISTENCE LAWS VIOLATE ARTICLE VIII, SECTION 17 OR THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION (ARTICLE I, SECTION 1)?

The court holds the state subsistence laws unconstitutional on equal protection grounds.[12]

Although this court has not yet addressed the issue whether equal access to fish and game is a fundamental right, we have held that commercial fishing is not fundamental. Commercial Fisheries Entry Comm'n v. Apokedak, 606 P.2d 1255, 1262 (Alaska 1980). Other courts have concluded that recreational hunting is not a fundamental right. See, e.g., Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978) (elk hunting by non-residents not fundamental); Utah Public Employees Ass'n v. State, 610 P.2d 1272 (Utah 1980) (entry in big game permit drawing not fundamental). See also Herscher v. State, Department of Commerce, 568 P.2d 996, 1003, 1006 (Alaska 1977).

In my view, the interest at stake, i.e., the right to participate in subsistence hunting and fishing, is not a fundamental right. Maximum scrutiny is reserved for fundamental

12. The majority opinion employs article VIII section 17 and the concurring opinion of Justice Moore uses article I section 1. As Justice Moore points out, the method of analysis in either case is the same. Because Alaska's equal protection standards are more stringent than the federal constitutional standard, any statute which passes muster under Alaskan law will also survive the equal protection clause of the United States Constitution. Herrick's Aero-Auto Repair v. Department of Transportation, 754 P.2d 1111, 1114 (Alaska 1988). Therefore, discussion of the federal standard is omitted.

rights and suspect classifications. Ostrosky, 667 P.2d at 1192. Given what I perceive to be the appropriate characterization of the interest involved, the state must demonstrate the existence of a substantial relationship between the means utilized by the legislation and the legitimate governmental ends sought to be achieved thereby.

Since I am of the view that strict scrutiny is inapplicable, I conclude that the questioned legislation does not violate the Alaska Constitution's equal protection clause. The challenged subsistence laws are fairly and substantially related to the important governmental goal of protecting the health and welfare of the state's subsistence users, a goal admittedly within the state's police powers to pursue.[13]

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13. As mentioned previously, in enacting the state subsistence laws, the Alaska legislature explicitly found that "the general health and welfare of these citizens is significantly tied to their participation in [subsistence] activities." 1985 House Journal 1246. In a similar vein this court said in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854, 859 n.18 (Alaska 1978):

> . . . For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions by those of different cultures, many Alaska Eskimos, Indians and Aleuts eke out a livelihood by reliance on fish and game. . . . Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of those people. . . .

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Implicit in my view that this legislation is not violative of equal protection is the further conclusion that the subsistence classification formulated to fulfill this concededly legitimate legislative purpose is not constitutionally infirm. As we said in Apokedak, 606 P.2d at 1267:

> [I]ndividual cases will arise in which those barred may be able to show extreme hardship. The legislature in its wisdom could conceivably have better provided for such instances. But equal protection, even under Alaska's stricter standard, does not demand perfection in classification. If it did, there would be few laws establishing classifications that would sustain an equal protection challenge.

The subsistence legislation in question here effectively captures within its ambit the thousands of subsistence users residing in Alaska's numerous rural villages. In short, I would hold that the subsistence laws' fit satisfies the requirements of equal protection under both article I, section 1, and article VIII, section 17 of the Alaska Constitution.

appellant

appellant

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Judge Cutlers decision

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

SAM E. McDOWELL, et al. Plaintiffs vs. DON W. COLLINSWORTH, COMMISSIONER OF FISH AND GAME, et al. Defendants and the ALASKA FEDERATION OF NATIVES, et al. Intervenors.	)	Filed In the Trial Courts STATE OF ALASKA THIRD DISTRICT AT PALMER JUN 1990 Clerk of the Trial Courts By ________ Dep:

Case No. 3AN-83-1592 Civil

MEMORANDUM OF DECISION SEVERING UNCONSTITUTIONAL PORTIONS OF STATUTE FROM REMAINDER OF STATUTE

On April 16, 1990 the state filed a motion requesting the court to determine the severability of the remaining provisions of the 1986 subsistence law from the rural preference provision ruled unconstitutional by the Alaska Supreme Court in this case on December 22, 1989. See McDowell v. State, 785 P.2d 1 (Alaska 1989). The motion was assigned to this court on May 16, 1990.

The state asserts that severability is a close question that needs to be decided speedily. The state slightly favors non-severability. Plaintiffs also support non-severability. Intervenors, the Alaska Federation of Natives (AFN), argue for severability. Two amicus briefs also have been filed, one by the class action plaintiffs in several cases pending in federal

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district court, Bobby v. Alaska, arguing in favor of severability, and one by Safari Club International, Inc. opposing severability.

The court has thoroughly reviewed all of the briefs filed. The court also has studied the decisions in Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985), and McDowell, supra, and the relevant statutes from 1975 to date cited by the parties.

The court will not repeat the history of the Madison and McDowell cases, in order to avoid unnecessary delay in entering this order, nor will the court outline the extensive legislative history of subsistence regulation that led to the passage of the 1986 amendments to AS 16.05.258 and 16.05.940. The court also will not recite the constitutional doctrine of severability. The parties have adequately set these out in their briefs.

The question before the court is whether the 1986 Alaska Legislature intended the subsistence priority law to fall altogether if the rural resident preference should fall. After review of the pertinent documents and laws the court finds the answer to be no, and therefore finds the remaining provisions of the 1986 subsistence law to be severable from the rural limitation ruled unconstitutional. The court bases its finding primarily on the analysis set forth in intervenor's brief and amici Bobby's brief.

The court disagrees with the "clear probability" burden of proof enunciated by intervenor, however. With respect to the

burden of proof, the court finds the state's argument in its reply more persuasive. The court thus has used a preponderence of evidence standard in evaluating the legislature's intent with regard to severability. The court finds that even under this less stringent standard the evidence fails to show that the legislature would have intended non-severability.

The parties and all amici agree there were three purposes behind the 1986 legislature's amendment to the subsistence law. The court should find in favor of severability unless a preponderance of evidence shows that the legislature would have intended non-severability to further these purposes.

The first goal of the legislature was to protect those Alaskans most reliant on the non-commercial use of fish and game, i.e., subsistence users. All parties agree that severability serves this purpose because severing the unconstitutional rural residency requirement from the remainder of the statute leaves the subsistence law on the books. A finding in favor of non-severability would delete the law altogether with the result that subsistence uses would not have a priority over any other uses.

The second purpose of the legislature was to put state fish and game laws in compliance with ANILCA to assure the state of control of fish and game management on both federal and state lands. This purpose is not relevant to the question of severability, however, because this purpose cannot be served regardless of the decision on severability. The supreme court's ruling in McDowell renders compliance with ANILCA an

impossibility without a constitutional amendment. Moreover, a decision in favor of non-severability would put the state further out of compliance with ANILCA because there then would be no subsistence preference in Alaska law at all. The legislature likely would have preferred to comply with ANILCA as much as possible because the degree of compliance with ANILCA might affect whether the threatened federal takeover of fish and game management on federal lands actually occurs.

The third purpose of the legislature was to cure the post-Madison confusion and disruption in the harvests of fish and game. This purpose actually is two separate purposes. The first is eliminating uncertainty about the amount of subsistence use. The second is providing for other users some certainty about their use. These other users include commercial users and sportsmen, particularly hunters, including out of state hunters.

For the court to find in favor of non-severability for these last two reasons, the court would have to find that the legislature intended to throw out the decade-old subsistence preference altogether merely to avoid a return to the confusion and disruption caused by the Madison decision. The court finds nothing in the legislative history that indicates a willingness to take such a drastic step, even though some legislators were determined to protect other uses. To the contrary, both the record and the briefs of the parties convincingly show the legislature's emphasis since 1975 on furthering a subsistence priority. As the state acknowledges, the 1986 law retained the

basics of the previous law. Consequently, this court concludes that severability, not non-severability, is the appropriate result.

Some of the arguments made by the parties and amicus Safari Club herein for non-severability appear to be based on untested predictions and fear of the unknown -- the unknown effectiveness of regulations and the unknown quantity of harvest that will be taken by subsistence users. Any confusion resulting from severability should be short-lived. Those who argue against severability exaggerate in predicting that all Alaskans will automatically become subsistence users and that subsistence use will significantly disrupt or cause prohibition of other uses of fish and game.

All Alaskans will not automatically become subsistence users. Before receiving a subsistence permit, a person would have to apply to the agency responsible for determining eligibility and meet the agency criteria for determining eligibility for that particular subsistence fishery or hunt. The agency, in deciding whether the potential subsistence user satisfied the criteria for subsistence use, would be guided by the definition of subsistence in AS 16.05.940(31), with the words "a rural area of" stricken. A subsistence use according to that statute means a use that is "noncommercial, customary and traditional."

Clearly there will be some confusion and difficulty in determining who actually are subsistence users and who are not.

It will be burdensome for the state to decide on appropriate regulations to carry out AS 16.05.258. This difficulty does not require the court to find the remaining provisions non-severable, however. There is no legal or logistical barrier to the promulgation of new regulations that both permit subsistence use to those Alaskans who qualify as subsistence users and foster management of the resources so as to allow other uses.

Regulations could provide deadlines for applying for subsistence permits. All residents will not apply. Applicants could be required to provide some of the information the state needs to make its eligibility determinations. Alaska already has a system in place for all residents to apply for permanent fund dividends. On those applications, certain information must be given, witnesses must be provided, and the applications must be notarized. There appears to be no reason why those who wish to subsistence hunt or fish could not be burdened to provide information in similar form, in order to obtain the benefit of subsistence harvesting.

Logical limitations could be placed on the amount of fish and game taken for subsistence purposes, based on criteria such as size of household and use of product harvested. To permit the state to obtain knowledge to help it wisely control the resource's uses, reports of the amount harvested could be required. Regulations might even be considered that would limit residents who successfully subsistence fish from other harvest activities such as sports fishing, unless they catch and release.

Many innovative but fair ways of distributing the resources are possible, even with a subsistence priority. The above are mere suggestions of possible approaches by the Fish and Game boards. They do not in any way represent the opinion of the court as to what regulations should be passed.

A further finding must be made with regard to "tier-two" determinations and the continued viability of "local residency" as a criterion in AS 16.05.258(C)(2). This criterion will be used only if subsistence use itself has to be limited to fewer than all persons eligible. The court sees no reason to strike down the "local residency" criterion as long as it is interpreted and applied as amici Bobby suggest in their brief. Memorandum for Amici Curiae on the Severability Issue, at 8-9. For example, if an applicant resides in southeast Alaska, there is no reason why his place of residence should not be considered with regard to whether he is chosen for a limited subsistence hunt near Fairbanks. Even though the Alaska Supreme Court held earlier in this case that use of a rural residency requirement is too crude a yardstick for determining all subsistence eligibility, because it is unrelated to the compelling purposes of the subsistence act, the court did not hold that the domicile of a person has no relation to whether the person should be given a permit for a specific subsistence hunt or fish opening if a "tier-two" determination has to be made. This court does not believe the supreme court would reach that far.

A finding also must be made in regard to the first section

of AS 16.05.258, which previously directed the boards to identify "in each rural area" the fish stocks and game populations of the state that are customarily and traditionally used for subsistence. The law directs the boards to make these determinations as a step preliminary to adopting regulations to determine subsistence use and subsistence users. The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell, supra. The boards still must find, however, that a stock or population is customarily and traditionally used for subsistence before making it available for subsistence use.

Based on the foregoing analysis, the court finds that the following provisions are severed from the following statutes:

from AS 16.05.258(a) - "rural" in line 4
from AS 16.05.940(26) - "rural" in line 1
from AS 16.05.940(29) - "a rural area of" in line 3
from AS 16.05.940(30) - "a rural area of" in line 2
from AS 16.05.940(31) - "a rural area of" in line 3.

DATED at Palmer, Alaska this 20 day of June, 1990.

Beverly W Cutler
BEVERLY W. CUTLER
SUPERIOR COURT JUDGE

SUMMARY OF JUDGE CUTLER'S DECISION REGARDING SEVERABILITY

* The current statutory preference for subsistence uses over commercial and sport uses of fish and wildlife is severable from the limitation to rural residents held unconstitutional by the Supreme Court in McDowell. This means that subsistence uses of fish and wildlife continue to have a priority over other uses statewide -- i.e., on state lands, private lands, federal lands (once the subsistence needs of rural residents are met under ANILCA), and in all waters of the state.

* The state must determine customary and traditional subsistence uses of fish stocks and game populations -- by individuals and not necessarily on a community basis -- everywhere in the state. This includes both rural areas and areas which until now have been designated non-rural (e.g., the Kenai Peninsula).

* Eligibility for subsistence will be determined on the basis of an individual's personal history of customary and traditional subsistence use. This will require individual permitting decisions by the state. Judge Cutler analogized to the Permanent Fund Dividend application process: "There appears to be no reason why those who wish to subsistence hunt or fish could not be burdened to provide information in similar form, in order to obtain the benefit of subsistence harvesting."

* The use of "local residency" as one of the "tier 2" eligibility criteria for determining who gets a priority when there is not a sufficient harvestable surplus to satisfy all subsistence users is constitutional and valid. This means that, when even subsistence uses must be further restricted, local residents will have a priority.

* There is no statutory approach which can satisfy both the Alaska Constitution and ANILCA: "The supreme court's ruling in McDowell renders compliance with ANILCA an impossibility without a constitutional amendment."

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THIRD JUDICIAL DISTRICT AT PALMER

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The court disagrees with the "clear probability" burden of proof enunciated by intervenor, however. With respect to the

burden of proof, the court finds the state's argument in its reply more persuasive. The court thus has used a preponderence of evidence standard in evaluating the legislature's intent with regard to severability. The court finds that even under this less stringent standard the evidence fails to show that the legislature would have intended non-severability.

The parties and all amici agree there were three purposes behind the 1986 legislature's amendment to the subsistence law. The court should find in favor of severability unless a preponderance of evidence shows that the legislature would have intended non-severability to further these purposes.

The first goal of the legislature was to protect those Alaskans most reliant on the non-commercial use of fish and game, i.e., subsistence users. All parties agree that severability serves this purpose because severing the unconstitutional rural residency requirement from the remainder of the statute leaves the subsistence law on the books. A finding in favor of non-severability would delete the law altogether with the result that subsistence uses would not have a priority over any other uses.

The second purpose of the legislature was to put state fish and game laws in compliance with ANILCA to assure the state of control of fish and game management on both federal and state lands. This purpose is not relevant to the question of severability, however, because this purpose cannot be served regardless of the decision on severability. The supreme court's ruling in McDowell renders compliance with ANILCA an

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For the court to find in favor of non-severability for these last two reasons, the court would have to find that the legislature intended to throw out the decade-old subsistence preference altogether merely to avoid a return to the confusion and disruption caused by the Madison decision. The court finds nothing in the legislative history that indicates a willingness to take such a drastic step, even though some legislators were determined to protect other uses. To the contrary, both the record and the briefs of the parties convincingly show the legislature's emphasis since 1975 on furthering a subsistence priority. As the state acknowledges, the 1986 law retained the

basics of the previous law. Consequently, this court concludes that severability, not non-severability, is the appropriate result.

Some of the arguments made by the parties and amicus Safari Club herein for non-severability appear to be based on untested predictions and fear of the unknown -- the unknown effectiveness of regulations and the unknown quantity of harvest that will be taken by subsistence users. Any confusion resulting from severability should be short-lived. Those who argue against severability exaggerate in predicting that all Alaskans will automatically become subsistence users and that subsistence use will significantly disrupt or cause prohibition of other uses of fish and game.

All Alaskans will not automatically become subsistence users. Before receiving a subsistence permit, a person would have to apply to the agency responsible for determining eligibility and meet the agency criteria for determining eligibility for that particular subsistence fishery or hunt. The agency, in deciding whether the potential subsistence user satisfied the criteria for subsistence use, would be guided by the definition of subsistence in AS 16.05.940(31), with the words "a rural area of" stricken. A subsistence use according to that statute means a use that is "noncommercial, customary and traditional."

Clearly there will be some confusion and difficulty in determining who actually are subsistence users and who are not.

It will be burdensome for the state to decide on appropriate regulations to carry out AS 16.05.258. This difficulty does not require the court to find the remaining provisions non-severable, however. There is no legal or logistical barrier to the promulgation of new regulations that both permit subsistence use to those Alaskans who qualify as subsistence users and foster management of the resources so as to allow other uses.

Regulations could provide deadlines for applying for subsistence permits. All residents will not apply. Applicants could be required to provide some of the information the state needs to make its eligibility determinations. Alaska already has a system in place for all residents to apply for permanent fund dividends. On those applications, certain information must be given, witnesses must be provided, and the applications must be notarized. There appears to be no reason why those who wish to subsistence hunt or fish could not be burdened to provide information in similar form, in order to obtain the benefit of subsistence harvesting.

Logical limitations could be placed on the amount of fish and game taken for subsistence purposes, based on criteria such as size of household and use of product harvested. To permit the state to obtain knowledge to help it wisely control the resource's uses, reports of the amount harvested could be required. Regulations might even be considered that would limit residents who successfully subsistence fish from other harvest activities such as sports fishing, unless they catch and release.

Many innovative but fair ways of distributing the resources are possible, even with a subsistence priority. The above are mere suggestions of possible approaches by the Fish and Game boards. They do not in any way represent the opinion of the court as to what regulations should be passed.

A further finding must be made with regard to "tier-two" determinations and the continued viability of "local residency" as a criterion in AS 16.05.258(C)(2). This criterion will be used only if subsistence use itself has to be limited to fewer than all persons eligible. The court sees no reason to strike down the "local residency" criterion as long as it is interpreted and applied as amici Bobby suggest in their brief. Memorandum for Amici Curiae on the Severability Issue, at 8-9. For example, if an applicant resides in southeast Alaska, there is no reason why his place of residence should not be considered with regard to whether he is chosen for a limited subsistence hunt near Fairbanks. Even though the Alaska Supreme Court held earlier in this case that use of a rural residency requirement is too crude a yardstick for determining all subsistence eligibility, because it is unrelated to the compelling purposes of the subsistence act, the court did not hold that the domicile of a person has no relation to whether the person should be given a permit for a specific subsistence hunt or fish opening if a "tier-two" determination has to be made. This court does not believe the supreme court would reach that far.

A finding also must be made in regard to the first section

of AS 16.05.258, which previously directed the boards to identify "in each rural area" the fish stocks and game populations of the state that are customarily and traditionally used for subsistence. The law directs the boards to make these determinations as a step preliminary to adopting regulations to determine subsistence use and subsistence users. The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell, supra. The boards still must find, however, that a stock or population is customarily and traditionally used for subsistence before making it available for subsistence use.

Based on the foregoing analysis, the court finds that the following provisions are severed from the following statutes:

from AS 16.05.258(a) - "rural" in line 4
from AS 16.05.940(26) - "rural" in line 1
from AS 16.05.940(25) - "a rural area of" in line 3
from AS 16.05.940(30) - "a rural area of" in line 2
from AS 16.05.940(31) - "a rural area of" in line 3.

DATED at Palmer, Alaska this 20 day of June, 1990.

Beverly W. Cutler
BEVERLY W. CUTLER
SUPERIOR COURT JUDGE

Operational implications of the Cutler severability decision

1. In talking to you yesterday, our assumptions were that there would be no subsistence priority in the state and that all that would occur on state lands and waters was that subsistence seasons would be open to all Alaskan residents without a priority. This would have required some changes in state regulations where there were not sufficent fish or wildlife for all Alaska residents.

2. Rather, Judge Cutler's decision means that all residents will not be eligible for subsistence uses, but only those individuals who apply and are determined to have customary and traditional uses. These residents can be rural or non-rural residents.

3. To date the boards have only made customary and traditional use determinations of fish stocks and wildlife populations by communities and areas in rural areas. They have made these determinations without regard to individual users. No criteria for determining individuals', as opposed to communities', customary and traditional use patterns have been established. These will have to be developed by the Joint Boards of Fisheries and Game at a meeting to be called.

4. In addition to developing the criteria for individual eligibility, the boards will have to go through a process of 1) determining where there are customary and traditional uses in non-rural areas e.g, the Kenai Peninsula for fishing and hunting and 2) then an application process will have to be instituted to make these individual determinations. Judge Cutler likened this to the permanent fund dividend application process where each individual must apply, have witnesses attesting to use and notarization of applications if necessary. We anticipate that there would be tens of thousands of such applications requiring an extensive outreach program as well as a great deal of money to implement.

5. Before hunts could be implemented for this fall season, determinations of individual elgibility for each of the hunts where there are different rules for subsistence hunting from general hunting will have to be made. Once the subsistence users are determined, and we expect that this information will not be available until sometime during the fall, then if there is any additional surplus animals available for harvest, the persons who have applied for drawing permits will be given permits. Whether all of this can be accomplished in time for any hunting in these areas this fall is problemmatic at this time. At best, getting the joint boards together, developing individual elgibility criteria, sending out applications, having them filled out, returned, scored, and the people notified of the results will take several months. In 1985 when a similar exercise was begun, it took 2-3 months to accomplish this task. With no potential for a joint board meeting immediately, we believe that it will take at least 3-4 months to accomplish this task.

6. In addition, Judge Cutler has directed the boards to determine where customary and traditional uses of fish and wildlife have occurred in the non-rural areas of the state. In these areas, these customary and traditional uses should be considered, eligibility determinations made, and subsistence opportunities given prior to the allowance of other commercial and recreational uses after July 1. Candidates for these subsistence fisheries include subsistence fishing on the east side beaches of the Kenai Peninsula which were eliminated partially because the area was determined to be non-rural and therefore not eligible for subsistence, Kenai moose hunts, Mat-Su valley moose hunts, greater Fairbanks area moose and caribou hunts, etc.

7. Our initial determination of which hunts which have already been determined to be subsistence hunts will need individual determinations include the following: Unit 4 deer (NE Chichigof Is.), Unit 1D moose (Haines), Unit 5A moose, Unit 11 Mentasta caribou, Unit 12/13 Nelchina caribou, Unit 15C English Bay goats, Unit 13

moose (Copper River), Unit 15 moose and Unit 16 moose Mat-Su Valley.

8. We would not suggest that people who are applying for drawing permits today and tomorrow not apply. They may become eligible for hunts if it is determined that there is a harvestable surplus after the individual customary and traditional use determinations are completed or if some action is taken by the legislature to change the rules laid out in the court's order. We do believe that because of the increased number of people who will qualify for subsistence uses, that non-subsistence uses, including non-resident use will be reduced and possibly eliminated in a number of these hunts.

9. Whether any of the above listed hunts will occur this fall or not is a question which we can't answer for certain at this time. It depends upon how quickly the boards can meet and the administrative determinations of eligibility made.

THE SECRETARY OF THE INTERIOR
WASHINGTON

June 20, 1990

Honorable Steve Cowper
Governor of Alaska
Juneau, Alaska 99811

Dear Governor Cowper:

As you know, the decision of the Alaska Supreme Court in McDowell v. State of Alaska, which struck down the State's rural subsistence preference, has made it impossible for the State to maintain a subsistence program meeting all of the requirements of title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). On June 15, 1990, the Supreme Court of Alaska denied the State's request for an additional stay. As a result, on July 1, the date the McDowell decision goes into effect, I will be compelled to implement a Federal program to ensure that subsistence uses are given a preference on public lands.

Both the State and Federal governments have an affirmative responsibility to protect and provide the opportunity for continued subsistence uses on public lands in Alaska by rural residents. For both governments this responsibility will require coordinated and cooperative action to ensure that sufficient fish and wildlife resources are available on public lands to meet customary and traditional needs for those resources by rural residents. In some cases this responsibility will require action to ensure that harvest allocations of migratory resources on non-public lands are set at levels that will protect the ability of rural residents on public lands to take at the customary and traditional level.

To this end, the Alaska Department of Fish and Game and the Alaska Department of Public Safety are negotiating a memorandum of understanding on the Federal subsistence program with the Federal land managing agencies and the Bureau of Indian Affairs. The principal purpose of the memorandum of understanding is to facilitate cooperation between the State and Federal governments in managing fish and wildlife resources on public and non-public lands so as to protect subsistence opportunities on public lands. I am confident the memorandum of understanding will achieve this purpose.

As the State entities that make harvest allocations on non-public lands, the Boards of Fisheries and Game obviously play a crucial role in determining whether sufficient fish and wildlife resources will be available to meet subsistence needs on public lands. The subsistence regulations proposed by the Department of the Interior are temporary. They are predicated on a high degree of cooperation between the Boards of Fisheries and Game and the

Federal land managers in setting harvest limits and other management decisions. The regulations represent the minimum extension of Federal authority necessary to fulfill the statutory obligation the Federal government has in this matter. Absent the high degree of cooperation discussed above, we will be faced with the prospect of either closing public lands to non-subsistence uses of fish and wildlife or further extending Federal authority to comply with the mandates in the law. One of the things I must consider is the possibility that Federal authority may have to be extended predicated on the Federal government's constitutional mandate to protect Native American interests and our fish, wildlife, and other natural resources.

I fully expect the Boards will accommodate Federal obligations on public lands first in making harvest allocations on non-public lands, in order to ensure that sufficient resources will be available to provide rural residents with a meaningful opportunity to take fish and wildlife on public lands at the customary and traditional use level. Otherwise it will be impossible for the State and Federal governments to meet their responsibilities to protect and provide the opportunity for continued subsistence uses on public lands by rural residents.

Your cooperation is appreciated.

Sincerely,

BY THE RULES COMMITTEE

1 IN THE SENATE

2 SENATE CONCURRENT RESOLUTION NO. 60

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Suspending Uniform Rule 23 of the Alaska
6 State Legislature concerning measures
7 introduced during the First Special
8 Session of the Sixteenth Alaska State
9 Legislature.

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

11 That under Rule 54 of the Uniform Rules of the Alaska State Legisla-
12 ture the provisions of Rule 23 of the Uniform Rules relating to notice of
13 meetings are suspended in the consideration of measures introduced during
14 the First Special Session of the Sixteenth Alaska State Legislature.

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BY SEN. HALFORD , Coghill

IN THE SENATE

SENATE CONCURRENT RESOLUTION NO. 61

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

Relating to prohibiting the transportation out of the area of harvest of wild game resources harvested under a subsistence priority.

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

WHEREAS the state supreme court has ruled that the current subsistence priority use law violates the equal protection and common use clauses of the state constitution; and

WHEREAS the state constitution does allow for priority of uses under sec. 4 of art. VIII; and

WHEREAS the people of the state support subsistence use by all Alaskans but oppose unconstitutional discrimination between users;

BE IT RESOLVED by the Alaska State Legislature that the Board of Game is requested to consider the adoption of emergency regulations that prohibit the transportation out of the area of harvest of wild game resources harvested under a subsistence priority.

COPIES of this resolution shall be sent to the Honorable Samantha Castle, chair, Board of Game.

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE JOINT RESOLUTION NO. 86

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Proposing amendments to the Constitution
6 of the State of Alaska relating to
7 subsistence uses of fish and wildlife by
8 rural residents in order to retain
9 management of those resources by the
10 State of Alaska; and providing for an
11 effective date.

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

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

15 SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. Consistent
16 with the sustained yield principle, the legislature may grant a pref-
17 erence in the taking of fish and wildlife and other renewable natural
18 resources for subsistence uses by residents of rural areas and, when
19 necessary to assure sustained yield or to protect subsistence uses,
20 may allocate those resources on the bases of customary and direct
21 dependence, local residence, and the availability of alternative
22 resources.

23 * Sec. 2. In addition to authorizing the legislature to enact laws
24 granting a preference for subsistence uses, the amendment proposed in sec.
25 1 of this resolution (1) validates, ratifies, and reinstates state subsis-
26 tence laws, including the provisions of ch. 52, SLA 1986, that are
27 consistent with federal laws relating to subsistence uses, and (2) enables
28 the state to retain management of fish and wildlife on federal land.

29 *. Sec. 3. Article XV, Constitution of the State of Alaska is amended

by adding a new section to read:

SECTION 29. EFFECTIVE DATE AND RECONSIDERATION OF SUBSISTENCE AMENDMENT. (a) Section 19 of Article VIII, regarding a subsistence preference, takes effect immediately upon certification of the election returns by the lieutenant governor.

(b) The lieutenant governor shall place the following proposition on the ballot at the general election in 1994: "Shall Section 19 of Article VIII of the Alaska Constitution, regarding subsistence, be retained?" If a majority of the votes is in the negative, that section is repealed.

* Sec. 4. The amendments proposed in secs. 1 and 3 of this resolution, and the effect of the amendment proposed in sec. 1 of this resolution, as set out in sec. 2 of 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.

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 25, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. II, sec. 9, and art. III, secs. 17 and 18, of the Alaska Constitution, I am transmitting a joint resolution that would (1) amend the Alaska Constitution to authorize the legislature to give rural residents a preference for subsistence uses of fish and wildlife; (2) validate, ratify, and reinstate the provisions of current state statutes relating to subsistence that have been held unconstitutional by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989); (3) make the subsistence amendment effective immediately upon certification by the lieutenant governor of the results of the election at which the amendment will be put before the people; and (4) provide for a second vote by the people at the 1994 general election. Under that same authority, I also am transmitting a bill that would establish a Subsistence Review Commission and amend the definition of the term "rural area" in current statute to authorize the Board of Fisheries and Board of Game to define it in administrative regulations.

In 1978, the Alaska legislature recognized that subsistence -- i.e., the taking of fish and wildlife for personal consumption and use -- should have a preference over sport and commercial uses of fish and wildlife. In Title VIII of the Alaska National Interest Land Conservation Act (ANILCA), P.L. 96 -- 487, 94 Stat. 2371, 2422 (1980), the United States Congress established a priority for rural residents on federal land, and provided that the priority would be implemented by the secretaries of interior and agriculture unless the state enacted laws of general applicability affording the same priority. In 1982, the Board of Fisheries and Board of Game jointly adopted regulations establishing a subsistence preference for rural residents. In the 1982 general election, the voters of the state overwhelmingly supported that subsistence preference by defeating an initiative that would have repealed state subsistence laws. Finally, in 1986, the legislature

established a subsistence preference for rural residents in state statutes.

Although it has been both state and federal policy for more than a decade, the Alaska Supreme Court held in the McDowell case that a subsistence preference for rural residents violates the Alaska Constitution. In subsequent proceedings in that case, the superior court recently ruled that the preference for subsistence uses over sport and commercial uses remains a part of state law, but only those individual Alaskans with a prior history of subsistence use are eligible to participate.

This puts the state in an intolerable position. Under existing state law, as interpreted by the court, only a select few Alaskans will be eligible to participate in subsistence, and they will have a preference over all other Alaskans. Determining who the lucky few are will be incredibly intrusive and burdensome to the residents of rural villages -- those Alaskans who everyone agrees are most reliant on the resources. It will require a substantial and expensive state bureaucracy.

In many ways, however, it will not substantially change the pre-McDowell allocation of fish and wildlife as a practical matter, except on the Kenai Peninsula with respect to salmon. The superior court ruled that the "tier two" criteria used to further allocate subsistence resources among qualifying subsistence users, including the local residency component, is constitutionally valid. As a consequence, when game resources are insufficient to supply the needs of all subsistence users (as is the case with the Nelchina caribou herd), local residents will still have a preference. In other areas of the state, subsistence seasons for local residents are, in most cases, the same as the general hunting seasons in which all Alaskans may participate. On the Kenai Peninsula, on the other hand, those with a history of customary and traditional subsistence uses of salmon will have a statutory preference over commercial and sport users, potentially resulting in a dramatic reallocation of those resources in that area.

On federal land, in the meantime, the federal government will take over management of fish and wildlife to the extent necessary to give rural residents a subsistence preference, as required by ANILCA. This dual management regime will prove awkward at best; at worst, it could seriously jeopardize the sustained yield of fish and wildlife because of the difficulty of coordinating between two sets of managers with two different mandates.

In my view, any advantages that might result from the status quo are greatly outweighed by the disadvantages of (1) the burdensome and intrusive (and expensive)

administrative process that will have to be established, (2) federal management on federal land, and (3) the potentially dramatic reallocation of fish on the Kenai Peninsula. The subsistence constitutional amendment I am proposing will reestablish the pre-McDowell state policy of granting rural residents a subsistence preference and enable the state to retain management of fish and wildlife statewide. Should it choose to do so, the legislature could establish a management regime for federal land different from that for state and private land. If it did so, however, management would remain in state hands and eliminate the confusion and coordination problems of having two sets of managers. Most importantly, passage of the resolution will leave the final decision on this important issue to the people of the state, the ones most directly affected by it.

Section 1 of the joint resolution would add a new section to art. VIII of the Alaska Constitution ("natural resources") to authorize (1) a subsistence preference for rural residents; and (2) the allocation of fish and wildlife for subsistence uses on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or game population as a mainstay of livelihood. This would give the legislature clear constitutional authority to pass laws that are consistent with the provisions of ANILCA.

Section 2 of the joint resolution validates, ratifies, and reinstates those provisions of the state's subsistence laws held invalid as a result of the McDowell decision. Case law from this and other jurisdictions makes clear that an amendment will have retroactive effect if such an intent is clearly expressed, as here. See, e.g., Matthews v. Quinton, 362 P.2d 932, 938-39 (Alaska 1961). By ratifying and reinstating the provisions of the 1986 law that are consistent with federal law, the state would be back in the same position it was in before the McDowell decision, but with the certainty that the provisions of the state's subsistence laws are constitutional under the Alaska Constitution.

Section 3 of the joint resolution would add a new section to art. XV of the Alaska Constitution ("transitional measures"), providing that the subsistence amendment to art. VIII proposed in sec. 1 of the joint resolution becomes effective immediately upon certification of the election returns by the lieutenant governor, and not the normal 30 days after that certification as provided in art. XIII, sec. 1. The sooner the amendment becomes effective, the sooner the state will be able to take the management of fish and wildlife on federal land back from the federal government. It also provides that retention of the subsistence amendment will be placed on the ballot in the

general election in 1994. This will give the people of the state a second opportunity to speak on this issue. If the amendment is rejected by a majority of those voting in 1994, it will be repealed.

Section 4 of the joint resolution is, essentially, standard language directing the lieutenant governor to place the proposed constitutional amendments, including the statement of effect, before the voters in a single ballot proposition at the next general election.

The bill would establish a Subsistence Review Commission to review all aspects of state and federal laws relating to subsistence uses of fish and wildlife and the implementation of those laws. It would be made up of nine members, including members from the Board of Fisheries or Board of Game, from the Regional Council System, and from organizations representing Alaska Natives, sportsmen, and commercial fishing interests, and four public members. Between now and the second vote of the people, in 1994, the Subsistence Review Commission would provide a forum to bring together all segments of the Alaska population to consider this issue and to make recommendations to the governor and the legislature regarding any necessary changes to state or federal law.

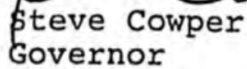
Section 5 of the bill repeals and reenacts the current statutory definition of "rural area," to authorize the Board of Fisheries and the Board of Game jointly to define that term in administrative regulations. In Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that the current state definition of "rural area" is inconsistent with ANILCA. So long as that definition remains inconsistent with ANILCA, that federal law requires federal management of fish and wildlife on federal land. By authorizing the joint boards to define "rural area" in administrative regulations, the state will have the necessary flexibility to adopt a definition that is consistent with ANILCA and thereby retain state management of fish and wildlife on all land in the state.

The subsistence constitutional amendment that I am proposing would give constitutional recognition to what has been state policy for more than a decade: residents of rural areas, those most dependent on fish and wildlife resources, should have a preference for subsistence uses of those resources over other uses. It would enable the legislature to once again implement that policy and, in doing so, retain state management of fish and wildlife throughout the state. Establishing the Subsistence Review Commission would ensure that there is a forum to continue discussion of this issue and to make recommendations for any necessary changes in federal law. Most importantly, it

will enable the people of the state -- those most affected -- to make their will known through their vote at the general election this year, through the commission, and through their vote again in 1994.

I urge your prompt and favorable action on these proposals.

Sincerely



Steve Cowper
Governor

BY SEN. STURGULEWSKI

1 IN THE SENATE

2 SENATE JOINT RESOLUTION NO. 87

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 subsistence uses of fish and wildlife;
8 and providing for an effective date for
9 the amendment.

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

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

13 SECTION 19. SUBSISTENCE USES OF FISH AND WILDLIFE. Consistent
14 with the sustained yield principle, the legislature may grant a pref-
15 erence to and among residents of rural areas of the State for the
16 taking of fish and wildlife for subsistence uses.

17 * Sec. 2. In addition to authorizing the legislature to enact laws
18 relating to granting a preference for subsistence uses, the intent of the
19 amendment proposed by this resolution is to

20 (1) validate, ratify, and reinstate state subsistence laws,
21 including provisions of ch. 52, SLA 1986, that are consistent with federal
22 laws relating to subsistence uses; and

23 (2) allow the state to retain management of fish and wildlife on
24 federal land.

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

1 * Sec. 4. The amendment proposed by this resolution, if approved by the
2 voters, is effective immediately upon certification of the election returns
3 by the lieutenant governor.
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BY SEN. STURGULEWSKI

IN THE SENATE

SENATE JOINT RESOLUTION NO. 88

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

Relating to the subsistence priority required under the Alaska National Interest Lands Conservation Act.

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

WHEREAS the Alaska National Interest Lands Conservation Act (ANILCA) requires rural subsistence users to be given priority, in times of shortage, in the taking of fish and wildlife on federal land in Alaska; and

WHEREAS ANILCA further provides that the State of Alaska may retain fish and wildlife management authority on federal lands so long as it provides in laws of general applicability for a state rural subsistence preference; and

WHEREAS ANILCA does not specifically define the term "rural" and other key statutory terms; and

WHEREAS the lack of such specific definitions has resulted in conflicting court and administrative decisions on the implementation of the subsistence priority in Alaska; and

WHEREAS these conflicting decisions have seriously hampered the ability of the state to effectively manage Alaska's fish and wildlife and has exacerbated conflicts over the subsistence priority; and

WHEREAS other federal laws affecting state fish and wildlife management across the nation also include key terms that are not specifically defined; and

WHEREAS there is a clear need to resolve the uncertainty caused by this lack of specificity in federal law and allow Alaska and other states to implement federal standards in a way that recognizes unique local

concerns and conditions;

BE IT RESOLVED by the Alaska State Legislature that the United States Congress is respectfully requested to provide that terms not specifically defined in federal laws, such as the subsistence priority contained in ANILCA, dealing with state fish and wildlife management shall be defined by reference to definitions found in the laws of affected states.

COPIES of this resolution shall be sent to the Honorable George Bush, President of the United States; the Honorable Dan Quayle, Vice-President of the United States and President of the U.S. Senate; the Honorable Thomas S. Foley, Speaker of the U.S. House of Representatives; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

2 SENATE BILL NO. 553

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

6 For an Act entitled: "An Act relating to subsistence uses of fish and
7 wildlife and creating the Subsistence Review
8 Commission; and providing for an effective date."

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

10 * Section 1. The Subsistence Review Commission is established.

11 * Sec. 2. The Subsistence Review Commission shall review all aspects of
12 state and federal laws relating to subsistence uses of fish, wildlife, and
13 other natural resources, and the implementation of those laws, including
14 the effects of Alaskans' use of and state management of, fish and wildlife.
15 This review must include an examination of

16 (1) what subsistence is and who should qualify as a subsistence user;

17 (2) the most appropriate way to provide for subsistence in Alaska;

18 (3) what a subsistence priority is and how it should be implemented;

19 (4) what constitutes "customary trade and barter" as those terms are
20 used in federal and state subsistence laws, the potential for increases in
21 the sale of subsistence harvests, and the resulting impact on other users
22 under those provisions;

23 (5) the roles of the Board of Fisheries, Board of Game, and the
24 regional councils and advisory committees in enabling local users to par-
25 ticipate in the decision-making process with respect to local resources and
26 in bringing local concerns to the attention of the boards; and

27 (6) what changes, if any there should be in state and federal laws
28 relating to subsistence uses of fish, wildlife, and other natural renewable
29 resources.

* Sec. 3. The Subsistence Review Commission shall report its findings and any recommendations for needed changes to the governor and the legislature no later than January 15, 1993.

* Sec. 4. (a) The Subsistence Review Commission consists of nine members appointed by the governor, to include

(1) a representative of each of the following:

(A) the Board of Fisheries or the Board of Game,

(B) the Fish and Game regional council system,

(C) organizations representing

(i) Alaska Natives,

(ii) sportsmen's groups and

(iii) commercial fishing interests, and

(2) four public members.

(b) A majority of the commission constitutes a quorum for conducting official business of the commission.

(c) The governor may appoint additional non-voting, ex-officio members representing state and federal agencies.

(d) Members of the commission who are not state or federal employees are entitled to transportation and per diem expenses as provided in AS AS 39.20.180.

* Sec. 5. AS 16.05.940(26) is repealed and reenacted to read:

(26) "rural area" has the meaning stated in regulations adopted under the Administrative Procedure Act (AS 44.62) by the Board of Fisheries and the Board of Game, meeting jointly under AS 16.05.315;

* Sec. 6. Sections 1 - 4 of this Act are repealed upon the filing of the Subsistence Review Commission's report with the governor and the legislature as provided in sec. 3 of this Act.

* Sec. 7. Sections 1 - 4 and 6 of this Act take effect immediately under AS 01.10.070(c).

1 * Sec. 6. Section 5 of this Act takes effect upon approval by the
2 voters in the 1990 general election of a constitutional amendment relating
3 to a subsistence preference.
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STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 25, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. II, sec. 9, and art. III, secs. 17 and 18, of the Alaska Constitution, I am transmitting a joint resolution that would (1) amend the Alaska Constitution to authorize the legislature to give rural residents a preference for subsistence uses of fish and wildlife; (2) validate, ratify, and reinstate the provisions of current state statutes relating to subsistence that have been held unconstitutional by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989); (3) make the subsistence amendment effective immediately upon certification by the lieutenant governor of the results of the election at which the amendment will be put before the people; and (4) provide for a second vote by the people at the 1994 general election. Under that same authority, I also am transmitting a bill that would establish a Subsistence Review Commission and amend the definition of the term "rural area" in current statute to authorize the Board of Fisheries and Board of Game to define it in administrative regulations.

In 1978, the Alaska legislature recognized that subsistence -- i.e., the taking of fish and wildlife for personal consumption and use -- should have a preference over sport and commercial uses of fish and wildlife. In Title VIII of the Alaska National Interest Land Conservation Act (ANILCA), P.L. 96 -- 487, 94 Stat. 2371, 2422 (1980), the United States Congress established a priority for rural residents on federal land, and provided that the priority would be implemented by the secretaries of interior and agriculture unless the state enacted laws of general applicability affording the same priority. In 1982, the Board of Fisheries and Board of Game jointly adopted regulations establishing a subsistence preference for rural residents. In the 1982 general election, the voters of the state overwhelmingly supported that subsistence preference by defeating an initiative that would have repealed state subsistence laws. Finally, in 1986, the legislature

established a subsistence preference for rural residents in state statutes.

Although it has been both state and federal policy for more than a decade, the Alaska Supreme Court held in the McDowell case that a subsistence preference for rural residents violates the Alaska Constitution. In subsequent proceedings in that case, the superior court recently ruled that the preference for subsistence uses over sport and commercial uses remains a part of state law, but only those individual Alaskans with a prior history of subsistence use are eligible to participate.

This puts the state in an intolerable position. Under existing state law, as interpreted by the court, only a select few Alaskans will be eligible to participate in subsistence, and they will have a preference over all other Alaskans. Determining who the lucky few are will be incredibly intrusive and burdensome to the residents of rural villages -- those Alaskans who everyone agrees are most reliant on the resources. It will require a substantial and expensive state bureaucracy.

In many ways, however, it will not substantially change the pre-McDowell allocation of fish and wildlife as a practical matter, except on the Kenai Peninsula with respect to salmon. The superior court ruled that the "tier two" criteria used to further allocate subsistence resources among qualifying subsistence users, including the local residency component, is constitutionally valid. As a consequence, when game resources are insufficient to supply the needs of all subsistence users (as is the case with the Nelchina caribou herd), local residents will still have a preference. In other areas of the state, subsistence seasons for local residents are, in most cases, the same as the general hunting seasons in which all Alaskans may participate. On the Kenai Peninsula, on the other hand, those with a history of customary and traditional subsistence uses of salmon will have a statutory preference over commercial and sport users, potentially resulting in a dramatic reallocation of those resources in that area.

On federal land, in the meantime, the federal government will take over management of fish and wildlife to the extent necessary to give rural residents a subsistence preference, as required by ANILCA. This dual management regime will prove awkward at best; at worst, it could seriously jeopardize the sustained yield of fish and wildlife because of the difficulty of coordinating between two sets of managers with two different mandates.

In my view, any advantages that might result from the status quo are greatly outweighed by the disadvantages of (1) the burdensome and intrusive (and expensive)

administrative process that will have to be established, (2) federal management on federal land, and (3) the potentially dramatic reallocation of fish on the Kenai Peninsula. The subsistence constitutional amendment I am proposing will reestablish the pre-McDowell state policy of granting rural residents a subsistence preference and enable the state to retain management of fish and wildlife statewide. Should it choose to do so, the legislature could establish a management regime for federal land different from that for state and private land. If it did so, however, management would remain in state hands and eliminate the confusion and coordination problems of having two sets of managers. Most importantly, passage of the resolution will leave the final decision on this important issue to the people of the state, the ones most directly affected by it.

Section 1 of the joint resolution would add a new section to art. VIII of the Alaska Constitution ("natural resources") to authorize (1) a subsistence preference for rural residents; and (2) the allocation of fish and wildlife for subsistence uses on the basis of local or community residence, availability of alternative resources, and customary and direct dependence on a fish or game population as a mainstay of livelihood. This would give the legislature clear constitutional authority to pass laws that are consistent with the provisions of ANILCA.

Section 2 of the joint resolution validates, ratifies, and reinstates those provisions of the state's subsistence laws held invalid as a result of the McDowell decision. Case law from this and other jurisdictions makes clear that an amendment will have retroactive effect if such an intent is clearly expressed, as here. See, e.g., Matthews v. Quinton, 362 P.2d 932, 938-39 (Alaska 1961). By ratifying and reinstating the provisions of the 1986 law that are consistent with federal law, the state would be back in the same position it was in before the McDowell decision, but with the certainty that the provisions of the state's subsistence laws are constitutional under the Alaska Constitution.

Section 3 of the joint resolution would add a new section to art. XV of the Alaska Constitution ("transitional measures"), providing that the subsistence amendment to art. VIII proposed in sec. 1 of the joint resolution becomes effective immediately upon certification of the election returns by the lieutenant governor, and not the normal 30 days after that certification as provided in art. XIII, sec. 1. The sooner the amendment becomes effective, the sooner the state will be able to take the management of fish and wildlife on federal land back from the federal government. It also provides that retention of the subsistence amendment will be placed on the ballot in the

general election in 1994. This will give the people of the state a second opportunity to speak on this issue. If the amendment is rejected by a majority of those voting in 1994, it will be repealed.

Section 4 of the joint resolution is, essentially, standard language directing the lieutenant governor to place the proposed constitutional amendments, including the statement of effect, before the voters in a single ballot proposition at the next general election.

The bill would establish a Subsistence Review Commission to review all aspects of state and federal laws relating to subsistence uses of fish and wildlife and the implementation of those laws. It would be made up of nine members, including members from the Board of Fisheries or Board of Game, from the Regional Council System, and from organizations representing Alaska Natives, sportsmen, and commercial fishing interests, and four public members. Between now and the second vote of the people, in 1994, the Subsistence Review Commission would provide a forum to bring together all segments of the Alaska population to consider this issue and to make recommendations to the governor and the legislature regarding any necessary changes to state or federal law.

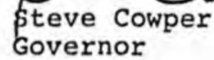
Section 5 of the bill repeals and reenacts the current statutory definition of "rural area," to authorize the Board of Fisheries and the Board of Game jointly to define that term in administrative regulations. In Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that the current state definition of "rural area" is inconsistent with ANILCA. So long as that definition remains inconsistent with ANILCA, that federal law requires federal management of fish and wildlife on federal land. By authorizing the joint boards to define "rural area" in administrative regulations, the state will have the necessary flexibility to adopt a definition that is consistent with ANILCA and thereby retain state management of fish and wildlife on all land in the state.

The subsistence constitutional amendment that I am proposing would give constitutional recognition to what has been state policy for more than a decade: residents of rural areas, those most dependent on fish and wildlife resources, should have a preference for subsistence uses of those resources over other uses. It would enable the legislature to once again implement that policy and, in doing so, retain state management of fish and wildlife throughout the state. Establishing the Subsistence Review Commission would ensure that there is a forum to continue discussion of this issue and to make recommendations for any necessary changes in federal law. Most importantly, it

will enable the people of the state -- those most affected -- to make their will known through their vote at the general election this year, through the commission, and through their vote again in 1994.

I urge your prompt and favorable action on these proposals.

Sincerely,



Steve Cowper
Governor

BY SEN. STURGULEWSKI

1 IN THE SENATE

2 SENATE BILL NO. 554

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

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

7 and amending the definition of 'rural;' and providing

8 for an effective date."

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

10 * Section. 1. AS 16.05.251(a) is amended to read:

11 Sec. 16.05.251. REGULATIONS OF THE BOARD OF FISHERIES. (a) The

12 Board of Fisheries may adopt regulations it considers advisable in

13 accordance with the Administrative Procedure Act (AS 44.62) for

14 (1) setting apart fish reserve areas, refuges, and sanctu-

15 aries in the waters of the state over which it has jurisdiction,

16 subject to the approval of the legislature;

17 (2) establishing open and closed seasons and areas for the

18 taking of fish; if consistent with resource conservation and develop-

19 ment goals, the board may adopt regulations establishing restricted

20 seasons and areas necessary for persons 60 years of age and older to

21 participate in sport <u>or</u> [,] personal use [, OR SUBSISTENCE] fishing;

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

23 size limitations on the taking of fish;

24 (4) establishing the means and methods employed in the

25 pursuit, capture, and transport of fish;

26 (5) establishing marking and identification requirements

27 for means used in pursuit, capture, and transport of fish;

28 (6) classifying as commercial fish, sport fish, personal

29 use fish, [SUBSISTENCE FISH,] or predators or other categories

essential for regulatory purposes;

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

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

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

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

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

(12) regulating commercial, sport, [SUBSISTENCE,] and personal use fishing as needed for the conservation, development, and utilization of fisheries;

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an on-board observer program

(A) is the only practical data-gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other

1 agencies, including the National Marine Fisheries Service, North
2 Pacific Fishery Management Council, and the International Pacific
3 Halibut Commission;

4 (14) establishing nonexclusive, exclusive, and superexclu-
5 sive registration and use areas for regulating commercial fishing.

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

7 (d) Regulations adopted under (a) of this section must, consis-
8 tent with sustained yield [AND THE PROVISIONS OF AS 16.05.258], pro-
9 vide a fair and reasonable opportunity for the taking of fishery
10 resources by personal use, sport, and commercial fishermen.

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

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

15 (1) setting apart game reserve areas, refuges, and sanctu-
16 aries in the water or on the land of the state over which it has
17 jurisdiction, subject to the approval of the legislature;

18 (2) establishing open and closed seasons and areas for the
19 taking of game;

20 (3) establishing the means and methods employed in the
21 pursuit, capture, and transport of game, including regulations, con-
22 sistent with resource conservation and development goals, establishing
23 means and methods that may be employed by persons with physical dis-
24 abilities;

25 (4) setting quotas, bag limits, harvest levels, and sex,
26 age, and size limitations on the taking of game;

27 (5) classifying game as game birds, song birds, big game
28 animals, fur bearing animals, predators, or other categories;

29 (6) methods, means, and harvest levels necessary to control

predation and competition among game in the state;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

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

(10) regulating sport hunting [AND SUBSISTENCE HUNTING] as needed for the conservation, development, and utilization of game.

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

(d) Regulations adopted under (a) of this section shall provide that [, CONSISTENT WITH THE PROVISIONS OF AS 16.05.258,] the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.

* Sec. 5. AS 16.05.258 is amended by adding a new subsection to read:

(g) The Board of Fisheries and the Board of Game shall determine which areas of the state are rural in character based on fish and wildlife use, on the development and diversity of the economy, transportation systems, communication links, community infrastructure, educational and cultural institutions, and government institutions, and on other similar factors that may be established by regulation. The boards shall consider in the aggregate communities or areas that are economically, socially, and communally integrated. A community or area with a population of

(1) 2,500 or less is rural unless the community or area possesses significant characteristics of a nonrural nature or is part

1 of an urbanized area;

2 (2) more than 2,500 but less than 7,000 may be rural or
3 nonrural, depending on its characteristics;

4 (3) 7,000 or more is nonrural unless the community or area
5 possesses significant characteristics of a rural nature.

6 * Sec. 6. AS 16.05.940(5) is amended to read:

7 (5) "commercial fishing" means the taking, fishing for, or
8 possession of fish, shellfish, or other fishery resources with the
9 intent of disposing of them for profit [,] or by sale, barter, trade,
10 or in commercial channels; [THE FAILURE TO HAVE A VALID SUBSISTENCE
11 PERMIT IN POSSESSION, IF REQUIRED BY STATUTE OR REGULATION, IS CON-
12 SIDERED PRIMA FACIE EVIDENCE OF COMMERCIAL FISHING IF COMMERCIAL
13 FISHING GEAR AS SPECIFIED BY REGULATION IS INVOLVED IN THE TAKING,
14 FISHING FOR, OR POSSESSION OF FISH, SHELLFISH, OR OTHER FISH RE-
15 SOURCES;]

16 * Sec. 7. AS 16.05.940(26) is amended to read:

17 (26) "rural area" means a community or area of the state
18 <u>designated as "rural" under AS 16.05.258(g)</u> [IN WHICH THE NONCOMMER-
19 CIAL, CUSTOMARY, AND TRADITIONAL USE OF FISH OR GAME FOR PERSONAL OR
20 FAMILY CONSUMPTION IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY OF THE
21 COMMUNITY OR AREA];

22 * Sec. 8. The division of legal services of the Legislative Affairs
23 Agency shall prepare a bill providing for the repeal of secs. 1 - 4, 6, 9,
24 10, and 12 of this Act. The bill shall be presented to the House and
25 Senate Rules Committees for introduction on the first day of the First
26 Session of the Eighteenth Alaska State Legislature.

27 * Sec. 9. The division of legal services of the Legislative Affairs
28 Agency shall prepare a bill containing appropriate amendments to the Alaska
29 Statutes, outside of AS 16.05, correcting references to "subsistence,"

"subsistence uses," "subsistence users," and similar terms in order to conform to the provisions of this Act. The bill shall be presented to the House and Senate Rules Committees for introduction on the first day of the First Session of the Nineteenth Alaska State Legislature.

* Sec. 10. AS 16.05.090(c), 16.05.094, 16.05.258, 16.05.259, 16.05.-330(c), 16.05.930(e), 16.05.940(26), 16.05.940(29), 16.05.940(30), and 16.05.940(31) are repealed.

* Sec. 11. Sections 5, 7, 8, and 9 of this Act take effect on the effective date of a constitutional amendment relating to subsistence that is approved by the voters in the 1990 general election.

* Sec. 12. Except as provided in sec. 11 of this Act, this Act takes effect on the last legislative day of the Second Regular Session of the Eighteenth Alaska State Legislature.

6-2485E

By Sen. Kelly + Sturgulewski

Kelly,

1 IN THE SENATE

2 SENATE BILL NO. 555

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SPECIAL SESSION

5 A BILL

6 For an Act entitled: "An Act establishing the Commission on Subsistence
7 Use of Fish and Game; and providing for an effective
8 date."

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

10 * Section 1. COMMISSION ON SUBSISTENCE USE OF FISH AND GAME ESTABLISH-
11 ED. (a) There is established in the Department of Fish and Game the
12 Commission on Subsistence Use of Fish and Game. The commission consists of
13 nine members. Members of the commission serve without compensation, but
14 are entitled to per diem and travel expenses authorized for boards and
15 commissions under AS 39.20.180. Members of the commission serve until the
16 repeal of this Act as provided under sec. 3 of this Act.

17 (b) The nine members of the commission consist of

18 (1) the speaker of the house of representatives, or the speak-
19 er's designee;

20 (2) the president of the senate, or the president's designee;

21 (3) two members representing Alaska Natives, appointed by the
22 governor, who shall consider nominations made by the Alaska Federation of
23 Natives and other Native organizations;

24 (4) two members representing sport fishermen and hunters, ap-
25 pointed by the governor, who shall consider nominations made by the Alaska
26 Outdoor Council and other sport hunting and fishing organizations;

27 (5) two members representing commercial fishermen, appointed by
28 the governor, who shall consider nominations made by the United Fishermen
29 of Alaska and other commercial fishermen's organizations; and

1 (6) one member representing the public, appointed by the gover-
2 nor.
3 (c) The commission, by majority vote of the membership, shall elect a
4 chair and other officers it considers necessary from among its membership.
5 (d) In this section, "commission" means the Commission on Subsistence
6 Use of Fish and Game.
7 * Sec. 2. The Commission on Subsistence Use of Fish and Game shall
8 study the question of how to best resolve the issue of subsistence use of
9 fish and game in the state. The commission shall recommend to the legis-
10 lature definitions for "rural," "customary trade and barter," "wild renew-
11 able resources," and other key terms used in federal and state laws, and
12 shall make recommendations as to when a subsistence preference should be
13 implemented, and how and to whom the preference should be applied. The
14 commission shall report its findings and recommendations to the legislature
15 no later than the 10th legislative day of the First Session of the
16 Eighteenth Alaska State Legislature. The commission's report may include
17 recommended changes in state and federal laws and regulations.
18 * Sec. 3. This Act is repealed January 21, 1993.
19 * Sec. 4. This Act takes effect immediately under AS 01.10.070(c).
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A Constitutional Amendment for Subsistence

Prepared by
Office of the Governor
P.O. Box A
Juneau, AK 99811-0101
465-3500

Proposed Subsistence Amendments to the Alaska Constitution

Governor's Version (HJR 88 and SJR 78)

- Limits subsistence to rural residents
- Allows for allocation among rural residents when resources are not sufficient for all rural residents.
- Reinstates existing state subsistence law.
- Complies with federal law.
- Resolves the *McDowell* case.
- Most closely tracks existing federal and state laws. Allows state to retain management of fish and game.

House Judiciary Version (HJR 74, Judiciary)

- Provides for a preference for subsistence uses by rural residents.
- Does not preclude subsistence use by residents in non-rural areas.
- Reinstates existing state subsistence law.
- Complies with federal law.
- Resolves the *McDowell* case and once technical amendment to intent language is added in Section 2, allows state to retain management of fish and game.

House Resources or "Hoffman" Version (HJR 74, Resources)

- Gives legislature authority to enact laws relating to subsistence uses which are consistent with valid federal law in order to retain management of fish and wildlife resources.
- Existing valid federal laws require a rural preference.
- Requires technical amendment to reinstate existing state law (except for definition of "rural").
- Resolves the *McDowell* case and, once technical amendment is added, would allow state to retain management of fish and wildlife.

Senate Resources Version (SJR 78, Resources)

- Provides for a preference for subsistence uses by rural residents.
- Does not preclude subsistence use by residents in non-rural areas.
- Reinstates existing state subsistence law, except for rural definition.
- Complies with federal law.
- Resolves the *McDowell* case and allows state to retain management of fish and wildlife.

The Problem

On December 22, 1989, the Alaska Supreme Court issued a decision in *McDowell v. State* that the rural preference in the state subsistence law was unconstitutional. This ruling makes it constitutionally impossible for Alaska to enact a law consistent with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). That section makes federal officials responsible for providing for subsistence uses of fish and wildlife by rural residents on federal public lands unless, in laws of general applicability, the state provides for such uses. **In order to retain unified state management of fish and wildlife on all lands in Alaska, a constitutional amendment is the only viable solution available to Alaskans.**

Objectives

- Any solution must meet the following objectives:

- The state must retain its traditional role as manager of the fish and wildlife resources in Alaska in order to ensure the continued health and viability of those resources, as well as to make sure management of the resources is responsive to the needs of Alaskans.

- There should be a priority for subsistence uses of fish and wildlife by those Alaskans who most rely on such uses, the majority of whom live in rural areas of the state.

- The greatest certainty and predictability must be given to all fish and wildlife users, requiring that potential management conflicts between state and federal management agencies be minimized.

Failure to Act

A proposed constitutional amendment must be approved by two thirds of both the House and Senate before being placed on a statewide, general election ballot. If the Legislature fails to act on this amendment, there will be no vote of the people in November to determine if there should be a rural preference. As a result, the state will not be able to come into compliance with federal law for at least over two years (until the next statewide election). During that time and beginning on July 1, there will be federal management of subsistence uses of fish and wildlife over two-thirds of Alaska. The exact extent of federal authority will be the subject of litigation for years to come. There is no question that state residents will lose opportunities currently provided by the state for hunting and fishing.

What Federal Management Means

On July 1, the federal government assumes management authority over fish and wildlife on federal lands in order to provide for subsistence uses. Since the federal agencies do not plan to release their interim plan until June 11, we do not know for sure what that plan means for Alaskans. However, we do know some things:

- That the federal definition of rural will most likely be more restrictive than the definition the state has used in the past, meaning that fewer Alaskans will be granted the subsistence priority.

- That the geographic scope of federal jurisdiction will most likely be narrow to start with (primarily wildlife only when on federal lands), but will be subject to intense litigation and could very well be expanded to include all fish in all navigable waters and the territorial sea, as well as wildlife that migrate between federal and state lands.

- That federal land management agencies have different standards for measuring a fish or wildlife population's health and viability. These differences could result in a more conservative management approach, resulting in fewer hunting and fishing opportunities for Alaskans.

- That federal agencies are more susceptible to national political pressures exerted by animal rights groups and anti-hunting and anti-trapping forces.

- That the uncertainties created by dual management could make it difficult to determine what surpluses are available for harvest and result in more conservative management approaches by both the state and federal governments.

- That federal managment will be conducted by a Federal Managment Board and that Alaskans will have significantly less involvement in the regulatory process.

- Although the federal agencies say they want to cooperate with state fish and game managers, they have designed a stand-alone program that gives them virtual veto power over all fish and game management decisions on federal lands, or two-thirds of the state. For example, if the state approved regulations allowing a higher sport harvest than federal officials deemed appropriate, the federal managers could veto that allowable harvest.

- Although federal agencies do not plan to contract with the state, they have acknowledged contracting with tribal organizations is under consideration.

Amending the State Constitution is the Only Answer

Amending the state constitution is the cleanest way to allow the state to again be consistent with ANILCA and provide a subsistence priority for rural residents. Such an amendment would ensure that the state would retain management of fish and wildlife on federal land, a goal which played a major role in the statehood movement. In addition, it would permit the state to ensure that rural residents most reliant on fish and wildlife have the necessary opportunities to take those resources when needed. The state has attempted to do so for more than 10 years now, only to be stymied by one court decision after another. By authorizing a subsistence priority for rural residents in the Alaska Constitution, the state would have clear authority to finally implement what has been state policy for more than a decade.

Other Options

Short of amending the state constitution, there are two other options available to the state in order to retain management of fish and wildlife:

- **Challenge ANILCA in federal court**

The administration could go to court over the constitutionality of the requirements of ANILCA. However, a Department of Law analysis (see attached letter from Mr. Thomas Koester, Assistant Attorney General) indicates that such a challenge has little chance of success. In addition, the state has supported the rural subsistence preference contained in ANILCA for over 10 years and such a legal challenge would be totally contrary to past and current state policy. Another suggestion has been to challenge ANILCA on the basis that the definition of subsistence is vague. However, Congress very clearly defined subsistence uses in ANILCA as "the customary and traditional use of fish and game" in rural areas for food, crafts, and customary sharing and exchange.

- **Amend ANILCA**

ANILCA was crafted as compromise legislation which balanced a number of competing interests. The state participated in the final compromise. Amending ANILCA would require an agreement among the state, the Alaska Native community, and the Alaska Congressional delegation at the very minimum. There is virtually no chance of reaching any kind of agreement on how ANILCA could be changed to be consistent with the state's constitution, yet still provide for subsistence uses of rural residents. Another option would be to ask Congress to amend ANILCA to clearly preempt state law and require the state to give rural residents a subsistence priority statewide, in spite of the Supreme Court's interpretation of our state constitution. Because of state sovereignty principles, this was not considered to be an option that the state should willingly support.

Some people have recommended other options, but these have been rejected by the state:

- **Use current management tools creatively to benefit rural residents**

Prior to the state's 1978 statute giving subsistence uses a priority, the Boards of Fisheries and Game had the authority to provide for subsistence uses using the traditional regulatory tools of methods and means. Some people, including the Alaska Outdoor Council, have argued that these tools could be used creatively to explicitly favor rural residents. However, any direct attempt by the boards to implement such a priority through regulations would be subject to the same constitutional challenge as the rural preference struck down in *McDowell.* In addition, simply using these tools would not satisfy the requirements of ANILCA, resulting in federal takeover. Finally, improved means of access throughout the state have greatly reduced the ability to address subsistence uses through such regulatory means.

- **Amend both state and federal law**

Governor Cowper originally proposed amending state law to provide a subsistence priority through some kind of individualized permitting system, and then amend ANILCA to conform to the state law. State officials went to great lengths attempting to develop a system that would be consistent with the state constitution. This approach was eventually rejected because 1) it would be extremely burdensome and intrusive on those Alaskans it was intended to protect; 2) it would create a large, cumbersome bureaucracy with a cost of many millions of dollars a year; 3) it was estimated that at least 100,000 individual determinations would need to be made, all of them subject to appeals and litigation; 4) it would require a minimum of three to four years to establish such a system and to make the intitial determinations; and 5) there was a serious question whether such a system would be consistent with the Alaska Constitution as interpreted in *McDowell.* Without an amendment to ANILCA, which would be difficult to achieve, this approach would still result in the state being out of compliance with federal law, resulting in federal takeover of fish and wildlife management.

State Actions to be Taken if the Legislature Fails to Act

The most pressing issue facing the Department of Fish and Game is how to prepare for the upcoming summer and fall hunting seasons. Those preparations, which will include an emergency meeting of the Board of Game, are currently on hold until the federal government announces its rules for July 1 on, and until the Superior Court rules on the severability question. At issue is whether the entire subsistence law was struck down by last December's Supreme Court decision or just the portion that provides for a rural preference. The state has requested the court to expedite its ruling.

If the Court rules that the subsistence law is still valid, but that all Alaskans qualify as subsistence users, the Board of Game and the Department of Fish and Game will review hunts around the state to determine whether seasons and bag limits will need to be adjusted to accomodate the increased number of people eligible for subsistence hunting and fishing. Restrictions may need to be placed on subsistence harvests, or general non-subsistence hunting may need to be capped, depending on how the Superior Court rules. On the other hand, the board may be permitted to provide for subsistence uses on state lands, but without a priority.

Of particular concern are the approximately 180 drawing permit hunts which are scheduled, beginning in early August. Administration of these hunts is time-consuming. Once the department knows which hunts will occur and with what seasons and bag limits, approximately two months is needed to process them. Last year more than 25,000 people were drawn for the 178 permit hunts that were held. Over 80,000 applications for the hunts were submitted. The state still does not have enough information to proceed with the normal process for this year's permit hunts. As a result, this year's hunts will be delayed, but by how long is still unknown.

The other unknown is the federal government. Since many wildlife populations migrate back and forth between state, federal and private lands, it is absolutely essential to know what federal plans are. For example, if a certain number of animals will be taken from a particular caribou herd while it's on federal lands, the state will need to adjust the allowable take on adjacent state and private lands accordingly. The state will not be able to manage on state and private lands until the federal government makes its decisions public.

Answers to Some Other Arguments

"Alaskans don't support a subsistence priority." This is simply not true. Time and again, Alaskans have consistently shown their support for a subsistence priority for rural residents: in the 1978 subsistence statute, throughout the ANILCA legislative process, in the 1982 statewide ballot referendum, and in the 1986 subsistence statute. Recent polls show that Alaskans support a rural preference by a 2 to 1 margin.

"The Supreme Court gave all Alaskans equal rights, and a constitutional amendment would take those rights away." Not true also. Governor Cowper's proposed constitutional amendment would merely exempt the subsistence priority law from the constitution's equal access provisions. The amendment would clarify that the Legislature does have the authority to grant a preference based on residency for subsistence uses. Granting a preference or an exemption based on residency is nothing new; many state programs treat people differently because of where they live in the state, and rightfully so.

"The federal government will merely contract with the state to run the existing program; nothing will change." The federal government has designed a stand-alone program in order to manage fish and wildlife for subsistence uses, and has no intention of contracting those responsibilities out to the state." This program gives the federal agencies absolute veto authority over every management decision made by state fish and game managers on federal lands. Federal agencies have also indicated they are considering contracting with tribal organizations such as regional, non-profit Native corporations, for certain functions. The state supports a unified management system. Dual management will cause major problems and multiple managment will be a nightmare.

Kenaitze Problem: Rural Definition

The Problem: The state definition of "rural area" is inconsistent with ANILCA. Either the state or the federal law must be changed for the state to retain fish and game management.

Relation to *McDowell*: This inconsistency is a separate problem from the *McDowell* problem (constitutional prohibition of a rural priority). Until *McDowell* is fixed, the state cannot deal with a rural priority, either to define it in state law, or to attempt to convince Congress to define it.

ANILCA: The federal subsistence law allows the state to retain management of fish and game on federal lands if the state has the same definition of and priority for subsistence uses as the federal law. ANILCA defines "subsistence uses" as customary and traditional uses by "rural Alaska residents," but does not define "rural."

State Law: In the 1986 state subsistence law, the legislature defined "rural area" as places in the state in which the noncommercial use of fish and game is "a principal characteristic" of the economy. This definition was specifically certified by the Department of Interior as being consistent with ANILCA and its legislative history.

Kenaitze Challenge: The state definition of "rural area" was challenged in the Kenaitze case. Plaintiff argued that as used in ANILCA, "rural" was tied to population levels or densities.

District Court Ruling: The U.S. District Court in Anchorage ruled in the state's favor, holding that the state definition was consistent with ANILCA.

Ninth Circuit Decision: The federal court of appeals reversed, holding that "rural" as used in ANILCA must have some link to population level, and that the state's reliance on federal legislative history and on the Secretary of Interior's certification of consistency had been misplaced. The state unsuccessfully petitioned for review by the U.S. Supreme Court.

Result of Inconsistency: Under the ninth circuit ruling, the state definition of subsistence is no longer consistent with ANILCA, because of the inconsistency of the rural definition. Thus, unless either the state or the federal law is changed, the state cannot continue to manage fish and game on federal land.

Attempt to Change ANILCA: In the spring of 1989, the state, with the help of Congressman Young, attempted to technically amend ANILCA by incorporating the state's definition of "rural area" into the federal law. This attempt was stalled by opposition from rural groups.

McDowell: While the state was evaluating its options, the Alaska Supreme Court in *McDowell* ruled that under the Alaska Constitution, the state cannot define and provide for subsistence in terms of rural. This removed the state's ability to deal with the definition of "rural" in its own statutes, and removed the state's leverage in attempting to obtain a definition of "rural" in ANILCA, because the state can no longer constitutionally manage for subsistence on a rural basis.

"Rural" in ANILCA: Although the appeals court decided that the state's definition of "rural area" was not consistent with ANILCA, and that a consistent definition would have to involve population levels, the court did not state what such a definition would look like. Since that time, the U.S. District Court (which has the case again on remand) has refused to issue further guidelines to an acceptable definition, but has also decided that the ninth circuit decision does not necessarily mean that the entire Kenai Peninsula is rural.

"Rural" as of July 1, 1990: In anticipation of federal management after July 1, the federal agencies are considering a definition of rural which would incorporate two population levels; as we understand it, communities with populations above 7,000 would not be rural, communities with populations of less than 2,500 would in most cases be rural, and communities in between may be rural depending on such factors as fish and game use, development and diversity of the economy, transportation, communication, infrastructure, educational and cultural institutions.

Summary: The definition in the 1986 state statute of "rural area" has been found inconsistent with ANILCA, but the state cannot replace that definition with another one unless the *McDowell* constitutional problem is addressed first. Further there is little guidance about what definition would be consistent with the ninth circuit's reading of ANILCA.

Chronology of the State's Subsistence Law

1978 State's first subsistence law: The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary. The law defines subsistence uses as "customary and traditional uses" of fish and game for specific purposes such as food.

1980 ANILCA: Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves and wildlife refuges. Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982 Consistency: The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses, and the Department of Interior certifies the state's consistency with ANILCA.

1982 Repeal initiative: A statewide effort to repeal the subsistence law fails by a large margin at the polls.

1983 Subsistence suit: Several Alaskans file suit against the state subsistence law. In *McDowell v. State,* they argue that the law denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it, and for that reason the law is unconstitutional.

1985 *Madison* decision: The Alaska Supreme Court, in the *Madison* decision, rules that state regulations limiting subsistence to rural residents are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions on ANILCA and threatens takeover of fish and wildlife management on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986 New subsistence law: The Alaska Legislature enacts a new law limiting subsistence to rural residents. In state superior court, the *McDowell* suit is amended to challenge the new subsistence law. The Kenaitze Indian Tribe also files a suit in federal court under ANILCA to protest the classification of the Kenai Peninsula as an urban area.

1987 *Kenaitzes* initially denied: A federal judge rules against the Kenaitzes, saying the state subsistence law's definition of rural agrees with the use of the word "rural" in federal law.

1987 *McDowell* initially denied: The state superior court holds that the 1986 subsistence law is constitutional.

1988 Kenaitze decision reversed: The Ninth U.S. Circuit Court of Appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA. The U.S. Supreme Court ultimately denies the review.

1989 Kenaitze negotiations: Under direction by the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus opinion.

1989 *McDowell* decision: On December 22, the Alaska Supreme Court rules the 1986 state subsistence law is unconstitutional because it excludes urban residents from subsistence activities.

1990 Stay granted: On January 5, the Alaska Supreme Court granted the state a stay in the *McDowell* decision until July 1 with regard to existing regulations. As a consequence, all existing regulations are in effect and are enforceable until that time.

1990 Reconsideration denied: On February 9, the State of Alaska petitions the court requesting reconsideration of the *McDowell* decision. That request was denied.

1990 Legislature adjourns: On May 8, the Alaska Legislature adjourned failing to take action on a proposed constitutional amendment thus triggering significant federal management of fish and wildlife in Alaska on July 1.

FEDERAL SUBSISTENCE MANAGEMENT PROGRAM

Questions & Answers

QUESTION: Why is the Federal government assuming responsibility for managing subsistence hunting, trapping, and fishing on Public lands 7/1/90?

ANSWER: Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126) requires the Secretary of the Interior and the Secretary of Agriculture to implement a program to grant preference in favor of subsistence uses of fish and wildlife resources on public lands unless the State of Alaska implements a subsistence program consistent with ANILCA's requirements. The State implemented such a program which the Department of the Interior found to be consistent with ANILCA. In December 1989, however, the Alaska Supreme Court ruled in *McDowell v. State of Alaska* that the rural preference in the State subsistence definition, which is required by ANILCA, violated the Alaska Constitution. The Court stayed the effect of the decision until July 1, 1990.

QUESTION: What are "Public Lands"?

ANSWER: "Public lands" applies to public public lands as defined in Section 102(3) of ANILCA. Lands validly selected by the State or Native corporations formed under the Alaska Native Claims Settlement Act are excluded from the public lands definition in Section 102(3).

QUESTION: Why does ANILCA deal with subsistence?

ANSWER: Congress wanted to make sure that Alaskans can continue to take part in subsistence activities. Following the passage of the Alaska Native Claims Settlement Act, Congress decided that Federal and State agencies needed to provide for subsistence uses. Congress made provisions in ANILCA to ensure that State and Federal agencies would give adequate consideration to subsistence uses.

QUESTION: When will the State regain management of subsistence on Federal lands?

ANSWER: The State may regain control of subsistence management when there is no longer a conflict between ANILCA Title VIII and the State Constitution.

QUESTION: What is ANILCA Title VIII?

ANSWER: ANILCA is the acronym for the Alaska National Interest Lands Conservation Act of 1980. Title VIII is the section of ANILCA which deals with subsistence.

QUESTION: How can ANILCA be changed?

ANSWER: ANILCA can be amended by Congress.

QUESTION: How will the Federal government implement their responsibility for managing subsistence hunting, trapping, and fishing on Public lands?

ANSWER: The Secretary of the Interior and Secretary of Agriculture will jointly develop subsistence regulations and are responsible for implementing the subsistence provisions of ANILCA. The US Fish & Wildlife Service (Service) was delegated the lead responsibility for coordinating the other Federal agencies to develop and implement the Federal subsistence management program. Five Federal agencies, including USF&WS, USFS, BLM, BIA, and NPS, are responsible for management of lands covered by Title VIII. Other Federal agencies with subsistence management interests are the U.S. ARMY, U.S. Air Force, and National Marine Fisheries Service.

Given the short time to prepare these regulations, the Federal program will minimize change to the State program consistent with meeting the Federal government's responsibilities under Title VIII. These regulations will be published in the Federal Register prior to 7/1/90.

A Federal Subsistence Board, made up of the Regional or State Directors of the Fish and Wildlife Service, National Park Service, Forest Service, Bureau of Land Management, and Bureau of Indian Affairs, will broadly execute the Secretary of the Interior's and Secretary of Agriculture's subsistence responsibilities which include: Set subsistence seasons and bag limits; make determinations of rural and non-rural communities and areas; determine customary and traditional subsistence uses; and establish and determine the membership of Regional Advisory Councils and local Advisory Committees specific to public lands.

QUESTION: What will be the process for promulgating permanent Subsistence management regulations for Public lands in Alaska?

ANSWER: If the State appears to be unable to resume subsistence management on public lands by December 31, 1990, the Federal government will begin developing permanent regulations shortly after the interim regulations take effect 7/1/90. Public comment will be solicited on the temporary regulations which will serve as proposed rules. Public meetings will also be held in the affected areas to solicit comments. The federal government will then revise the temporary regulations in response to public comments and agency and legislative mandates and publish them as final regulations.

Recommendations and information concerning the management of hunting and fishing for subsistence priority on public lands will be requested of existing advisory councils and advisory committees. If the Secretary of the Interior determines that existing regional advisory councils, or local advisory committees are inadequate to fulfill the functions outlined in Section 805 of ANILCA, then Federal subsistence advisory councils and local advisory committees will be established to focus on subsistence uses specific to public lands. Regulation proposals may originate from a variety of sources, but emphasis will be on the advisory council and committee system.

While the public may comment and interact directly with the Board, it is the intent that most public comments be channeled through the councils and committees.

QUESTION: What priority will the Federal Subsistence Board consider in establishing fish and wildlife uses on public lands?

ANSWER: Highest priority will be for the maintenance of "Healthy" fish and wildlife populations. Second priority will be for providing for all "Customary and Traditional" subsistence uses of fish and wildlife. U.S. District Court's decision in *Bobby v. State of Alaska* emphasized the need for sound data on fish and wildlife populations and on subsistence use before restricting subsistence harvest.

QUESTION: How will the Federal Subsistence Board determine if a fish or wildlife population is "Healthy"?

ANSWER: A "healthy" population is stable, in balance with its ecosystem, and without a long term, irreversible, downward trend. Such populations may be non-indigenous. Such determinations shall recognize that customary and traditional subsistence uses by local rural residents may be a natural part of such ecosystems.

QUESTION: What is the State's role in this Federal takeover process?

ANSWER: Alaska Department of Fish & Game has broad continuing responsibilities for dealing with subsistence, as well as sport and commercial take statewide. The State Boards of Fisheries and Game will continue to set seasons and bag limits for non-subsistence harvest of fish and wildlife on Federal lands. The State Boards may recommend seasons and bag limits for subsistence harvest of fish and wildlife on Federal lands to the Federal Subsistence Board. Federal Subsistence regulations promulgated in 36 CFR and 50 CFR Part 40 anticipate an interactive process between the State fish and game regulatory procedure and the Federal Subsistence regulatory process. Because of its State Constitution the State cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. The State can facilitate harvest by rural residents through various regulations dealing with means and methods of take and perhaps other mechanisms.

If rural residents cannot obtain their customary and traditional take and uses of fish and wildlife because of State regulatory impediments, the Federal Subsistence Board will be required to modify or negate State regulations as they apply to Public lands. However, if State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations should closely parallel State regulations.

QUESTION: Who will qualify as a Subsistence user?

ANSWER: Local "rural" residents who have a "customary and traditional" subsistence use of fish or wildlife. The Federal Subsistence Board will determine which communities or areas are rural. The Federal Subsistence Board will also determine which communities or areas have customary and traditional use of fish and wildlife. The subsistence priority will not be based on race, color, creed, or national origin.

A rural resident is one who resides in an area or community with a population of 2,500 or less; or 2,500 - 7,000 if it possesses the characteristics of a rural area or community and is not part of an urbanized area. Rural determinations will consider population; size; economic size and diversity; fish and game

use; and development and variety of transportation, communication links, community infrastructure, demographics, educational and cultural institutions and government facilities.

"Customary and traditional uses" will be identified as a long-term, consistent pattern of use for subsistence purposes, which provides substantial economic, cultural, social, or nutritional elements of the subsistence user's life, and which are exemplified by the following characteristics:

> (1) methods and means of harvest which reflect efficiency and economy of effort and cost, as conditioned by local circumstances;
> (2) means of handling, preparing, preserving, and storing fish or game which have been traditionally used by past generations, but not excluding recent technological advances where appropriate;
> (3) the handing down of knowledge of fishing or hunting skills, values and lore from generation to generation;
> (4) the hunting or fishing effort or the products of that effort are distributed or shared among others according to custom and tradition, including customary trade, barter, sharing, and gift-giving.

QUESTION: What are "subsistence uses"?

ANSWER: ANILCA defines subsistence uses as 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 non-edible by-products of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal family consumption; and for customary trade.

QUESTION: Why is there a subsistence priority?

ANSWER: ANILCA requires that residents of rural areas be given priority use of fish and wildlife on Federal lands. This priority is given only when there is not enough fish or wildlife to satisfy everyone's needs. In an area where there is not enough fish or wildlife for everyone, rural residents with customary and traditional uses of that fish or wildlife will be the last group of users to be restricted.

QUESTION: Will sport and commercial taking of fish and wildlife still be allowed on Federal lands?

ANSWER: Yes. If subsistence uses are adequately provided for, then sport and commercial hunting and fishing will be allowed. National Parks will continue to be closed to sport hunting.

QUESTION: How do we find out which lands are under Federal subsistence management?

ANSWER: Most Federal and State land management offices have maps showing Federally managed areas. Most offices of Alaska Department of Fish & Game, Fish and Wildlife Service, Forest Service, and Bureau of Land Management have maps.

QUESTION: Will there be one set of regulations for all Federal lands or will each Federal agency have its own set of regulations?

ANSWER: There will be one set of general regulations which apply to all Federal lands. Individual agencies may set additional regulations which apply only to their lands. For example, individual agencies will continue to regulate access on lands they manage.

QUESTION: Will the Federal Subsistence Management Board adopt regulations for assuring "access" to public lands for subsistence take of fish and wildlife as provided for in Section 811 of ANILCA?

ANSWER: No. Decisions and regulations concerning access will be the responsibility of the respective Federal land manager. Appropriate means of access include snowmobiles, motorboats, and other means of surface transportation traditionally employed for subsistence hunting and fishing. Currently, access by foot, snow machine, and boat is allowed on public lands, but the use of all-terrain vehicles is on a site-specific basis. In National Parks and Monuments only, "...subsistence uses without use of aircraft as a means of access..." is allowable (46 FR 31849, June 17, 1981). The Park Service currently provides for "certain exceptions" which are managed under special permits issued by park superintendents for unusual circumstances, like matters involving safety.

QUESTION: How will the Federal Subsistence Board likely regulate to achieve subsistence hunting, trapping, and fishing priority on public lands?

ANSWER: Closure of public lands through individual agency closure authority may be used where all sport hunting or fishing seasons affecting a given area have to be curtailed to achieve subsistence priority for that area. The Board may also establish sport fishing and hunting seasons and bag limits on public lands, different from the State seasons and bag limits, in order to achieve subsistence priority. The Board may also defer to State closures which serve to achieve the objectives of ANILCA.

QUESTION: Must subsistence users on public lands have a State hunting, trapping, or fishing license to subsistence hunt, trap, or fish?

ANSWER: Yes. All persons engaged in subsistence hunting, trapping, or fishing on public lands must possess State of Alaska licenses, permits, harvest tickets, and tags and must comply with State reporting and validation requirements. In addition, such persons must possess any Federal licenses or permits required for such activities. Contact the Federal land management office nearest the area you want to hunt or fish in to find out if there is a special permit required.

QUESTION: Can a hunter harvest one bag limit of a species under State regulations and an additional bag limit of that same species under Federal regulations?

ANSWER: No. Hunters may take only one bag limit for each species. Subsistence bag limits and general bag limits are not cumulative.

QUESTION: Where will regulation booklets be found that list subsistence seasons and bag limits for Federal lands?

ANSWER: Federal regulations will be available from hunting/fishing license vendors throughout the State after July 15th.

QUESTION: Will the Federal subsistence program manage subsistence fisheries that take place in navigable waters, such as the subsistence salmon fisheries on the Yukon and Kuskokwim Rivers?

ANSWER: No. Federal managers currently do not plan to manage subsistence fisheries in State navigable waters.

QUESTION: Is the Endangered Species Act or the Marine Mammal Protection Act subsorvient to Title VIII of ANILCA?

ANSWER: No.

QUESTION: Will the Federal Subsistence Management Board adopt regulations for the take of wild renewable resources other than fish and wildlife?

ANSWER: No. Because of past management and the desire to avoid confusion, wherever possible, regulation of the use of other wild renewable resources will be left to the individual Federal land managing agency.

QUESTION: Can decisions of the Federal Subsistence Board be appealed?

ANSWER: Yes. Any affected person may file a request for reconsideration. The Board shall make a final decision on the request within 45 days. The Board is, however, the final administrative remedy. Further relief is only available through the courts. Decisions by a Federal agency outside its role on the Board are subject to appeal under the appeal procedures of that agency.

SUMMARY

of

TEMPORARY SUBSISTENCE MANAGEMENT REGULATIONS

FOR FEDERAL PUBLIC LANDS IN ALASKA

BACKGROUND:

Proposed temporary regulations were issued June 8, 1990 for the federal management of subsistence uses of fish and wildlife on federally-owned public lands in Alaska. (Throughout this document, the term "public lands" refers to those lands owned or administered by the Federal government.)

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 requires a priority use of fish and wildlife for subsistence uses over uses for sport and commercial purposes on public lands in Alaska.

The State had such a program in place, but in December, 1989 the Alaska Supreme Court ruled that rural preference in the State subsistence statute violated the Alaska Constitution. The Court delayed implementation of the decision until July 1, 1990.

As a result of that decision, the Department of the Interior and the Department of Agriculture will be required to manage for subsistence priority on public lands to meet the requirements of ANILCA. The U.S. Fish & Wildlife Service has been delegated the lead responsibility for developing a contingency plan with other Department of Interior and Department of Agriculture agencies which fulfills their subsistence responsibilities.

These temporary rules will affect the subsistence uses of fish and wildlife on public lands in Alaska managed by the Fish & Wildlife Service, National Park Service, Bureau of Land Management, Forest Service, Bureau of Indian Affairs, Air Force, Army and various other federal land managing agencies.

If a State Constitutional amendment, which allows rural preference for subsistence, is passed during the upcoming special session of the State Legislature, and if it is ratified by the voters in the State's November election, the State would presumably be back in compliance with ANILCA. The State would then once again assume responsibility for subsistence management of fish and wildlife on federal lands.

Because the subsistence preference under State law will end July 1, 1990, this has created a very short time frame for the Federal Government to act in developing regulations and implementing a subsistence management program for public lands July 1.

In April, a Notice of Intent to Propose Rules was established in the Federal Register, and public comments were solicited. Because of the short time available, the opportunity for public review and comment was limited. Seventy-two written comments were received, and were taken into account in developing these proposed regulations.

The proposed regulations were published in the Federal Register on June 8, 1990, and the comment period ends June 18. Given the short time to prepare these regulations, and in anticipation that the State will be able to re-establish subsistence management, the federal regulations minimize change to the State program, but ensure that the federal requirements under ANILCA are met. To do otherwise would be extremely disruptive to subsistence users and create unnecessary chaos if and when the State is again able to assume subsistence management.

Major changes to existing State seasons and bag limits are not anticipated. Should the federal government be required to retain management responsibility beyond this year, changes to the seasons and bag limits will be considered only after review by local and regional advisory councils and public comment.

These temporary regulations will remain in effect until December 31, 1991 (18 months), or until the State subsistence management program is certified by the Secretary of Interior to be in compliance with direction contained in ANILCA, whichever comes first. The development of permanent regulations, which is expected to start later this year, will involve extensive public interaction and comment and will be completed by December 31, 1991.

SPECIAL ISSUES:

Cooperation with the State: Because the Federal Government intends to minimize disruption to traditional State regulation and management of fish and wildlife, a high level of coordination and cooperation between the State and Federal regulatory programs is anticipated. A memorandum of agreement will be developed with the State, and it will address coordination of the State and Federal fish and wildlife management programs.

Definition of Public Lands: Lands affected by these regulations are federal lands, but exclude lands selected by the State or Native Corporations. This meets the definition of public lands in ANILCA which excludes validly selected lands in its public lands definition. Even though some of the selected lands will not be conveyed to the State or to Native Corporations because of over-selection, none of the selected land will be considered public lands for subsistence management purposes.

<u>Federal Subsistence Board</u>: The regulations set up a Federal Subsistence Board which will function similarly to the State Boards of Fisheries and Game. The Board will broadly execute the subsistence requirements under ANILCA which include:

1. Maintain healthy fish and wildlife populations.
2. Set federal subsistence seasons and bag limits.
3. Make determinations of rural and non-rural communities and areas.
4. Determine customary and traditional subsistence uses.
5. Establish and determine the membership of regional and local advisory committees specific to public lands.

Board membership is comprised of the regional or State directors of the Fish & Wildlife Service, National Park Service, Forest Service, Bureau of Land Management, and Bureau of Indian Affairs.

<u>Advisory Structure</u>: Regional and local advisory committees are an important part of the ANILCA requirements for subsistence management; however, the existing State advisory system has broad responsibilities for dealing with subsistence take and uses as well as sport and commercial take statewide. These regulations require the Secretary of Interior to determine if the existing advisory structure meets the ANILCA requirements. This determination must be made by June, 1991. Pending the Secretary's decision, the Federal Subsistence Board will rely on the existing advisory structure and public comment.

<u>Definition of Rural</u>: The definition of rural is, perhaps, the key element in these regulations. ANILCA did not define rural, and the State has wrestled with the rural definition since passage of ANILCA. A court ruling in 1988 stated that the rural definition in the State's Subsistence law was not consistent with ANILCA and the common meaning of the term rural.

Because there are a number of factors which determine whether a community is rural or not, population alone cannot be used for definition. These regulations adopt the State's determinations of rural or non-rural until December 31, 1990, unless superseded by determinations of the Federal Subsistence Board.

<u>Access</u>: Reasonable access for subsistence use was provided for in ANILCA. Generally, access by foot, snow machine, aircraft, and boat is allowed on public lands, but the use of all-terrain vehicles is on a site-specific basis. Aircraft access is prohibited in National Parks and Park Monuments with certain exceptions. Decisions and regulations concerning access are the responsibility of the respective federal land manager. Correspondingly, information on access is available from the federal land manager.

REGULATION SUMMARY

Subpart A - General Provisions: The first part of the regulations outlines the purpose of the regulations for federal subsistence management on public lands in Alaska, the authority which is the Alaska National Interest Lands Conservation Act. It also provides definitions used in the regulations.

Subpart B - Program Structure: The second section of the regulations outlines the makeup of the Federal Subsistence Board and its duties. It also outlines the structure of the regional and local advisory councils and committees should they be set up after the Secretary of Interior determines the adequacy of the existing State of Alaska advisory structure.

This section also outlines the Federal Subsistence Board's relationship with federal agencies, providing for a single set of regulations to apply to subsistence on public lands. It also addresses the relationship with the State of Alaska, providing that State of Alaska fish and wildlife regulations apply to public lands, except for the subsistence regulations.

This section further provides for the Federal Subsistence Board's determination of a healthy population of fish and wildlife. This determination is based upon the maintenance of fish and wildlife resources and their habitats in a condition which assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems and minimizes the likelihood of irreversible or long term adverse effects upon such populations and species.

Rural Determinations are outlined in this section also. The Federal Subsistence Board will determine the rural or non-rural status of all areas or communities within Alaska no later than December 31, 1990. Pending such determinations, each area or community will retain its rural or non-rural status under Alaska law. The general guidelines for rural and non-rural are as follows:

- A community with a population of 2500 or less is considered rural.
- A community with a population of 7000 or more is considered non-rural.
- Communities with a population between 2500 and 7000 will be reviewed first.
- Population data from the most recent census will be used for the determination process.

Other factors besides population will be used to determine a community's rural or non-rural status. These include fish and wildlife use, development and diversity of their economy, transportation, communication links, community infrastructure, educational and cultural institutions, and government institutions.

For determining whether subsistence uses are CUSTOMARY AND TRADITIONAL, the Federal Subsistence Board will consider such factors as length, consistency, and pattern of use, reliance on subsistence, methods and means of take, passage of knowledge from generation to generation, and distribution or sharing. Additional items in this section include provision for public comment on regulations, emergency closures to subsistence hunting, and appeals.

Part C - General Requirements: This section addresses subsistence use qualifications, licenses, permits, tags, and fees, and penalties. The taking of fish and wildlife on public lands for subsistence uses is restricted to Alaska residents of rural areas or communities, and subsistence users on public lands must possess State of Alaska licenses, permits, harvest tickets, and tags and must comply with reporting and validation requirements.

Subpart D - Subsistence Hunting, Trapping, and Fishing: This section very closely follows existing State fish and Game regulations. In many cases the language is identical to state regulation or modified so it applies only to this federal program on public lands. The regulations note particular State provisions from which they were derived.

Definitions for subsistence hunting and trapping are included, specific prohibitions for subsistence use are included for both small and large game animals, and for fur animals and furbearers.

Additional requirements outline possession and transportation, evidence of sex and identity, sealing of bear skins and skulls, sealing of skins, prohibition on use of game as food for dog or furbearer or as bait.

Subsistence taking of fish and wildlife shall not be considered an emergency taking and nothing in these regulations prohibit a person from taking wildlife in defense of life or property.

The remainder of this section outlines requirements and definitions for subsistence fishing, including types of fish, methods and means of take, legal types of gear, and requirements for shellfish. The bag limits specified for fish and shellfish for subsistence season and the state bag limit set for a State general season for the same species are not cumulative. A person or group may not take the bag limit under a subsistence season and then take an additional bag limit under the State's general season.

June 6, 1990

MEMORANDUM

TO: DAVID RAMSEUR, Press Secretary
NORMAN COHEN, Department of Fish and Game

FROM: JAMES E. TORGERSON, Special Assistant Attorney General

THROUGH: JOHN W. KATZ, Director of State/Federal Relations and Special Counsel to the Governor

SUBJECT: SUBSISTENCE REGULATIONS

The federal government's proposed regulations are labeled "temporary," in anticipation of the State rapidly returning to compliance with ANILCA. Accordingly, the proposed regulations were drafted to "minimize change" to existing State law while still complying with ANILCA. However, if the State is not in compliance by December 31, 1990, the federal government will begin development of permanent regulations, not necessarily designed to ameliorate the affects of a takeover.

Even in the proposed temporary regulations, the federal government is given ultimate authority to decide issues of fish and game management on federal lands. The State believes that it is inappropriate for the federal government to manage resources traditionally managed by the State. Further, the State has a number of specific concerns, among which are the following, with the federal government's proposed authority over Alaska's fish and game management.

1. Federal Subsistence Board - This board will have ultimate responsibility to execute the Secretary of the Interior's subsistence responsibility. It will be composed of five (5) federal bureaucrats, selected because they are the regional or state director of one of the five (5) primary federal land management agencies in Alaska. This arrangement is objectionable to the State because:

a. All final decisions regarding subsistence management in Alaska will be made by federal bureaucrats who are more accountable to national interest groups and their superiors in Washington, D.C. than they are to Alaskans.

b. The federal government may ignore or override State fish and game officials factual findings and resource management decisions.

2. Harvestable Surplus - Presently the State determines the harvestable surplus of fish and game resources using a "sustained yield" standard. In many instances, the federal government will use a "healthy population" standard. For now, the federal government says that the terms frequently are similar; this perspective may change. Further, it is clear that the federal government will use a separate, more restrictive "healthy and natural population" standard in National Parks and Monuments.

3. Definition of Rural - The federal government will have the authority to determine which communities are and which are not considered rural, even though there will be some initial deference to State determinations.

4. Geographic Scope - The federal government has the authority to define the geographic scope of its jurisdiction.

a. Navigable waters are not now included in the definition of federal lands but may well be if the Department of the Interior is required to regulate salmon for subsistence purposes.

b. Lands selected by the State and ANCSA corporations but to which they have not yet received title are not now lands the federal government will manage for subsistence purposes, but that could change in the future.

c. State and private lands used by migratory game that also traverses federal land may be managed by the federal government in the future, although this would not occur under the present regulations. (See Kleppe v. New Mexico - The Wild Burro Case)

5. Litigation - A federal takeover of control of fish and game management for subsistence purposes is virtually certain to spawn a number of lawsuits that will consume the time and resources of the participants and create uncertainty for fish and game users state-wide. Furthermore, as a result of the litigation, federal judges could end up managing fish and wildlife on state lands as well as federal lands. In this regard, we have been advised that some litigants may seek to expand the geographic ambit of the takeover by including coastal and navigable waters and State and Native selected lands which have not yet been conveyed.

6. Alaskans Access to Process - The presence of a federal rather than State resource manager almost certainly will diminish State residents' access to the management process, because of the federal decision-makers insularity and lack of accountability, and because of the difficulty of getting necessary information from the federal managers.

7. Management Coordination - While State hunting rules apply to State game management units and subunits, the same does not apply to the federal rules. The latter will only apply to federal lands within these units and subunits. Without adequate maps, the general public will be without the tools to understand which rules apply to their activities. Detailed maps have not been supplied and must be if the transition is to come off with a minimum of conflict and misunderstanding.

cc: Garrey Peska
Denby Lloyd
Lew Pamplin

Subsistence in Alaska: A Summary

Division of Subsistence, Alaska Department of Fish and Game
Box 3-2000, Juneau Alaska, 99802 (907) 465-4147
February 26, 1990

Introduction

Subsistence is important to the economy and culture of many families and communities in Alaska. This report describes some characteristics of subsistence in Alaska, based on studies by the Division of Subsistence, Alaska Department of Fish and Game.

What is Subsistence?

Subsistence is part of the cultures, traditions, and economics of many families and communities in Alaska. In current state and federal law, subsistence is defined as customary and traditional, non-commercial uses of wild resources, for a variety of purposes. These uses include harvesting and processing wild resources for food, clothing, fuel, transportation, construction, arts, crafts, sharing, and customary trade.

Alaska has a subsistence law because subsistence continues to support a major part of state's rural economy and culture. Alaska is unique in this regard. Alaska is a pluralistic state. A sizable number of traditional cultures and economies exist side-by-side in the state. These traditional cultures and economics coexist with the industrial-capitalism of Alaska's urban centers.

The stated intent of the federal and state subsistence statutes was to provide the opportunity for these traditional cultures and economies to continue to exist.

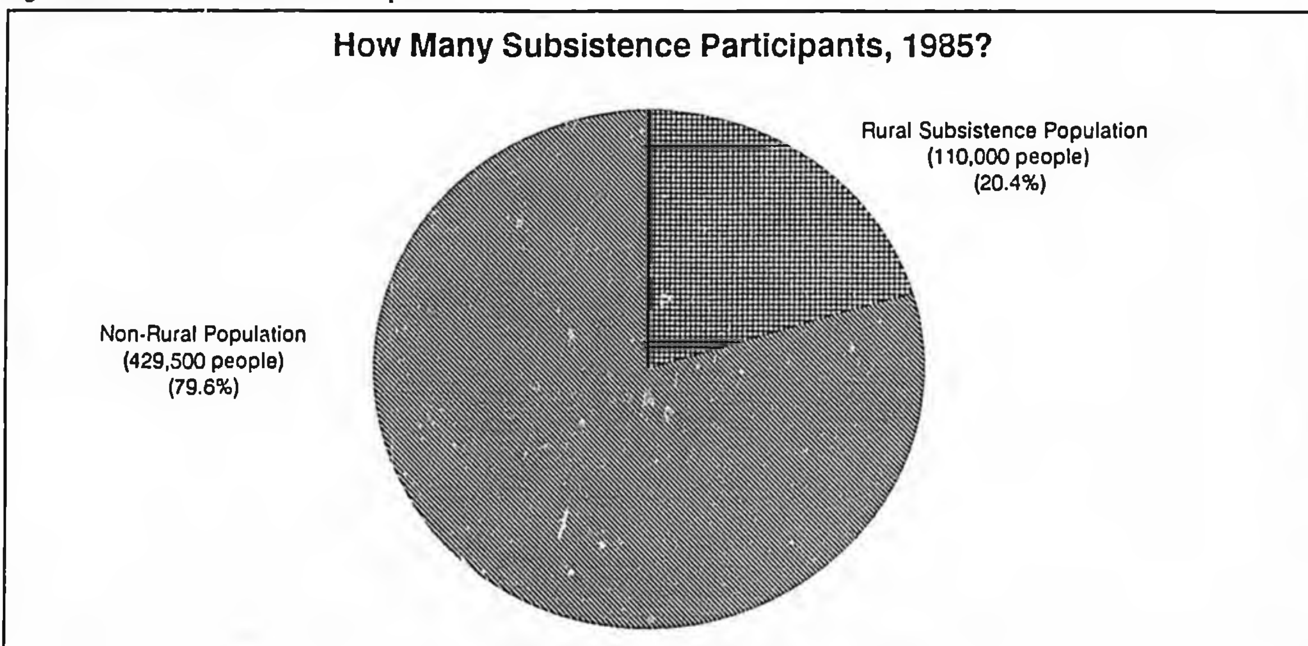
How Many People Participate in Subsistence?

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).

Our studies indicate that not all 110,000 rural residents actually harvested wild resources for subsistence. In fact, harvesting fish and game was the responsibity of a minority of people in rural areas. However, subsistence foods are widely distributed through non-market networks in rural communities. Because of non-commercial sharing, most residents in rural communities make use of subsistence foods during the course of a year to some extent. Thus, the best estimate of the number of participants in subsistence is the size of the rural population.

Figure 1. Alaska Rural and Non-Rural Population



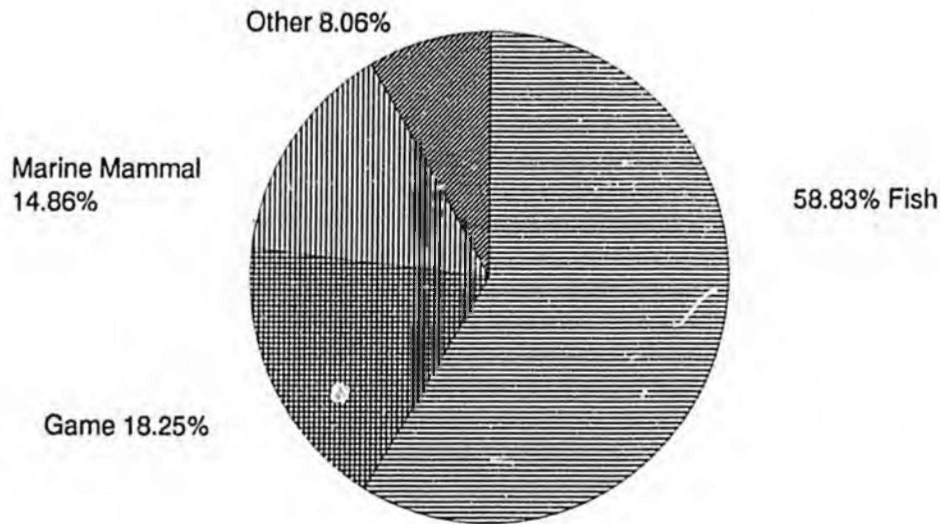


Figure 2. Statewide Subsistence Harvest Composition

How Large is the Subsistence Harvest?

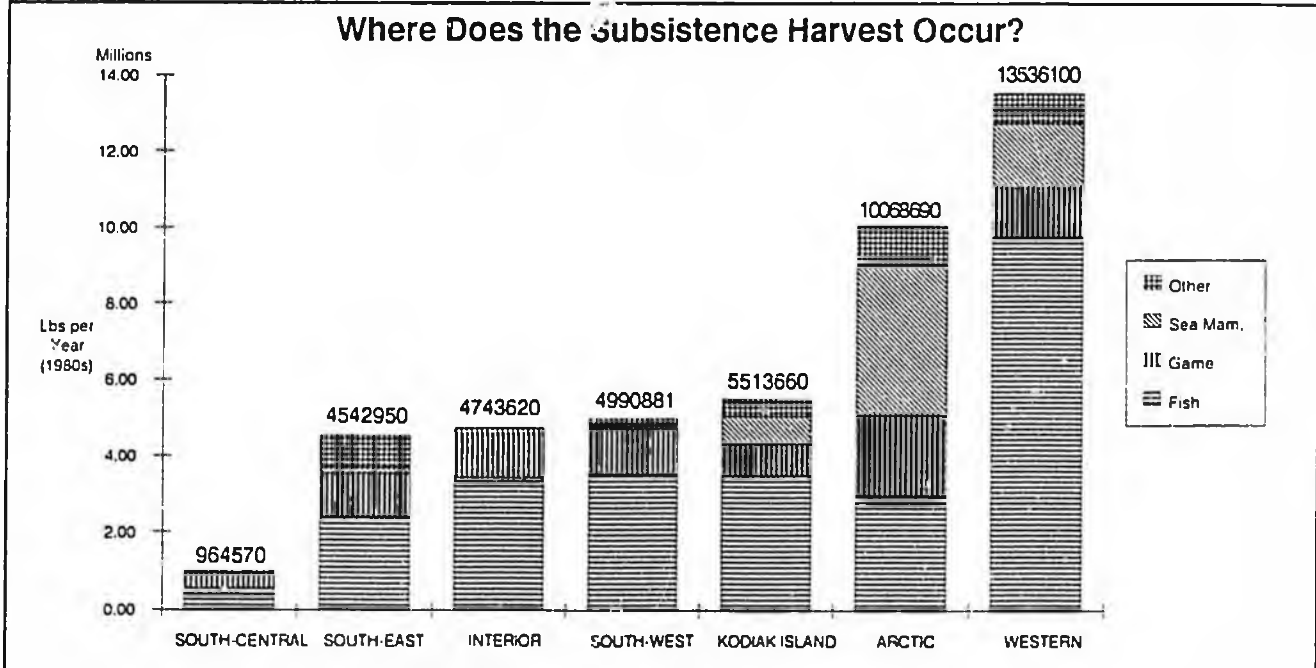
Statewide, non-commercial fishing and hunting provided an estimated 35-45 million pounds of food annually to rural areas during the 1980s. This comes to about 300-400 lbs per person a year, or about a pound of food per day.

Most of the subsistence harvest was fish (about 59 percent by weight), along with marine mammals (about 15 percent), land mammals (about 18 percent), and other wild resources (about 8 percent, including shellfish, birds, and wild plants) (Fig. 2).

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 lbs) and Arctic regions (about 10 million lbs). Other sizable non-commercial harvests occur on Kodiak Island (5.5 million lbs), Southwest Region (5.0 million lbs), the Interior Region (4.7 million lbs), and the Southeast Region (4.5 million lbs). The smallest harvest occurs in the Southcentral Region (.9 million lbs), primarily in the Copper River Basin, Tyonek, English Bay, and Port Graham (Fig. 3).

Figure 3. Subsistence Harvests by Region



How Does Subsistence Compare with Commercial and Sport Uses?

While subsistence is important, it represents a comparatively small portion of the wild resources harvested annually in Alaska. In Alaska's salmon fisheries, subsistence harvests generally represent less than 1 percent of the total salmon harvests. Considering all fish and game harvested in the state, about 4 percent by weight went to subsistence uses, 1 percent went to sport uses, and 95 percent went to commercial uses (Fig. 4).

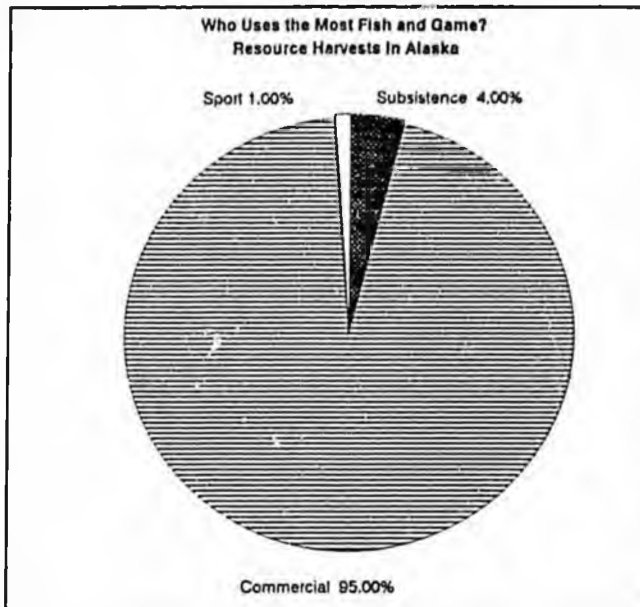


Figure 4. Fish and Game Harvests by Principal User Group

Subsistence and Cash

Our studies indicate that in many rural areas, subsistence is part of a traditional regional economy, termed a "mixed, subsistence-market economy". This type of economy occurs in the Canadian north as well. In mixed, subsistence-market economies, fishing and hunting are central activities conducted by extended family groups. The family invests in small-scale, efficient technologies, such as fishwheels, gill nets, motorized skiffs, and snowmachines, used for producing food. Subsistence production is not oriented toward market sale or accumulated profit, as is commercial market production. Rather, it is directed toward meeting the self-limiting needs of families and small communities.

A family's subsistence production is augmented and supported by cash employment by family members. Depending upon the region, employment commonly is in commercial fishing, commercial trapping, and public sector wage employment. Typically, but not always, mean annual monetary incomes in the region are modest and intermittent. Families follow an economic strategy of using a portion of the annual monetary earnings to capitalize in subsistence technologies for producing food. This combination of subsistence and commercial-wage activities by extended family groups characterizes the mixed, subsistence-market economy.

This mixed, subsistence-market system underlies the economies of most rural areas of the state. The mixed economic system has existed in various forms since before the Russian period. It is very durable, which indicates its success in providing for rural families.

Traditional Harvest Areas

Our studies show that subsistence users tend to harvest in traditional use areas surrounding their communities. This means that most subsistence harvest areas tend to be relatively accessible from the community, although seasonal camps are used for certain species.

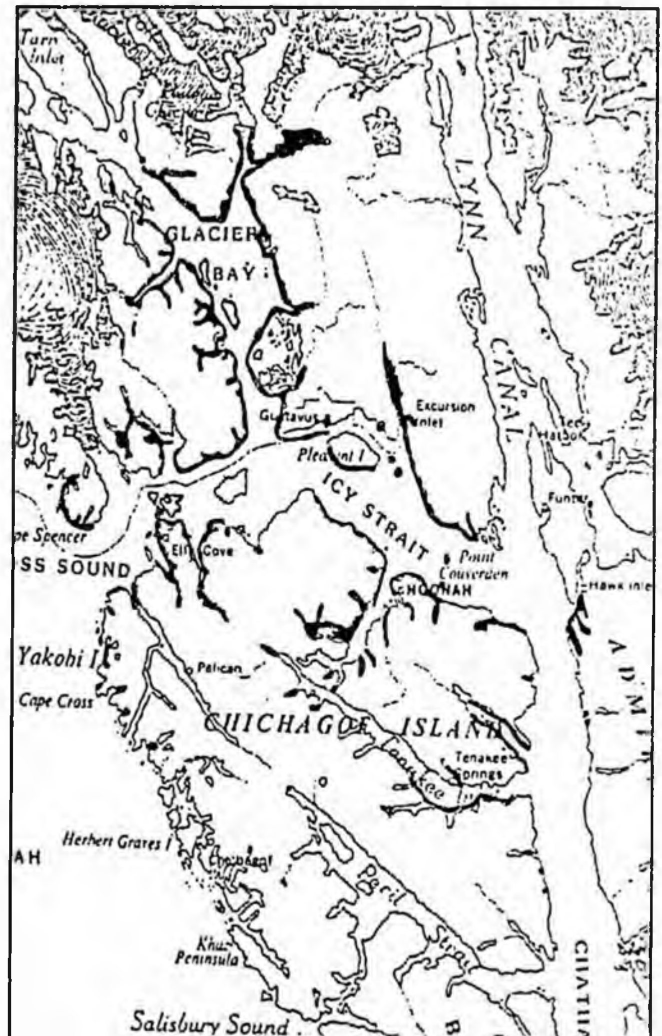


Figure 5. Subsistence Fishing Areas, Hoonah, 1920-1985.

Consequently, subsistence harvest areas for particular groups of people are definable and relatively predictable. Subsistence users generally do not harvest outside their community's traditional use areas (Fig. 5).

Subsistence Values

In addition to its nutritional value, subsistence provides important cultural and social values to rural communities. Our studies indicate that subsistence are central activities unifying extended families and small communities. The traditional wide-scale sharing of subsistence products between families help unify communities.

Subsistence activities bring meaning and purpose to life in many communities. This is especially true for Alaska Native groups. In many places, subsistence still expresses ancient spiritual linkages between humans, wild animals, and the land handed down by oral traditions.

The Importance of Subsistence

In summary, Alaska's rural regions tend to be different from Alaska's urban centers in terms of culture, traditional food use, and economic circumstance, reflecting the state's historic pluralism. Subsistence continues to be an essential part of the economy and culture of many rural areas. Subsistence fishing and hunting produces a substantial portion of the state's food supply in rural areas. Subsistence provides economic stability to many areas which have mixed, subsistence-market economic systems. And subsistence expresses a number of traditional values of importance to Alaska's diverse cultural groups.

Additional Reading

Alaska Department of Fish and Game, Division of Subsistence, Technical Paper Series. This series is the primary source of information on contemporary subsistence uses in Alaska. Write Technical Report Librarian, Division of Subsistence, ADF&G, Box 2-3000, Juneau, AK 99802, for listings and reports.

Wolfe, Robert J. and Robert J. Walker (1987) Subsistence Economics in Alaska: Productivity, Geography, and Development Impacts. Arctic Anthropology 24(2):56-81. This paper describes subsistence harvests in Alaska for the 1980s by geographic region.

Primary authors: Robert J. Wolfe and Robert G. Bosworth

ALASKA'S NEW SUBSISTENCE LAW--
WHAT DOES IT MEAN AND HOW DOES IT WORK?

Alaska Department of Fish and Game

August 27, 1986

In May 1986, the Alaska Legislature adopted several major changes to the state's subsistence law. These changes ensured that the state retained management of fish and game on all lands in Alaska. In June 1986, the Board of Game held an emergency meeting and eliminated the controversial Tier II hunting regulations. The emergency meeting provided some experience in implementing the new law.

Beginning with the next meeting of the Joint Board in November, both the Board of Fisheries and the Board of Game will begin to implement routinely the requirements of the new subsistence law, which are similar, but not identical to, the boards' approach before the Madison decision by the Alaska Supreme Court in 1985.

This report describes the subsistence law and how it works. It is intended to give the public, including fish and game advisory committee members, the information they need to participate in the board process.

WHAT DOES THE NEW SUBSISTENCE LAW REQUIRE?

The changes made in 1986 clarified what the Legislature intended the subsistence law to do. They confirmed that the Boards of Fisheries and Game should identify subsistence uses as customary and traditional uses of fish and game by people living in rural communities and areas. They also confirmed that hunting and fishing regulations should provide for subsistence uses. And they confirmed that subsistence has a preference over other uses when there is a resource shortage.

Under the new law, for a use of fish and game to be a subsistence use, the boards must make two findings:

1) that the area or community where the use occurs is "rural," that is, noncommercial, customary and traditional use of fish and game for personal and family consumption is a principal characteristic of its economy; and

2) that the use by an area or community of the particular game population or fish stock is customary and traditional, as determined under the eight criteria in 5 AAC 99.010 (Enclosure 1).

If those two conditions are met, the residents of that area or community are eligible for subsistence fishing or hunting for that specific fish stock or game population, if the resource can sustain a harvest.

The Legislature also clarified that subsistence hunting and fishing are subject to reasonable regulations, and that these will be separate from other hunting and fishing regulations. Subsistence fishing has long occurred under separate subsistence regulations, but subsistence hunting has not. Subsistence regulations will spell out which game populations and fish stocks are used for subsistence and who may harvest each population and stock for subsistence uses.

The identification of subsistence uses will be made on a community or area basis rather than for individual people. It will not be based on an individual's income, but rather on the role that use of fish and wildlife plays in the economy of communities and areas in the state.

To guide the boards in their decisions, the Legislature adopted a letter of intent. The letter specifically mentions eight criteria for identifying customary and traditional uses of fish and game resources, criteria similar to those previously adopted by the board which were subsequently overturned in the Madison case. The legislative record makes it clear that the criteria are consistent with the Legislature's intent. These eight criteria appear in regulation 5 AAC 99.010.

The Legislature also clarified in statute that non-subsistence uses (sport, commercial, and personal use) of fish are to be fairly and reasonably provided for. In addition to the protections for subsistence, the statute gives Alaska residents a preference over non-residents in the hunting of moose, caribou, elk, and deer. It also creates a new category, personal use fishing, to provide opportunities for residents who do not qualify for subsistence fishing to take fish by net for their own use.

HOW WILL THE THE NEW LAW WORK?

The Boards of Fisheries and Game are responsible for implementing the law. They will adopt hunting and fishing regulations which conform to the new law and are consistent with the requirements of public participation, the constitutional mandate to provide for sustained yield, and the available information on subsistence uses.

Alaskans who live in rural areas where customary and traditional uses of fish stocks and game populations have been identified by the boards may hunt and fish for those populations and stocks under subsistence regulations. Other

Alaskans will hunt and fish under non-subsistence regulations--in many cases the same general hunting and sport and personal use fishing regulations that existed before the Madison decision.

To implement the new law, the Board of Fisheries and the Board of Game will be conducting a systematic review of all areas, fish stocks, and game populations in the state. The review involves these specific steps:

(1) In November, the two boards will meet jointly to decide which areas or communities are rural. The law says that a "rural area" is a place where the "noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy...." To make a decision on a particular area, the board will take into account many aspects of its economy.

To identify rural areas, the boards need to know what role fish and game play in the economy of those areas. They will examine such things as communities' income, employment, businesses, population growth, population characteristics, settlement patterns, distance from urban areas and boundaries, and levels of use of fish and game.

No single indicator or formula determines whether a community or area qualifies as rural. For example, the boards cannot consider income alone. Nor can they consider per capita harvests alone. Many factors have to be weighed together. The boards need to consider the whole pattern of how personal and family use of fish and wildlife fits into the economy of each area or community. This information will come from the Department of Fish and Game, other agencies, the public, and advisory committee members.

The Joint Boards will deal with three types of communities and areas: those that clearly satisfy the standards for rural, those that clearly do not, and those that seem to be near the dividing line between rural and non-rural. The third type will probably get the most attention at the November meeting.

Remote parts of the state with isolated, small communities, few jobs, and heavy reliance on fish and game are most likely to be readily identified as rural. People living there will fish and hunt under subsistence regulations for resources that have customarily and traditionally been used in that area. When game populations that rural people customarily and traditionally use are in short supply, and

subsistence uses must be cut back, these uses will be given preference over non-subsistence uses.

Because the Alaska Legislature intended the changes in the state statute to be consistent with federal law, the boards can use federal legislative intent in interpreting what is meant by rural. The 1979 legislative history of the Alaska National Interest Lands Conservation Act (ANILCA) described Anchorage, Fairbanks, Juneau, and Ketchikan as urban. Residents of those areas will fish and hunt under sport and personal use fishing regulations, and general hunting regulations. They will be able to hunt under these regulations in rural areas.

The boards will probably devote more time to decide whether moderately sized or more recently settled communities are rural or non-rural. People in these places have been able to fish, in many cases, under subsistence regulations, while hunting under general regulations.

ANILCA legislative history also described certain communities (Bethel, Nome, Kotzebue, Dillingham, and Barrow) as rural. At its emergency meeting in summer 1986, the Board of Game determined that Bethel and Kotzebue are rural, but did not have occasion to examine Nome, Dillingham, or Barrow.

These examples will help guide the boards in determining which communities are rural. In reaching their conclusions the boards have to be reasonable. They must do the best they can with the available information to decide if personal use of fish and game is a principal component of the economy of each area or community they examine.

(2) Each board, during their normal separate meetings, will determine whether specific fish stocks and game populations can sustain a harvest. The Division of Game and the fisheries divisions will provide biological information to aid in these decisions.

(3) If a harvest can be allowed, the boards must determine whether the specific fish stock or game population had customarily and traditionally been used by the residents of specific areas or communities for "food, shelter, clothing . . ." or the other purposes listed in the law. The boards will use information from the department and the public in making this determination. The Division of Subsistence provides information on the characteristics of local resource use throughout the state. The Divisions of Game, Commercial Fisheries, and Sport Fish also provide

information about levels, seasons, and methods of harvest. The public, fish and game advisory committees, and regional advisory councils will provide testimony on their uses. The board examines these data against the eight criteria in 5 AAC 99.010 to determine if there are customary and traditional uses.

(4) Each board must then authorize subsistence fishing or subsistence hunting on these specific fish stocks and game populations by the residents of specific rural areas or communities which have customary and traditional uses of those resources.

(5) If there is a harvestable surplus after subsistence uses are provided for, the Board of Fisheries may adopt commercial, personal use, or sport fishing regulations, and the Board of Game may adopt general hunting regulations. In many cases, these additional regulations already exist. The boards must provide for fair and reasonable opportunities for non-subsistence uses, taking into account factors set out in the law, and must give Alaska residents a preference over non-residents in harvesting moose, caribou, elk, and deer.

Obviously, this is a great deal of work for the boards. There is no simple formula, but the law and the eight criteria provide extensive guidelines for decisions.

Because some important hunting seasons would have opened before the next regularly scheduled meeting, the Board of Game held an emergency session to deal with these critical hunts. Here are some examples of how the process worked during that board meeting:

The board decided that Delta bison could be harvested. But the board concluded that bison, a recently introduced species, were not the subject of customary and traditional uses. Therefore they will not be harvested under subsistence regulations. Alaskans will hunt bison under general hunting regulations; and because of the high demand, opportunity will be based on a drawing permit system.

In another case, the board found that moose in the Yakutat area could be harvested; were used for customary and traditional subsistence purposes by the residents of Yakutat; and that Yakutat is rural. Therefore, Yakutat area moose will be harvested under subsistence regulations by residents of Yakutat. The board also determined that there were enough moose to provide for both subsistence and non-subsistence hunting. Thus, Yakutat area moose will be available to all Alaskans under general hunting regulations.

In this case subsistence and general regulations are identical.

Under the subsistence law, subsistence hunting and fishing are subject to seasons, bag limits and other conservation and management measures, just as are all hunting and fishing. Subsistence uses will be provided for, and given a preference when necessary through separate seasons, bag limits, limits on methods of access, etc. In a few extreme cases, such as very low moose populations in the Minto Flats, only local residents will be allowed to hunt. In most cases, however, all Alaskans will have the opportunity to participate in general, drawing permit, registration, or open hunts.

PUBLIC INVOLVEMENT

Like all board decisions, board deliberations on rural areas, customary and traditional uses, and the regulations governing subsistence fishing and subsistence hunting are open to public comment, and to modification. The public and advisory committee members may recommend that certain communities or areas be found to be rural or non-rural, or that certain fish stocks or animal populations be identified as being subject to customary or traditional uses, and may provide information supporting the proposed result. The most useful information on whether an area is rural or not is that concerning the role of noncommercial use of fish and game in the area's economy. The eight criteria identify the factors and types of information that the boards use to determine whether a game population or fish stock is subject to customary and traditional uses.

At their November meeting, the boards will hear testimony on rural areas, including those areas examined in June by the Board of Game. Additionally, at the next regular board meetings, advisory committees and the public will have opportunities to comment on subsistence hunting and fishing regulations, and whether they correctly identify and adequately provide for subsistence uses. The process of fine-tuning the regulations will then become part of the boards' normal regulatory cycles.

FOR MORE INFORMATION

If you have questions about the upcoming Board of Fisheries and Game meetings, please contact any of the following:

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Victor Karmun	P. O. Box 686	
Division of Boards	Kotzebue, AK 99752	443-3420

Interior Region

Mitch Demientieff Division of Boards	1300 College Road Fairbanks, AK 99701	479-6211

Western Region

Clara Kelly Division of Boards	P. O. Box 90 Bethel, AK 99559	543-3107

Southwest Region

Dorothy Wilson Division of Boards	P. O. Box 199 Dillingham, AK 99576	842-5925

Southcentral Region

Karen Brandt Division of Boards	333 Raspberry Road Anchorage, AK 99518	267-2353

Southeast Region and Statewide

Laird Jones ~~Beth Stewart~~, Director Division of Boards	Box 3-2000 Juneau, AK 99802	465-4110
Steven Behnke, Director Division of Subsistence	Box 3-2000 Juneau, AK 99802	465-4147

THE EIGHT CRITERIA

Before Madison, the Boards of Fisheries and Game developed eight criteria in 5 AAC 99.010 which were used to identify customary and traditional uses by rural Alaska residents. The Department of Interior had certified that the eight criteria identified subsistence uses in a way which complies with ANILCA. The state subsistence law as recently amended again authorizes their use.

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

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

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

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

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

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

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

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

ADF&G, Division of Subsistence
Southeast Regional Office
Box 20
Douglas, Alaska 99824

Southeast Alaska Subsistence Fishing and Hunting Update
November 1989

Subsistence fishing and hunting are important parts of the culture and economy of many southeast Alaska communities. Subsistence is a social issue with a long history. Major changes have been occuring in state subsistence regulations that effect southeast villages. Many residents have not heard of them. This report is a current update of recent events effecting subsistence in southeast Alaska.

Background

Since 1979, the state has had a state law protecting subsistence fishing and hunting. The law requires that subsistence fishing or hunting be allowed where it traditionally occurs. The law requires that subsistence be given priority over commercial fishing and sport fishing and hunting. This means that in times of shortages of wild fish stocks and game populations, where it becomes necessary to restrict harvests, the state must cut back on sport and commercial uses before subsistence uses are cut back. Since 1981, the federal government also has had a federal law protecting subsistence (in ANILCA). It is almost identical to the state law. In both laws, subsistence is defined as the "customary and traditional use" of wild resources in "rural areas".

The subsistence laws are implemented by the Alaska Board of Fishery and Alaska Board of Game. These are two state boards made of seven citizens, appointed by the governor. They meet at least twice a year to make fishing and hunting regulations for the state.

The Board of Fisheries and Board of Game have just recently started to implement the subsistence law in the southeast region. This means they are in the process of creating regulations that will affect subsistence fishing and hunting for years to come in southeast Alaska.

Recent Decisions Affecting Southeast Alaska

The Boards of Fisheries and Game decide which communities in southeast qualify for subsistence. That is, the boards decide who may fish and hunt under subsistence regulations. Deciding who qualifies is a two step process.

In the first step, the Boards of Fisheries and Game decide which communities are "rural communities" in southeast. By law, subsistence occurs only in "rural communities or areas". Over the past four years, the Boards have decided that all communities in southeast (including Saxman) are "rural", except for the Juneau Borough and the Ketchikan area, which are "non-rural." This means that residents of Juneau or Ketchikan (except Saxman) cannot fish or hunt under subsistence regulations, but can only fish or hunt under general, sport, commercial, or personal use regulations.

In the second step, the Board of Fisheries and the Board of Game decide which rural southeast communities have "customary and traditional uses" of fish or game. By law, subsistence is defined as "customary and traditional uses." Over the past two years, the Board of Game has decided that all rural communities in southeast have customary and traditional uses of deer. They have decided that only residents of Chichagof and Baranof islands and residents of Kake have customary and traditional use of brown bear. The Board of Game has not completed their decisions about other game animals.

In their January-March 1989 meetings, the Board of Fisheries decided that the following southeast rural communities have customary and traditional uses of all types of salmon: Yakutat, Klukwan, Haines, Kake, Hoonah, Angoon, Hydaburg, Kasaan, Saxman, Klawock, and Craig. These communities qualify for subsistence salmon fishing. The Board decided that residents of Sitka had customary and traditional uses of sockeye salmon only.

The Board decided that these rural communities do not have customary and traditional uses of salmon: Skagway, Gustavus, Elfin Cove, Pelican, Tenakee Springs, Petersburg, Wrangell, Point Baker, Port Protection, Port Alexander, Thorne Bay, Coffman Cove, North Whale Pass, Hollis, Edna Bay, Meyers Chuck, and Hyder. These communities do not qualify for subsistence salmon fishing. The Board of Fisheries did provide "personal-use" fishing regulations for these communities. Personal use is a new fishing category for southeast. It allows salmon to be taken with nets for home use, under the terms of permits issued by ADF&G, but this type of fishing does not carry the subsistence priority.

The Board of Fisheries also decided about shellfish and bottomfish. In general, the same communities that qualified for subsistence salmon also qualified for subsistence shellfish (except king crab) and subsistence bottom fish. The same communities that did not qualify for subsistence salmon did not qualify for subsistence shellfish and bottom fish.

The Board of Fisheries determined that subsistence king and coho salmon may only be taken incidentally to sockeye, pink, and chum salmon fishing, except for kings and coho in Yakutat, and coho in Angoon.

Discussion of Recent Southeast Subsistence Decisions

These recent decision are important ones, for they affect the ability of residents to subsistence fish and hunt for years to come. The decisions by the Board of Fisheries are particularly important. The Board of Fisheries has eliminated from subsistence fishing a major portion of the rural residents in southeast, including residents of two major communities (Wrangell and Petersburg) and seventeen small communities. This includes both the Native groups and non-Native residents of these communities.

The system for establishing Alaska's fish and game regulations provides for citizen input in formulating and changing these regulations. The Boards have kept all upcoming agendas open for considering proposed revisions to subsistence regulations. Proposals submitted to the Board of Game by mid-December will be considered at the spring, 1990 meeting. Proposals submitted to the Board of Fisheries by April 1 will be considered at the fall, 1990 meeting.

Decisions by the Boards may also be challenged by legal suits. On June 30, 1989, a lawsuit was filed by Herman Kitka, Mark Jacobs, Jr., and John Dapcevich, on behalf of themselves and residents of the City and Borough of Sitka. They are suing the State of Alaska, Alaska Department of Fish and Game, and the Board of Fisheries over the recent decisions in Sitka that recognize Sitka's customary and traditional uses of some food species but not others.

Statewide Subsistence Issue: The Kenaitze Case

Another major subsistence issue is the lawsuit by the Kenaitze Indian Tribe on the Kenai Peninsula against the State of Alaska. It is a complicated suit, but in general, the Kenaitze Tribe is suing for an opportunity to subsistence salmon fish on the Kenai Peninsula. Recently, a California federal court found in favor of the Kenaitze on part of their suit. The federal court found that the state's current definition of "rural" did not match a "common" definition, and was not in compliance with ANILCA (the federal subsistence law).

This court decision throws the state's approach toward defining "rural" into confusion. The state has not wanted to define "rural" with a simple population size (the usual standard is 2,500 people), because

this would eliminate places like Barrow, Bethel, Nome, and Kotzebue from subsistence fishing and hunting. Clearly, these communities rely on subsistence. Instead, the state has defined "rural" in terms of the overall socioeconomic pattern in an area: "rural" was defined as places where "customary and traditional fishing and hunting was a principal component of the economy of the community or area". By this definition, most areas of the state qualified as rural, except Anchorage, Fairbanks, Juneau, Ketchikan, the Matsu Borough, the Kenai Peninsula, and a few communities like Valdez, Seward, and Big Delta. It is this approach that the court struck down.

The state's Governor's office and Washington legislators attempted to solve this problem by submitting an amendment to ANILCA, which would have defined "rural" in ANILCA by using the state's definition. This proposed amendment was blocked, primarily by an outcry of several Native organizations in the state, who were not consulted prior to the state taking this approach.

Currently, there has been no solution to these problems of how to define "rural" and how to allow the Kenaitze the opportunity to fish. Discussion is occuring between state agencies, the Kenaitze tribe, other Alaska Native groups, and other resource user groups on ways to try to solve them. There are no clear answers in sight. If the federal court steps in to decide these issues, the 2,500 population level is one possible definition the court would impose. This definition would eliminate as rural many places in Alaska which currently have rural status and subsistence opportunities.

November–December 1989

Subsistence

Adapting Ancient Ways to Modern Times

A Brief History

Why Alaska Has a Subsistence Law

Alaska is unique among the states in giving subsistence a priority in wildlife management. This legal priority can be traced to Alaska's Native land claims movement, when oil development at Prudhoe Bay forced settlement of Native property rights.

The eventual settlement in 1971 recognized Native land claims, created and funded Native corporations, extinguished aboriginal hunting and fishing rights, and opened the way for North Slope oil development and the Trans Alaska Pipeline. Congress realized that although aboriginal hunting rights had been extinguished, tens of thousands of rural Alaskans — both Natives and non-Natives — depended on wildlife for subsistence. Except during the oil boom in the 1980s, rural Alaska has generally been cash-poor. Imported foods are expensive. Most rural Alaska communities would have a hard time without dependable access to wild foods.

Subsistence has long played an essential role in the rural Alaskan economy

When Congress passed the Alaska National Interest Lands Conservation Act in 1980, it included a subsistence priority on federal lands and allowed subsistence hunting on national interest lands. In 1978, in anticipation of ANILCA, the state also passed a subsistence priority law. The laws are a recognition of several conditions:

- Subsistence hunting, fishing and gathering are important to Alaska and the nation. Not only is subsistence the traditional way of life of Alaska Natives, non-Natives value the opportunity to choose a subsistence lifestyle. Neither law discriminates racially.
- American history clearly shows that without special protection for subsistence uses, commercial, agricultural, and industrial uses of land and wildlife eventually overwhelm subsistence uses. Both laws make subsistence the priority consumptive use of wildlife.
- There is not enough wildlife for every Alaskan to live off the land, especially near Alaska's urban centers. Those who do subsist need some assurance that their livelihood won't be undermined by competition.

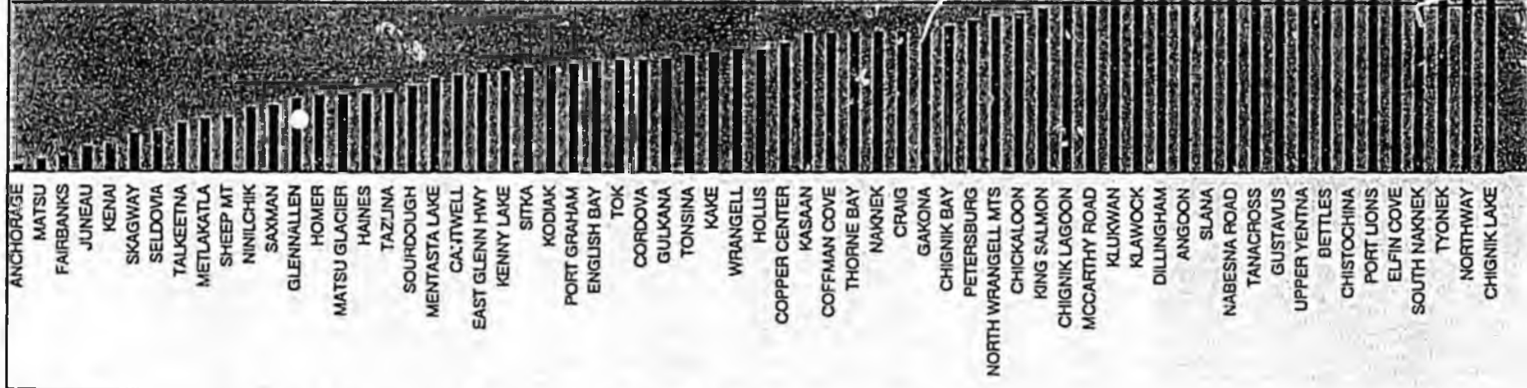
Implementing the subsistence law is the responsibility of the Alaska Boards of Fisheries and Game, whose members rely on the ADF&G staff for information. The Boards must decide which communities or areas qualify for subsistence, and which uses of wildlife are subsistence uses. In making these decisions, the Boards consider historical and contemporary information about wildlife harvests and use, as well as social and economic information.

Since the subsistence law was passed, the Boards have adopted subsistence hunting and fishing regulations, just as they have adopted sport, personal use, and commercial regulations. Subsistence regulations can provide for longer seasons and larger bag limits than sport regulations.

Rural designations, customary and traditional use designations, and other subsistence regulations can and do change over time. For example, certain communities that were not originally designated rural presented information to the Boards which persuaded the Boards to change their status. The Kenaitze Indian Tribe, whose members live in a non-rural area, recently sued the state. A federal court decided that the current definition of "rural" in the state subsistence law did not comply with the "plain language" of ANILCA. At this time, therefore, the state law is out of compliance with federal law. This will have to be rectified with refinements to state or federal statutes.

While the subsistence laws are important, subsistence existed long before the laws did. Subsistence has long played an essential role in Alaska's economy. Most Alaskans recognize this, and continue to support a legal system which does likewise.

Alaskans' Per Capita Harvests



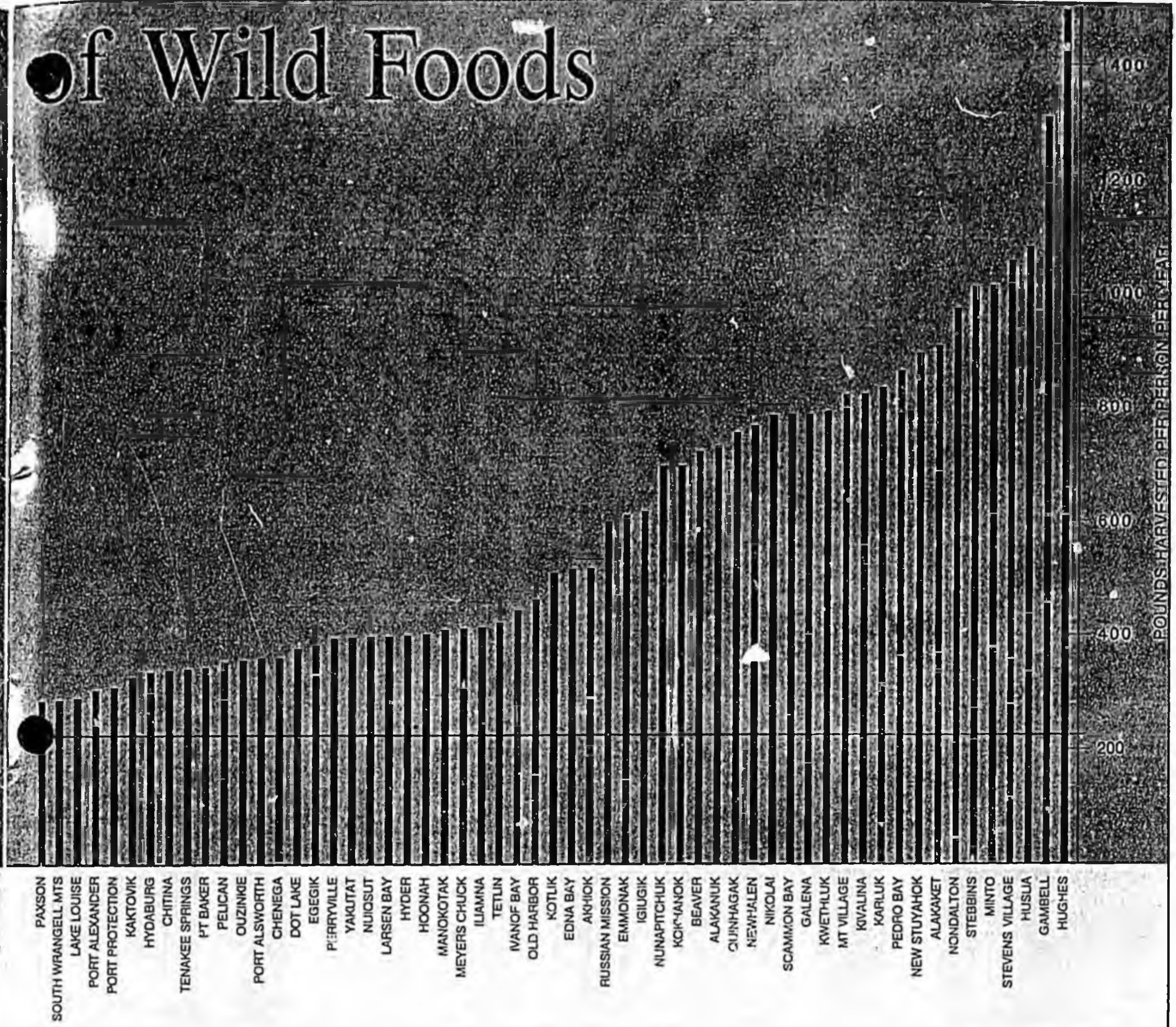
Rural Alaskans Harvest More Wild Meat, Fish, and Fowl, on the Average, Than Most Americans Buy in the Grocery Store

Alaskans use a lot of wild food. According to recent harvest surveys, many Alaskans harvest more wild meat and fish than the average American buys from the grocery store.

Since the Alaska subsistence law was adopted eleven years ago, the Division of Subsistence has compiled harvest data for more than 100 Alaska communities. They show that annual harvests vary from a low of 10 pounds per person (in Anchorage) to a high of 1,498 pounds per person (in Hughes). The median harvest is about 250 pounds.

The graph above shows harvests of fish, land mammals, marine mammals, and other wild resources in 122 Alaska communities. Harvest totals represent pounds dressed weight per person per year.

In approximately half of the sampled Alaska communities, wild food harvests are greater than the average 222 pounds per



person of store-bought meat, fish, and poultry purchased by families in the western United States each year.

Harvests varied significantly by region. Harvests in northwest and Arctic Alaska are highest (610 pounds per capita), followed by the Aleutian and Pacific coasts (378 pounds), the subarctic interior (377 pounds), and southeast Alaska (212 pounds). Harvests in predominantly urban areas of Alaska (Anchorage, Fairbanks, Juneau, Matanuska-Susitna Borough, Kenai, Ninilchik, Homer, and Seldovia) are lowest (48 pounds).

Why are harvests so different in different communities? Non-Native settlement entry, personal income, and location are among the factors accounting for some of the variation. In general, Native communities harvest more wild foods than non-Native communities. Communities with greater mean taxable incomes tend to harvest less subsistence food. Community income levels are strongly associated with settlement entry, so that statistically a community's non-Native population and mean income increase together.

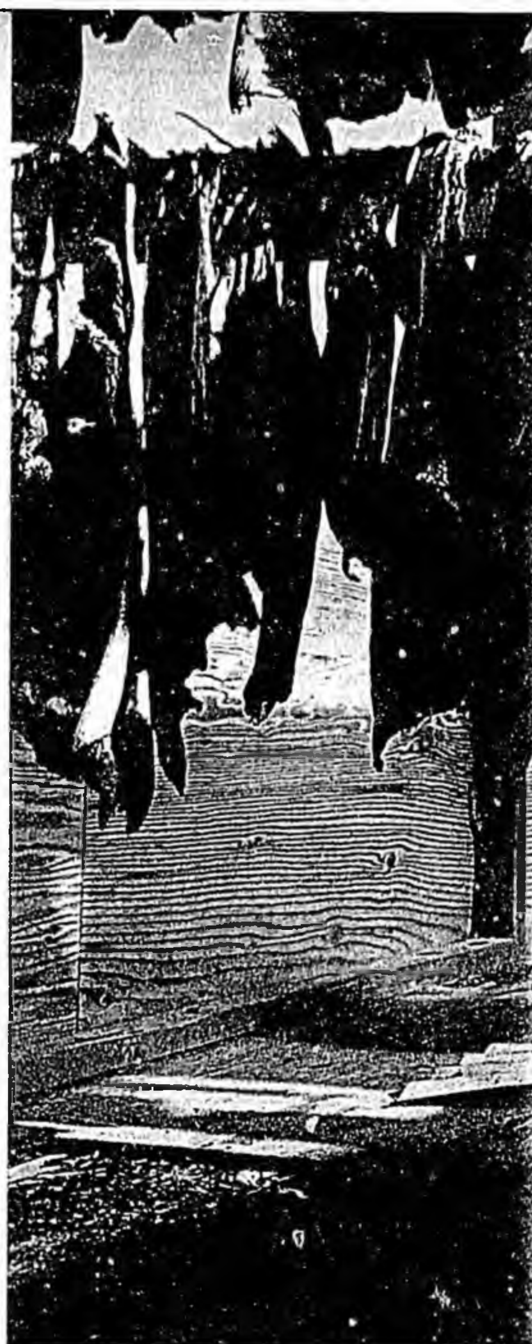
In general, harvests increase as the distance from the road systems increases. In other words, the communities with the lowest subsistence harvests in the 1980s occur along the roaded, settled areas surrounding Anchorage and Fairbanks.

Why do some rural Alaskans use so much more meat, fish, and fowl than the most Americans? Alaskans substitute wild foods for milk products (the single largest item in the American diet), fruits, vegetables, and grains. In rural Alaska, such imported foods are expensive and not always available. Some of the subsistence harvest (dried fish in particular) also is used to feed dogs. Rural Alaskans' diet is quite different from the diet of most Americans, as it is loaded with nutritious foods.

Myths

What Have You Heard?

by Robert Wolfe



What have you heard about subsistence in Alaska? I have heard so many misconceptions about subsistence in casual conversation that I've begun to call them myths. I have heard people say, "Subsistence is for Natives only." "Subsistence takes most of the fish and game." "Subsistence is just welfare." "Subsistence is bad for wildlife conservation." "Subsistence is disappearing." In fact, the subsistence we know is very different. Here is a short quiz about subsistence in Alaska. See if what you have heard is fact or fancy.

Is subsistence for Natives only?

No. Both Alaska Natives and non-Natives may hunt and fish for subsistence if they live in rural areas. Currently, more than half of the people who qualify for subsistence are non-Natives. In 1985, about 110,075 Alaskans lived in rural areas. Of these about 50,084 (45.5 percent) were Alaska Native and 59,991 (54.5 percent) were non-Natives.

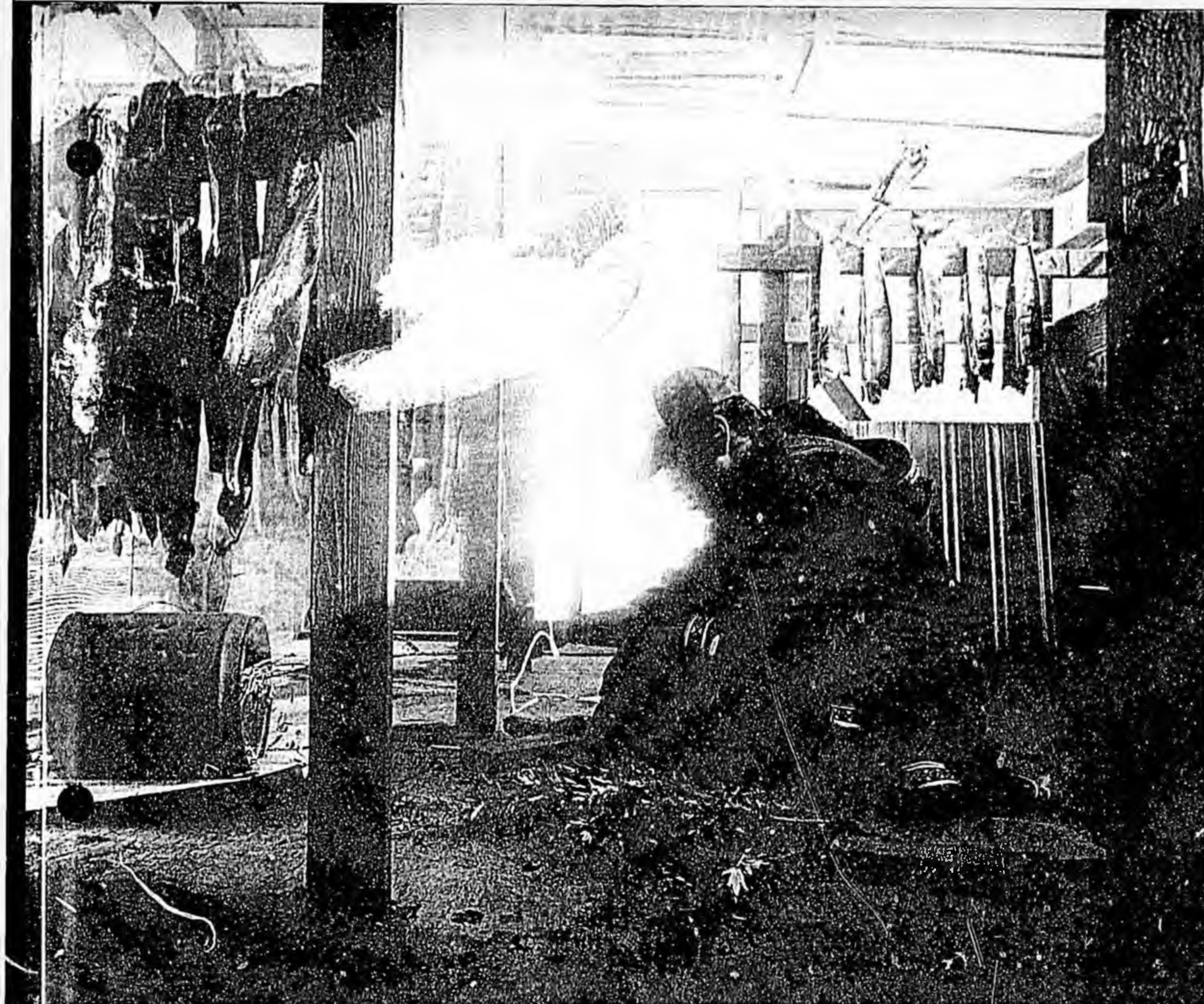
Subsistence has been legally defined to include the customary and traditional uses of fish and game in all of Alaska's rural areas. If a person moves into a rural area and adopts that way of living for their own, then that person, whether Alaska Native or non-Native, may legally fish and hunt for subsistence.

Of course, there is always an exception. Marine mammal hunting is regulated by international treaty and the Marine Mammal Protection Act. Only Alaska Natives may hunt marine mammals, such as seals, whales, polar bears, and sea otters.

Does "subsistence" mean hunting and fishing for food?

Certainly food is one of the most important subsistence uses of wild resources. The current rural subsistence harvest is about 354 pounds of food per person per year. That is more than the U.S. average consumption of 255 pounds of domestic meat, fish, and poultry per year. (The average American uses a total of 1,371 pounds of all foods a year.) However, there are other important uses of subsistence products, such as:

- Clothing: Wild furs and hides are still the best materials for ruffs (wind guards), mitts, parkas, kuspuks, clothes lining, and mukluks (winter boots) in many regions.
- Fuel: Wood is a major source of energy in rural homes, and is used for smoking and preserving fish and meat.
- Transportation: Fish, seals, and other products are used to feed dog teams.
- Construction: Spruce, birch, hemlock, willow, and cotton-



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wood are used for house logs, sleds, fish racks, and innumerable other items.

- Home goods: Hides are used as sleeping mats. Seal skins are used as pokes to store food. Wild grasses are made into baskets and mats.
- Sharing: Fish and wildlife are widely given out to support neighbors who cannot harvest for themselves because of age, disability, or other circumstances.
- Customary trade: Specialized products like seal oil are bartered and exchanged in traditional trade networks between communities. Furs sold to outside markets provide an important source of income to many rural areas.
- Ceremony: Traditional products are used in funerals, potlatches, marriages, Native dances, and other ceremonial occasions.
- Art and Crafts: Ivory, grass, wood, skins, and furs are crafted into beautiful items for use and sale.

All these uses of wild resources are recognized and protected in law. Subsistence is a rich pattern of living, of which food is but one important part.

Is big game (like moose or caribou) the main subsistence food?

As a general rule, no. The main subsistence food is fish. About 65 percent of the state's subsistence harvest by weight is fish, including salmon, halibut, herring, whitefish, cod, and Arctic char-Dolly Varden, among others. Land mammals are only about 18.5 percent of the state's subsistence catch. Marine mammals are 9.7 percent of the catch, and "other resources" are 6.4 percent (mostly clams, crabs, birds, berries, and plants).

Of course, the types of foods people eat vary from place to place. Fish is a smaller item in the extreme coastal arctic areas, where caribou, seal, whale, and walrus are major subsistence resources.

Does subsistence take most of the fish and game?

Again, as a general rule, no. Commercial fishing outstrips subsistence many times. In Alaska in 1985, commercial fisheries harvested about 908,500,000 lbs. of salmon, halibut, herring, and shellfish (there was an additional commercial groundfish harvest of 2,995,200,000 lbs.). This compares with a harvest of 40,305,449 lbs. of subsistence foods and 7,072,046 of sport-caught fish and game. Thus, commercial fish took 95 percent, subsistence took four percent, and sport took one percent of the total statewide harvest (excluding commercial groundfish).

Of course, these 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.

Does subsistence involve money?

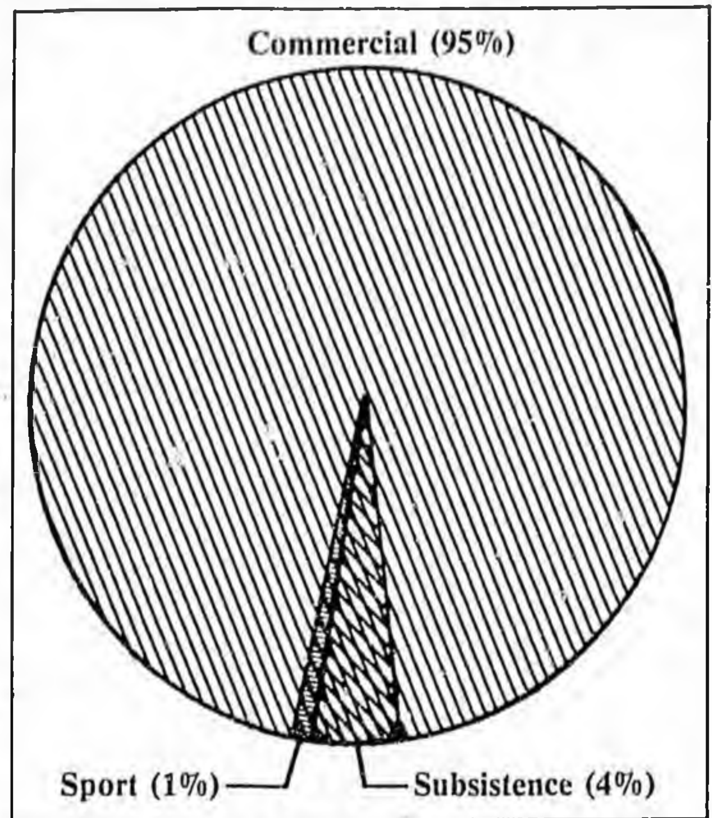
Yes. Rural families use money in order to purchase basic goods and services: fuel oil and electricity for heat, light, and power; family goods like clothing and shelter; subsistence equipment like guns, ammunition, fishing nets, power motors, gasoline, rain gear, and so forth. Money is used to invest in the tools for hunting, fishing, and gathering.

It is a common misconception that there is no money in traditional subsistence economies. However, trade and commerce have always been part of subsistence systems. Goods have been traded for thousands of years in Alaska. The commercial fur trade with European markets began about 300 years ago, bringing European currencies and goods into Alaska. So commercial enterprise and money have been part of traditional subsistence economies for a long time.

Rural Alaska's economies do operate differently from urban economies, however. In Alaska today, the rural economies are "mixed economies," where families and communities live by combining wild resource harvests with commercial-wage employment. Monetary jobs tend to be few and unstable. Monetary incomes tend to be small and insecure. Economic activity tends to occur in family groups, rather than business firms. Economic ventures tend to be small scale. Economic goals tend to be for the benefit of family groups, rather than monetary profits for business firms. These are major differences. Because of this, Alaska is a pluralistic society, with "mixed subsistence-cash economies" existing side-by-side with the "industrial capital economy" of the large population centers of Anchorage and Fairbanks.

Is subsistence compatible with wildlife conservation?

Rural communities depend on the land for subsistence. It is to their advantage to maintain undamaged land and ecosystems, so wildlife are abundant. Most subsistence communities have customary rules for treating the land and the ecosystem. These rules have been passed on through the generations: "Do not waste," "Take only what is needed," "Treat the animals with respect," "Do not damage the land without cause," among others. It is believed that if the rules are followed, then the land will continue to provide. Subsistence peoples are the original conservationists, although they may not use that word, because their very lives depend on it.



Who uses the most fish and game in Alaska?

This is not to say there is perfect compliance with customary rules, as with any group of people. However, today most people still comply with the traditional rules and practices. They comply, even when there are additional government rules and regulations governing land and resource uses. In fact, rural areas commonly must obey two sets of laws — those from the state-federal administration, and those handed down from their forefathers as customary law.

Federal law recognizes the compatibility of subsistence and wilderness values. The law protects subsistence uses in the new parklands, national refuges, and wilderness areas. Subsistence peoples and traditional uses are part of the natural ecosystem and have helped to maintain it for generations.

Is subsistence compatible with wilderness?

Yes. Most areas designated as "wilderness" today are the traditional homelands of subsistence peoples. Alaskans have been living in and using these areas for thousands of years, and continue to do so. These areas would not appear pristine and undamaged today — so they could be classified as wilderness — if rural Alaskans had not treated the lands and wildlife well. The lands are wilderness now, because subsistence is compatible with wilderness.

Is subsistence a type of welfare for families with low incomes?

No. Subsistence is not a welfare system for people with low incomes. In fact, households with the highest incomes in rural communities usually produce the most subsistence foods. Households with the lowest incomes usually produce less subsistence foods.

This makes sense if subsistence is seen as a family enterprise. Households with the lowest incomes in a community are commonly the very elderly, single mothers with young dependent children, and young single persons or young couples who are just getting started. These households also very likely cannot subsistence fish and hunt very well. They often lack the time, the labor, and the equipment to harvest effectively. They usually eat subsistence foods produced by other households in the community.

The households who produce the most subsistence foods in a community are usually households with large, mature labor forces which have equipment for hunting and fishing. Usually, these are households with mature parents and several mature children. They have the labor and the equipment to harvest wild foods. They typically produce extra subsistence food to share with elderly relatives, the less fortunate, and young adults. The mature households also usually have greater monetary incomes because there may be several household members with jobs.

Because of this, rural communities would suffer extreme hardships if subsistence hunting and fishing were limited to only households with low incomes. This would cut out the most productive households in the community.

JIM MAGDANZ

Rural families use money to purchase tools and supplies.

Why don't subsistence hunters use bows and arrows?

Subsistence requires equipment that works, is safe, and is sustainable with ecological and economic conditions over the long term. Most people stopped using bows and arrows over a century ago in Alaska. Rural Alaska has been using guns for hunting longer than America has been using automobiles for transportation, since the 1860s in most areas.

Subsistence equipment is usually small scale, appropriate technology. It is efficient and modern. Equipment commonly includes fish nets, fish wheels, aluminum skiffs with small outboards, snowmachines, binoculars, and citizens band radios. These may be used alongside dog teams, skin boats, smoke houses, and fish traps, depending upon the area and conditions.

Is subsistence disappearing?

Subsistence is constantly changing, but as a whole, there is little evidence that it is disappearing as a way of life in Alaska. In rural Alaska, subsistence activities are among the most highly valued parts of the culture. Subsistence harvests still are essential parts of the rural economy. In most rural places, children continue to learn how to capture wild foods and prepare them for use by the family and community.

Nevertheless, some things do threaten subsistence. Roads into rural areas usually result in declines in the subsistence way of living. Roads bring about ecological change, increased competition for wild resources, and in-migration of cultural groups that do not hunt and fish for subsistence. Unregulated commercial harvesting that depletes stocks and game populations have resulted in declines in subsistence in certain areas in Alaska. Examples of this include commercial whaling and commercial walrus hunting in the arctic, and commercial salmon traps in southeast Alaska. Unreasonably restrictive rules which limit access to traditional harvest areas or species may threaten subsistence over time. The new state and federal subsistence laws were intended to help bring about regulations beneficial to the subsistence way of life. In general, any change that depletes wild resources, reduces access to wild areas and resources, or increases competition between user groups can create problems for subsistence.

Robert Wolfe serves as Research Director for ADF&G's Division of Subsistence in Juneau.

Alaska State Legislature

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February 21, 1990

MEMORANDUM

TO: Representative Sam Cotten

FROM: Maria Gladziszewski
Legislative Analyst

RE: Subsistence Law in Alaska: 1960 to 1990
Research Request 90.166

You asked us for an overview of Alaska's subsistence law. In particular, you asked for a discussion of 1) the history of Alaska's subsistence law; 2) subsistence provisions in federal law (Title VIII of the Alaska National Interest Lands Conservation Act--ANILCA); 3) conflicts between state and federal subsistence law (including the reasons given by the Alaska Supreme Court in December 1989 for declaring Alaska's 1986 subsistence law unconstitutional); and 4) possible proposals for the resolution of conflict between subsistence provisions in ANILCA and state law (including what might be done to change ANILCA, to amend Alaska's constitution, or to formulate laws that could be passed by the legislature).

Table 1 presents a chronology of the development of Alaska's subsistence law. Below is a summary of the main points of the memorandum. A discussion of the three remaining questions follows the summary and Table 1.

SUMMARY

- In 1978, Alaska's first law granting subsistence uses a priority over other consumptive uses of fish and wildlife passed the legislature.

- In 1980, the U.S. Congress mandated that subsistence uses be accorded priority over the taking of fish and wildlife for other purposes on public lands. The definition of subsistence in ANILCA is nearly identical to the definition of subsistence in Alaska's 1978 law with one exception: subsistence as defined in ANILCA applies to "rural Alaska residents..."

- In 1981, the Joint Boards of Fisheries and Game include the phrase "rural Alaska residents" in published regulations regarding subsistence.

- In 1985, the Alaska Supreme Court determined (in the *Madison* decision) that the Joint Boards of Fisheries and Game did not have the statutory authority to identify subsistence uses as rural.

Because ANILCA mandated that subsistence uses were conducted by "rural Alaska residents," and the 1985 court decision meant that the Joint Boards of Fisheries and Game did not have the statutory authority to include a distinction between rural and nonrural residents in regulation, the State of Alaska was notified in the fall of 1985 by the Department of the Interior that it was out of compliance with federal law; federal officials threatened takeover of the management of subsistence resources on public lands in Alaska.

Responding to the situation created by the 1985 court decision that threatened Alaska's ability to manage its fish and wildlife resources, the Alaska legislature passed Alaska's current subsistence law in 1986.

In 1988, the U.S. Ninth Circuit Court ruled (in the *Kenaitze* decision) that the state definition of "rural area" in the 1986 subsistence law was inconsistent with the meaning of the term "rural" in ANILCA; the court found that Congress used rural to refer to areas that were "sparsely populated." Alaska subsistence law was again found to be out of compliance with federal law.

In 1989, the Alaska Supreme Court ruled (in the *McDowell* decision) that Alaska's current subsistence law was unconstitutional because it violated Article VIII, Sections 3, 15, and 17 of the Alaska Constitution (i.e., a rural preference for subsistence users is a special privilege to take fish and wildlife that is prohibited by the Alaska Constitution).

The legal questions raised by *Kenaitze* (a dispute over the definition of "rural") are overshadowed by the constitutional questions of *McDowell* (it doesn't matter how "rural" is defined, making such a distinction violates the Alaska Constitution).

In January 1990, the chief justice of the Alaska Supreme Court granted the state a stay of the effect of the *McDowell* decision with respect to existing hunting and fishing regulations; existing regulations remain in effect until July 1, 1990.

On February 9, 1990, the State of Alaska and the Alaska Federation of Natives petitioned the court requesting reconsideration of the *McDowell* decision.

Questions remain regarding whether or not a priority for subsistence still exists in state law. Alaska Superior Court will rule on whether the "rural" part of the 1986 law is severable from the other parts to determine if the remaining parts of the law are still in effect (i.e., do subsistence uses still have priority over other uses or is Alaska without a subsistence priority law altogether). State officials have not determined whether it is desirable for the law

to be severable or not; the governor, therefore, has not yet directed the attorney general which way to argue the severability question. As of today, a superior court judge has not yet been assigned to the case.

Federal authority to manage subsistence resources is unclear; courts have never ruled on the extent of federal authority to manage subsistence resources in Alaska. Questions remain regarding the lands to which federal authority extends; does federal authority extend only to "public lands" in Alaska or to any nonfederal lands upon which fish and wildlife resources used for subsistence depend? In addition, the question of federal powers has not been resolved; can federal officials merely exercise closure authority or do they have the authority to set seasons and bag-limits as well as other administrative authority?

Officials from the Office of the Governor, the Department of Law, and the Department of Fish and Game are exploring several options to resolve the conflict between ANILCA and Alaska's Constitution. Officials are not predicting exactly when the administration's preferred option will be announced.

TABLE 1
EVOLUTION OF ALASKA'S SUBSISTENCE LAW

SOURCE	ACTION	DEFINITION OF SUBSISTENCE
Ch 131, SLA 1960	Required a $1 license for those engaging in subsistence fishing; a license could not be issued to non-residents or to residents with annual gross incomes exceeding $4,000; persons holding resident commercial fishing licenses could engage in subsistence fishing.	Subsistence fishing is "[t]he taking, fishing for or possession of fish...for personal use and not for sale or barter, with gillnet, seine, fish wheel, long line, or other means defined by the Board."
Ch 199, SLA 1975 [AS 16.05.255(b)] [repealed by Ch 52, SLA 1986]	Added a subsistence hunting section to statute; authorized the Board of Game to establish subsistence hunting areas.	"subsistence hunting means the taking of game animals by a state resident for food or clothing for personal or immediate family use;"
Ch 269, SLA 1976 [AS 16.05.257] [repealed by Ch 52, SLA 1986]	Added language regarding subsistence hunting; provided for local participation in the process used to establish subsistence hunting areas.	"subsistence hunting means the taking of game animals by a state resident for food or clothing for personal or immediate family use;"
Superior court decision, (April 1977)	In Tanana Valley Sportsmen's Association v. Alaska, the superior court ruled that the Department of Fish & Game could not issue caribou permits on the basis of need; this ruling helped prompt the passage of the 1978 subsistence law; criteria originally used by the Board of Game for emergency caribou hunting regulations included dependence on the resource, proximity to the resource, and availability of alternative resources.	
Ch 151, SLA 1978	Established for the first time subsistence use as a priority use of Alaska's fish and wildlife resources; mandated that "whenever it is necessary to restrict the taking of [fish and game] to assure the maintenance of [fish and game] stocks...subsistence use shall be the priority use." If further restriction is necessary, priorities were to be set based on the second tier criteria of "customary and direct dependence upon the resource," "local residency," and "availability of alternative resources." Established a section of subsistence hunting and fishing within the Department of Fish & Game.	"...'subsistence uses' means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for customary trade, barter or sharing for personal or family consumption;"

TABLE 1 (Continued)
EVOLUTION OF ALASKA'S SUBSISTENCE LAW

SOURCE	ACTION	DEFINITION OF SUBSISTENCE
P.L. 96-487 ANILCA (1980)	Title VIII mandates that "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." Includes "rural" as part of the definition of subsistence but does not define rural; allows the state to maintain management over public lands if "...the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805..."	"...'subsistence uses' means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; and for customary trade."
5 AAC 01.597 (drafted in December 1980) (repealed 5/11/85, after Madison and initial Eluska rulings)	Board of Fisheries publishes "characteristics of subsistence fisheries;" states that ten characteristics should be applied "...to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority." Characteristic (5) is "a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;"	"The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses."
5 AAC 99.010 (drafted in December 1981)	Joint Boards of Fisheries and Game publish subsistence procedures mandating that "customary and traditional subsistence uses by rural Alaska residents will be identified by the use of [eight criteria]..." Criteria (4) is "the consistent harvest and use of fish or game which is near, or reasonably accessible from, the user's residence;"	"...subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing."
Findings of Fact (April 1981)	Board of Fisheries applies ten criteria of 5 AAC 01.597 to net fisheries of Cook Inlet and determines that the fisheries of Tyonek, English Bay and Port Graham qualify as customary and traditional uses by satisfying all ten criteria. The majority of those who fish with nets in Cook Inlet do not qualify for the subsistence priority.	"The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses."
Letter to the Governor of Alaska (May 1982)	Secretary of the Interior certifies that the state legislative program regarding subsistence is in compliance with ANILCA; this suspended potential federal regulation and left the state in charge of implementing ANILCA.	
5 AAC 77.001(a) (Spring 1982)	Board of Fisheries, under general authority of AS 16.05.251(a), establishes "personal use" fishing as a new category to cover persons who do not qualify for the subsistence priority.	

TABLE 1 (Continued)
EVOLUTION OF ALASKA'S SUBSISTENCE LAW

SOURCE	ACTION	DEFINITION OF SUBSISTENCE
Repeal Initiative (1982)	A statewide effort to repeal the 1978 subsistence law makes it to the ballot but fails by a substantial margin at the polls (112,000 to 80,000).	
Madison decision (February 1985)	Alaska Supreme Court overturns the interpretation of the boards in 5 AAC 99.010 of "subsistence uses" as applying only to rural residents. The court examined the definition in AS 16.05.940(23) and the legislative history and determined that the boards did not have statutory authority to identify subsistence uses as rural.	
Court of appeals Eluska decision (April 1985)	Court rules that the state has a duty to issue regulations to implement the statutory authority for a subsistence priority; in the absence of regulations, a "subsistence defense" can be argued (i.e., in a prosecution for a fish or game violation, it is a defense that the taking was done for subsistence uses).	
Emergency regulations (July 1985) [repealed in July 1986]	Boards of Fisheries and Game publish specific regulations governing subsistence uses; a "tier II" application and permit system was created for hunts previously governed by registration or randon-drawing permits; point systems were created for determining "customary and direct dependence," "local residency," and "availability of alternative resources." In many cases, non-resident hunts were closed.	
Letter to the Governor of Alaska (September 1985)	Secretary of the Interior notifies Alaska officials that the Madison decision means Alaska is out of compliance with ANILCA; if the state is not in compliance by June 1, 1986, federal officials will take over management of subsistence resources on public lands; in a letter dated 5/6/86 from an assistant secretary of the Interior to the director of the U.S. Fish & Wildlife Service, the Secretary could assume authority over "public lands" as defined by ANILCA, including non-Federal lands upon which fish and wildlife resources used for subsistence depend." The courts, however, have never ruled on the extent of federal authority to manage subsistence resources in Alaska.	

TABLE 1 (Continued)
EVOLUTION OF ALASKA'S SUBSISTENCE LAW

SOURCE	ACTION	DEFINITION OF SUBSISTENCE
Ch 52, SLA 1986	Alaska legislature passes new subsistence law; defines "rural area" as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;"	"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 nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption;"
Letter to the Governor of Alaska (November 1986)	An assistant secretary of the Interior states that, since passage of the 1986 subsistence law, Alaska is once again in compliance with ANILCA.	
Supreme Court Eluska decision (1986)	Court rules that AS 16.05.225(b) established subsistence uses within a regulatory scheme and found no evidence of an intent to grant any personal right to take or possess game in the absence of such regulations (i.e., in a prosecution for a fish or game violation, it is not a defense that the taking was done for subsistence uses).	
5 AAC 99.012 (1987)	Joint Boards of Fisheries and Game publish 13 criteria to be used to determine whether an area of Alaska is rural; criteria include "values associated with the use of fish and game" but not population.	
Kenaitze decision (October 1988)	The U.S. Ninth Circuit Court of Appeals rules that the state definition of "rural area" (in Ch 52 SLA 1986) is inconsistent with the meaning of the term "rural" in ANILCA; the court found that Congress used rural in its ordinary sense to refer to areas that are "sparsely populated;" the court refused to consider the legislative history of ANILCA in search of a contrary meaning; the court also ruled that, after initial certification of compliance by the Secretary of Interior, "ANILCA thereafter vests the power to approve or disapprove the state's performance in the courts alone. [The November 1986] letter purporting to recertify the state's compliance with ANILCA had no legally operative effect." Case remanded to the lower court for entry of a preliminary injuction.	

TABLE 1 (Continued)
EVOLUTION OF ALASKA'S SUBSISTENCE LAW

SOURCE	ACTION	DEFINITION OF SUBSISTENCE
Kenaitze injunction (April 1989)	District court judge orders the state to elect, by May 15, 1989, whether or not it will afford the Kenaitze Indians "on an interim basis priority over all other consumptive uses for [some subsistence uses on the Kenai]" and whether the state desires to turn over management of subsistence resources to the federal government.	
Notice to the District court (May 1989)	State officials inform the court that Alaska will not, at this time, turn over management of subsistence resources to the federal government.	
Consent preliminary injunction (May 1989)	Parties in the Kenaitze case agree to a one-year fishery, for the plaintiffs in the case only, until a permanent subsistence solution can be found.	
McDowell decision (December 1989)	Alaska Supreme Court rules that "the rural preference violates article VIII, sections 3, 15, and 17 of the Alaska Constitution" (i.e., special privileges to take fish and wildlife are prohibited by the Alaska Constitution); state officials begin to look for ways to implement a subsistence priority (e.g., amend Alaska's constitution, amend ANILCA, amend state law, etc.).	
Stay granted (January 5, 1990)	The chief justice of the Alaska Supreme Court grants the state a stay of the effect of the McDowell decision with respect to existing hunting and fishing regulations; existing regulations remain in effect until July 1, 1990.	
Petition for reconsideration (February 1990)	The State of Alaska and Alaska Federation of Natives file petitions requesting the supreme court to reconsider its McDowell decision; the court has no time limit to rule on the petitions.	
Superior court to rule on severability (Spring 1990?)	Court to rule on whether the "rural" part of the 1986 law is severable from the other parts to determine if the remaining parts of the law are still in effect (i.e., do subsistence uses still have priority over other uses or is Alaska without a subsistence priority law altogether); as of 2/20/90, a judge has not yet been assigned to the case.	

Prepared by the Legislative Research Agency, February 1990 (90.166).

FEDERAL SUBSISTENCE LAW

Title VIII of ANILCA declares that "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."[1] The definition of subsistence in ANILCA is essentially the same as it is in Alaska's 1978 subsistence priority law with one additional phrase. Congress stipulated that subsistence means "customary and traditional uses *by rural Alaska residents*..." Although "rural" is not defined in the law, the state definition of "rural" has been found to be out of compliance with what Congress intended in ANILCA (see discussion of *Eluska v. Alaska*, below). Additional provisions of federal law will be outlined in the context of the two court cases discussed below.

CONFLICTS BETWEEN STATE AND FEDERAL SUBSISTENCE LAW

The rulings in two recent court cases have forced the state of Alaska to examine the conflicts between the 1986 state subsistence law and the federal subsistence law in ANILCA. In *Kenaitze v. Alaska*, state and federal governments disagreed on what was meant by the term "rural" in ANILCA. The court ruled that the state's definition of rural was not consistent with what was meant by "rural" in ANILCA. The remedy preferred by state officials to the rural definition problem was to add the state's definition of "rural" to federal statute in ANILCA. The point became somewhat moot, however, after the *McDowell* decision. In *McDowell v. Alaska*, the court held that a subsistence preference based on rural residency was unconstitutional. Even without the rural definition problem as a result of *Kenaitze* (i.e, even if the state and federal definitions of "rural" were exactly the same), Alaska has a constitutional problem in that restricting subsistence uses to rural residents--whatever "rural" is defined to be--is not consistent with Alaska's constitution. The "rural definition problem" has not gone away since the *McDowell* decision; state officials are merely faced with a higher order dilemma--a constitutional problem rather than a statutory problem. The *Kenaitze* and *McDowell* cases are discussed in more detail below.

The U.S. Ninth Circuit Court Ruling in *Kenaitze v. Alaska*[2]

The U.S. Ninth circuit court held that "the state's redefinition of rural does not comport with [Section 803 of ANILCA]. Alaska has failed to enforce the state's subsistence priority; the state is not in compliance with ANILCA."
The court refused to consider the legislative history of ANILCA; it stated that "the state argue[d] that its definition of "rural" best promote[d] ANILCA's

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[1]The text of Title VIII of ANILCA is included as Attachment A (Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2422, 16 USC § 3111 et seq.).

[2]*Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988).

policy of protecting the subsistence way of life...Even if we agreed that this approach more clearly accomplishes the purpose behind ANILCA...Congress passes laws, not purposes...."

The court also ruled in this case that, after initial certification of compliance with the subsistence provisions of ANILCA by the Secretary of Interior, "ANILCA thereafter vests the power to approve or disapprove the state's performance in the courts alone. [The November 1986 letter from the assistant secretary of Interior to the Governor of Alaska] purporting to recertify the state's compliance with ANILCA had no legally operative effect." In other words, the Secretary of the Interior had only one chance to certify that the state was in compliance with ANILCA; any other determination that the state is out of compliance with ANILCA must come from the courts.

The court did rule in *Kenaitze* that the state was out of compliance with ANILCA. The case was then remanded to the lower court for entry of a preliminary injunction. The lower court did not order the state to turn over management of subsistence resources to the federal government--the court merely questioned the state regarding its desire to turn over management of subsistence resources to the federal government. The state expressed a desire to retain management of fish and wildlife resources, federal officials were not eager to take over management of subsistence resources, and the parties in the case agreed to temporize with a one-year fishery for the plaintiffs in the case while officials worked out a permanent subsistence solution. Officials had not arrived at a solution to the rural definition problem when the *McDowell* decision, discussed below, overshadows *Kenaitze* considerations.

The Alaska Supreme Court Ruling in *McDowell v. Alaska*[3]

On December 22, 1989, the Alaska Supreme Court found that "the rural preference violates article VIII, sections 3, 15 and 17 of the Alaska Constitution."

Article VIII, section 3: The no exclusive right of fishery
"Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, section 15: The uniform application clause
"No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State."

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[3] *McDowell v. State of Alaska*, Opinion No. 3540 (Alaska, December 22, 1989).

Article VIII, section 17: The equal rights clause

"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

The court ruled that special privileges--such as the subsistence priority afforded only to rural residents--are prohibited by the three articles of Alaska's constitution listed above. The court specifically stated, however, that it "[did] not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons....[The court held] only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics [was] unconstitutional." The court implied that a system based on individual characteristics might better stand a constitutional test when it stated that "[a] classification scheme employing individual characteristics would be less invasive of the article VIII open access values...than the urban-rural criterion."

On January 5, 1990, at the request of the attorney general of Alaska, Chief Justice Warren W. Matthews granted the state a stay until July 1, 1990 "solely with respect to existing hunting and fishing regulations." Existing hunting and fishing regulations remain in effect until July 1, 1990. Without action by the state or federal governments before July 1, 1990, the state will not be in compliance with ANILCA because it will not be able to implement the rural preference mandated by ANILCA.

Several questions remain regarding the impacts of the *McDowell* decision. The superior court must rule on whether the rural preference part of the 1986 law is severable from the other parts to determine if the remaining parts of the law are still in effect (i.e., do subsistence uses still have priority over other uses or is Alaska without a subsistence priority law altogether). Even if the court determines that the entire subsistence law is no longer in effect, Alaskans could still participate in subsistence uses but subsistence uses would not have priority over other uses.

In the event that the state remains out of compliance with ANILCA, questions remain concerning federal authority to manage subsistence resources. Courts have never ruled on the extent of federal authority to manage subsistence resources in Alaska. It is unclear to what land federal authority applies and what powers the secretary of interior possesses.

The ANILCA states that a subsistence priority exists on "public lands" and defines public lands as "lands, waters and interests...situated in Alaska...the title to which is in the United States." Expressly excluded are State and Native Corporation lands. Some argue, however, that federal authority could extend over . "non-Federal lands upon which fish and wildlife resources used for

subsistence depend."[4] As to what powers the secretary possesses, arguments can be made that the secretary has narrow or broad authority. Some argue that the secretary merely has closure authority as stated in ANILCA ("The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over public lands..."); others argue that the secretary's authority extends to setting hunting seasons, bag limits, and other management actions. In 1986, when federal officials prepared a draft plan for "takeover" of management of subsistence resources[5], they included only "federally owned lands" and included restrictions on hunting seasons, bag limits, gear specifications, etc.

RESOLUTION OF CONFLICTS: ALASKA'S OPTIONS AFTER *MCDOWELL*

In the two months since the *McDowell* decision, many Alaskans have thought about ways to resolve the conflicts between ANILCA and the state constitution. A complete analysis of all possible options is beyond the scope of this memorandum; included for your review as Attachment B, however, are a sample of written opinions on ways the state could proceed in response to *McDowell*.[6]

At least two categories of response to *McDowell* are immediately apparent: amend ANILCA to repeal the rural preference or amend the state constitution to allow for a rural preference. Attorneys from the Alaska Department of Law are analyzing the following nine possible courses of action that Alaska officials might take to resolve the conflict between Alaska's constitution and subsistence provisions in ANILCA:

1) ask the Alaska Supreme Court to reconsider its decision in *McDowell*[7];

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[4]Letter from an assistant secretary of the Interior to the director of the U.S. Fish and Wildlife Service (May 6, 1986).

[5]*Federal Subsistence Resource Management Program*, Draft, (1986).

[6]Included are the opinions of Robert E. Price (a former assistant attorney general for the state of Alaska); Gregory P. Cook (private attorney in Douglas, Alaska); John W. Katz (director of the Alaska Governor's office in Washington, DC); the Association of Village Council Presidents; Senator Ted Stevens (from informal comments during the Senator's visit to Juneau in January 1990); the United Fishermen of Alaska; Representative Dick Shultz; and Bill Caldwell (Alaska Legal Services). This author has made no attempt to pick which opinions to include as attachments; all written opinions in the possession of this agency are included.

[7]On February 9, 1990, the State of Alaska and the Alaska Federation of Natives filed petitions requesting the supreme court to reconsider its *McDowell* decision.

2) amend Alaska's constitution to authorize a subsistence priority for rural residents;

3) amend ANILCA to eliminate the federal subsistence priority for rural residents;

4) amend state law to provide a subsistence priority to state residents most dependent on fish and wildlife, then amend ANILCA to conform to state law;

5) amend ANILCA to preempt state law as necessary to grant rural residents a subsistence priority statewide;

6) interpret section 804 of ANILCA as preempting state law on federal lands (as those may ultimately be defined by the courts), with implementation carried out by state officials;

7) challenge the ANILCA subsistence priority for rural residents and/or Congress' power to require such a priority on constitutional grounds;

8) seek cooperative agreements with the secretaries of Interior and Agriculture under which the ANILCA priority would be implemented by them, perhaps only through closure authority to avoid dual management of the resource; and

9) use current management tools--seasons, bag limits, same-day (or even two-day) airborne prohibitions, etc.--creatively to benefit those most dependent on fish and wildlife.

Additional possible state responses to *McDowell* include amending Alaska's constitution and ANILCA to allow for a subsistence priority for Alaska Natives; establishing a system based on individual need for subsistence resources (this option would also require amendments to ANILCA); removing rural preference in ANILCA and enact a state statute which provides subsistence preference based on income, customary use, or other relevant factors; and returning management of subsistence resources to federal authorities, as provided in ANILCA.

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I hope you find this information useful. If you would like additional information, please do not hesitate to call this office.

Attachments