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"Equal Access" to Alaska's Fish and Wildlife

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resource uses. The court is presently faced with these issues in another appeal involving access to fish and wildlife.[2] Thus, the court has an immediate opportunity to more clearly define the meaning of "access" to fish and wildlife, and to concretely establish the scope and limitations of the equal access clauses.

This article will analyze the court's treatment of equal access in the fish and wildlife context to date. First, part II considers the court's "common use clause"[3] jurisprudence. Part III then discusses decisions under the "no exclusive right of fishery" clause.[4] Part IV analyzes the law under the "uniform application clause."[5] Part V then examines some of the unifying principles and themes of the equal access clauses. Part VI discusses the relationship between the equal access clauses and other constitutional provisions, such as the "preferences among beneficial uses" clause and the equal protection clause. Finally, this note concludes that the court should take the next available opportunity to further clarify the meaning of "equal access."

II. THE "COMMON USE" CLAUSE

A. Public Trust Principles

Article VIII, section 3 of the Alaska Constitution, often referred to as the "common use" clause, provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[6] The Alaska Supreme Court has called the common use clause "a unique provision, not modeled on any other state constitution."[7] The clause embodies public trust principles that arise from a long history in this country of state managed wildlife resources.[8] The United States Supreme

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2. In *State v. Kenaitze Indian Tribe*, No. S-6162, the state is appealing a decision holding that the provision in Alaska Statutes section 16.05.258, authorizing the establishment of nonsubsistence use areas, violates the equal access clauses. The lower court decision was issued in *Kenaitze Indian Tribe v. State*, No. 3AN-91-4569 Civil (Alaska Super., Nov. 26, 1993) (final judgment).

3. ALASKA CONST. art. VIII, § 3.

4. ALASKA CONST. art. VIII, § 15.

5. ALASKA CONST. art. VIII, § 17.

6. ALASKA CONST. art. VIII, § 3.

7. Owsichek v. State, 763 P.2d 488, 493 (Alaska 1988).

8. The anti-monopoly purpose of the clause "was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters. The constitutional framers'

Court has traced this history and concluded that the states have a trust responsibility to manage wildlife for the benefit of the public, not for the benefit of individuals or the government itself.[9]

Although the common use clause was intended to constitutionalize public trust principles,[10] the Alaska Supreme Court has not yet decided whether the clause grants greater protection over public access to natural resources than the public trust doctrine does toward tidelands and submerged lands.[11] To date, the court has held only that the "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[12]

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reliance on historic principles regarding state management of wildlife and water resources is evident from a written explanation in the committee materials for the term 'reserved to the people for common use.'" *Id.* The framers spoke of "[a]ncient traditions in property rights" which recognize that title to uncaptured wildlife "is reserved to the people or the state on behalf of the people." *Id.* (citing Alaska Constitutional Convention Papers, Folder 210, a paper prepared by Committee on Resources entitled "Terms").

9. Geer v. Connecticut, 161 U.S. 519 (1896). Specifically, the Court said that the state's power over wildlife "is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Id.* at 529. The Alaska Supreme Court surmised that the framers of the constitution relied heavily on *Geer* when they drafted the common use clause. *Owsichek*, 763 P.2d at 495.

10. *Owsichek*, 763 P.2d at 496. Alaska's public trust responsibility to manage wildlife is comparable to its obligations under the "public trust doctrine," where the state has a trust duty to protect the public's right of access to certain lands and navigable waters for certain purposes. *See* Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) (generally stating the public trust doctrine). In Alaska, the public has continuing access to privately held tidelands and submerged lands for navigation, commerce and fishing. *CWC Fisheries*, 755 P.2d at 1118.

11. In *CWC Fisheries*, the court examined whether a state tideland conveyance was subject to continuing public easements for navigation, commerce, and fisheries. Analyzing the conveyance under requirements of *Illinois Cent. R.R. Co.*, the court concluded that "[w]e need not decide at this time whether a fee simple tideland conveyance which satisfied the structures of *Illinois Central* would nonetheless run afoul of article VIII, section 3." *CWC Fisheries*, 755 P.2d at 1120 n.10.

12. *Owsichek*, 763 P.2d at 495.

B. Broad Public Access to Resources

The Alaska Supreme Court's principal interpretation of the common use clause regarding access to fish and wildlife can be found in *Owsichek v. State*.[13] There the court examined the state's system for assigning exclusive guiding areas to the big game guide industry. Under that system, the Alaska Guide Licensing and Control Board designated geographic areas in which only certain guides could lead hunts. Although persons could hunt recreationally in an "exclusive guide area" ("EGA"), only the Board-assigned guide could lead hunts professionally within the designated area.[14] The court concluded that the EGA system could not be justified as a wildlife management tool because the EGAs were endowed with many of the characteristics of private property.[15] Thus, the court reasoned that the EGAs "resemble[d] the types of royal grants the common use clause expressly intended to prohibit."[16] Although the court noted that the EGAs may have also violated the uniform application clause of the Alaska Constitution,[17] it struck down EGAs solely because they violated the common use clause.[18] In so doing, the court expressed a simple purpose for the common use clause, namely that it "was intended to guarantee broad public access to natural resources."[19]

The principle of broad access was reaffirmed and elaborated upon two years later. In *State v. Hebert*,[20] the court examined a regulation that established two "superexclusive" use fisheries. Under this type of fishery management, fishermen[21] must choose among several geographic areas where a fish species occurs. If a

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13. 763 P.2d 488 (Alaska 1988).

14. *Id.* at 489. In practice, there were two types of EGA's: truly "exclusive guide areas," which had only one designated guide in each, and "joint use areas," which had several designated guides in each. *Id.* The court referred to both types as "EGA's." *Id.* n.1.

15. *Id.* at 498.

16. *Id.* at 497-98.

17. *Id.* at 498 n.17. The court did not consider this issue in full because the parties did not include it in their arguments and because the case could be decided upon other grounds. *Id.*

18. *Id.* at 498.

19. *Id.* at 493.

20. 803 P.2d 863 (Alaska 1990).

21. The term "fishermen" is used for the sake of convenience. The regulation applied equally to male and females engaged in fishing activities.

person registers to fish an area designated as "superexclusive," he or she may not harvest that type of fish in any other area. On the other hand, if the fisherman registers to fish in an area that is not "superexclusive," he or she may not fish for the same species in a "superexclusive" area.[22] The *Hebert* court cited evidence that the number of fishermen would probably increase under this type of registration-choice system, and thus, it would be possible for more rather than fewer persons to participate in the fishery. Therefore, the court upheld the superexclusive use regulation and noted that "if anything, [it] furthers the interests underlying section 3's common use mandate."[23] Thus, "broad public access" is a principle that favors maximizing the number of persons able to participate in a hunt or fishery rather than maximizing an individual's opportunities to catch as much fish or harvest as much game in as many areas as possible.[24]

C. Common Use Clause Prohibitions

The court held in *Owsichek* that the common use clause implicitly prohibits what another equal access clause, the "no exclusive right of fishery" clause,[25] prohibits on its face, namely "special privileges" and "exclusive grants" to fish and wildlife.[26] Although the other two article VIII clauses share these prohibitions, the purposes underlying the common use clause are "wholly apart from the limits imposed by other constitutional provisions."[27] Specifically, the common use clause was enacted with the intent to prevent monopolization of natural resources.[28]

The common use clause's prohibition against "special privileges" is best examined by its application in resolving the constitutionality of the EGA system. When an area was reassigned, the EGA

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22. *Hebert*, 803 P.2d at 864.

23. *Id.* at 867.

24. This principle was followed by the state when it adopted a replacement for the EGA system struck down in *Owsichek*. The new system allows big game guides to select and register for up to three guiding areas in the state. ALASKA ADMIN. CODE tit. 12, § 38.820 (April 1994).

25. ALASKA CONST. art. VIII, § 15.

26. *See Owsichek*, 763 P.2d at 496. In an earlier decision, the court stated that the state's system for limiting entry into commercial fisheries is inconsistent with the common use clause because it grants an exclusive right to a select few. *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

27. *Owsichek*, 763 P.2d at 496.

28. *Id.*

system favored an applicant who had already used, occupied or invested in the area. Thus, this procedure worked like a seniority system that favored established guides over new entrants to the profession. The court found that such a system created a "special privilege" in violation of the common use clause.[29]

The EGA system was also found to be in violation of the "no exclusive grants" purpose of the common use clause. The prohibition against "exclusive grants" is another expression of the anti-monopoly principle against the granting of private rights in a public resource. Although the EGA system was unique in wildlife management, the court found it worthwhile to recognize features that gave it private property status. These features included their unlimited duration and the fact that guides could transfer them for profit without providing compensation to the state.[30]

The court found that the EGAs constituted an exclusive grant because they were unlimited in duration. The Alaska Supreme Court contrasted them with leases and concessions on state lands, which are limited in time, and therefore do not violate the common use clause.[31] The court noted that limiting entry into guide areas was inconsistent with the common use clause because it resulted in an exclusive right that could be exercised season after season.[32]

The *Owsichek* court also found that EGAs violated the public trust rationale underlying the common use clause because their sale generated no meaningful compensation to the public. The court again contrasted EGAs with leases and concessions, which do provide remuneration to the state.[33] Previously, the court had stated in dictum that the shore fisheries leasing program would not violate the public trust in part because shore fishery leases require compensation to the state for the use of public trust easements.[34] However, because profits realized from the sale of improvements constructed in an EGA went solely to the former EGA holder, and the Alaska Guide Licensing and Control Board routinely transferred the EGA to the buyer of those improvements, the public

29. *Id.*
30. *Id.* at 497.
31. *Id.* at 496-97.
32. *Id.* at 497.
33. *Id.*
34. *Id.* (citing *CWC Fisheries*, 755 P.2d at 1120-21).

trust doctrine was undermined by what was essentially an exclusive grant.[35]

D. Common Use: Its Scope and Limits

The Alaska courts have held that the "common use" of fish and wildlife is entitled to a high degree of constitutional protection. In a 1983 dissent, Justice Rabinowitz introduced this idea, stating that common use is a "highly important interest running to each person within the state."[36] In later court decisions a majority has supported this statement. For example, the court held in *Owsichek* that the interest is so vital that grants of exclusive rights are subject to "close scrutiny."[37] Furthermore, the clause itself makes no distinction in the level of scrutiny between personal and professional use,[38] and it protects both derivative and direct uses of fish and wildlife.[39] Whether direct or derivative, the right protected under the common use clause must be defined by the nature of the resource (that is, fish, wildlife or waters) and the nature of the use (that is, commercial, sport, subsistence or personal use), but not by a particular method or means of use.[40]

However, the common use clause does not govern all uses of fish and wildlife wherever they may be located. Constitutional history shows that the clause was not intended to govern the domestication of fur-bearing animals.[41] Furthermore, the common

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35. *Id.* at 496-98.

36. State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting).

37. *Owsichek*, 763 P.2d at 494.

38. In *CWC Fisheries*, the court noted that the public trust doctrine guaranteed fishermen access to public resources for "private commercial purposes" as well as recreation. 755 P.2d at 1121 n.14. Later that year, the court stated, "[t]he same [*CWC Fisheries*] rationale applies to professional hunting guides under the common use clause." *Owsichek*, 763 P.2d at 497.

39. The derivative use, however, should be "closely tied" to the actual taking of the fish or wildlife. For example, although professional hunting guides do not actually take game themselves, the court said that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." *Owsichek*, 763 P.2d at 497 n.15.

40. *See* Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798 (Alaska 1992) (holding that the state may regulate the method of using natural resources without violating the common use clause).

41. 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Dec. 16, 1955).

use clause does not govern fish in private ponds or legally registered trap lines.[42] And, although the common use clause protects the public's right to use fish in natural waterways, it does not authorize people to trespass over private property to reach the waters.[43]

III. THE "NO EXCLUSIVE RIGHT OF FISHERY" CLAUSE

A. History of the Clause

Article VIII, section 15 of the Alaska Constitution is often called the "no exclusive right of fishery" clause. It 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 limit entry into any fishery for 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.[44]

Among the equal access clauses, section 15 is unique in two respects. First, because it applies only to fishery resources, this clause is narrower than both the common use clause,[45] which applies to wildlife, waters and fish, and the "uniform application" clause,[46] which applies to all natural resources. Second, unlike the other two clauses, the "no exclusive right of fishery" clause was not adopted in its entirety along with the original constitution. Only the first part, prohibiting exclusive rights and special privileges, was adopted originally. The second part, allowing the state to limit entry into fisheries, was added as an amendment sixteen years later.

The constitutional framers intended the first part to take the place of a pre-statehood federal law that regulated Alaska's fisheries.[47] That law, section 1 of the White Act, prohibited

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42. *Id.*

43. *Owsichek*, 763 P.2d at 494 (citing 4 Proceedings of the Alaska Constitutional Convention at 2460 (January 17, 1956)).

44. ALASKA CONST. art. VIII, § 15.

45. *Id.* § 3.

46. *Id.* § 17.

47. The Committee on Resources of the Constitutional Convention stated that "[t]his section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act." 6 Proceedings of the Alaska Constitutional Convention 87 (Alaska Legislative Council); *see also* 1960 Op. Att'y Gen. No. 9, at 3 (Apr. 8, 1960).

federal regulations from granting an "exclusive or several right of fishery."[48]

The second part of the "no exclusive right of fishery" clause was submitted as a joint resolution to the Seventh Alaska Legislature in February 1971. It initially stated that "[t]he State may restrict entry to any fishery for purposes of conservation of the resource, to relieve economic distress among fishermen and those dependent upon them for a livelihood and to insure fair competition among those engaged in commercial fishing."[49] According to its sponsor, Governor William A. Egan, the purpose of the resolution was to make it "indisputably clear that the state may act to conserve and manage its fisheries in a manner which will benefit all Alaskans."[50] Further, the resolution was intended to remove all doubt that the first part of the clause, which prohibited exclusive rights of fisheries, did not necessarily prohibit "reasonable gear limitations or other restrictions on entry in our fisheries."[51] Thus, the original resolution was considered to be a clarification of the prohibition against exclusive rights and special privileges, not an exception to it.

Ultimately, the opening language evolved from "[t]he State may restrict entry to any fishery . . . ," to "[t]his section does not restrict the power of the State to limit entry into any fishery . . . ."[52] The legislature believed that the subtle change was needed to overcome ambiguity arising from the decision in *Bozanich v. Reetz*.[53] In *Bozanich*, the United States District Court for the District of Alaska held that laws limiting licenses to specific

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48. Section 1 of the White Act reads:

> 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.

White Act of 1924 ch. 272, § 1, 43 Stat. 464.

49. S.J. Res. 10, 7th Leg., 1971 SENATE J. 116.

50. Letter from Governor William A. Egan to Senator Terry Miller, Chairman, Senate Rules Committee (Feb. 3, 1971) in 1971 SENATE J. 116.

51. *Id.*

52. House Committee Substitute for Committee Substitute for S.J. Res. 10, 7th Leg, 1st Sess. (1971).

53. 297 F. Supp. 300 (D. Alaska 1969), *vacated on other grounds and remanded*, 397 U.S. 82 (1970).

groups of fishermen violated both the common use and the "no exclusive right of fishery" clauses.[54] In response to this decision, the Alaska Legislature altered the opening line in order "to show that the state's power to limit entry is a specific *exception* to the 'exclusive right' prohibition."[55] Because the amendment was intended to create an "exception" to the prohibition against exclusive rights and special privileges, the prohibition is more compelling than if the amendment were only intended to provide clarification.

B. Application of the Clause

In *McDowell v. State*,[56] the Alaska Supreme Court relied largely on section 15 in interpreting the constitutionality of the state's criterion for participating in subsistence uses of fish, game and other wild, renewable resources. Under the 1986 version of the subsistence law, only persons who resided in rural areas of Alaska were eligible to enjoy the subsistence priority, while persons residing in urban areas were excluded from subsistence uses.[57] It was this rural residency criterion that was challenged under the equal access clauses.[58]

The *McDowell* court struck down the rural residency criterion, basing its decision on the "no exclusive right of fishery" clause and on its pre-statehood predecessor, the White Act. Noting that section 1 of the White Act guaranteed access to fisheries regardless of residence, the court reasoned that "section 15 likewise was

54. *Id.* at 304-07.

55. House Resources Committee, 1971 HOUSE J. 761 (emphasis added).

56. 785 P.2d 1 (Alaska 1989).

57. ALASKA STAT. § 16.05.258 (1987) (amended 1992). The subsistence law established two different systems, or "tiers," for distinguishing who was eligible to participate in subsistence uses. The tiers were determined by resource abundance. When there was enough harvestable resource to satisfy all subsistence uses, that is, at the "first tier" of abundance, the urban-rural criterion determined eligibility. When abundance diminished below the point where all subsistence uses could be satisfied, then rural residents, all of whom who had qualified under the "first tier," were further distinguished by their dependence, their local residency and their availability of alternative resources. *Id.* This is called the "second tier." The *McDowell* court examined the criterion for first-tier eligibility, namely, rural residency.

58. *McDowell*, 785 P.2d at 1.

meant to ensure an equal right to participate in fisheries, regardless of where one resides."[59]

Three years after *McDowell*, the court again construed the "no exclusive right of fishery" clause in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game.*[60] That case involved a ban on aerial fish spotting, the practice of using aircraft to locate fish and direct the operations of commercial fishermen, in the Bristol Bay salmon fishery.[61] The court held that the ban did not violate the "no exclusive right of fishery" clause. The court found that the ban furthered equal access because all fishermen were equally excluded from aerial spotting, and that the pilots were not excluded from the numerous other uses of the resource.[62] This finding suggests that if a certain method or means is prohibited, and a group of individuals has no other way to use the resource, the remaining users may have been granted an unconstitutional "exclusive right" or "special privilege."[63]

Decisions construing the "limited entry" provision of article VIII, section 15 give further insight into the application of the "no exclusive right of fishery" clause. The Alaska Supreme Court has recognized the tension created by the clauses' simultaneous prohibition of exclusive rights in fisheries and the authorization of the state to limit entry.[64] The court has harmonized this apparent conflict by adopting a test of "least possible impingement."[65] This goal is achieved by the "optimum number" provision of Alaska Statutes section 16.43.290. Under this provision, the Commercial Fisheries Entry Commission establishes the optimum number of permits for each fishery. This number may be greater or less than

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59. *Id.* at 9.

60. 838 P.2d 798 (Alaska 1992).

61. *See* ALASKA ADMIN. CODE tit. 5, § 06.378 (June 1990).

62. *Id.* Other uses of the resource, as suggested by the court, were commercial fishing, participating in industries that support the fish harvest, using their planes to spot fish before an open harvest and transporting supplies and personnel for commercial fishing clients. *Id.* at 802.

63. The court made several other significant findings in upholding the fish spotter ban. First, it rejected the pilots' claim that they constituted a "user group" entitled to protection under the common use clause. *Id.* at 802. The court held that user groups are defined according to the nature of the resource (fish or wildlife) and the nature of the use (commercial, sport or subsistence), and not according to the particular tool used to take the resource. *Id.*

64. *See* State v. Ostrosky, 667 P.2d 1184 (Alaska 1983).

65. *Id.* at 1191.

the actual number of permits issued for the fishery. If greater, the state must issue additional permits until the optimum number is reached.[66] If lesser, the state must buy back permits until the optimum number is reached.[67] The Alaska Supreme Court has found that this system strikes an acceptable balance between fishermen's interest in access and the state's interest in conserving resources.[68]

Although limited entry is a unique situation, the "least impingement" principle may apply to other schemes that would create a special privilege for a subset of users.[69] In those instances, the inquiry should focus on whether another scheme, less intrusive upon equal access values, could achieve the same goals. For example, the Alaska Supreme Court suggested in *McDowell* that a system based on individual characteristics could be used to determine subsistence eligibility so long as it only minimally infringes upon the rights of those who are excluded.[70]

As previously discussed, the common use clause does not prohibit restrictive registration systems, such as "superexclusive" fisheries, if the system's restrictions on individuals result in greater public participation.[71] By the same rationale, these systems should also survive the exclusive use prohibitions of the "no exclusive right of fishery" clause. It is the element of choice that distinguishes a system where the state assigns areas (such as the EGA system)

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66. ALASKA STAT. § 16.43.330 (1992).

67. *Id.* §§ 16.43.310-320.

68. Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256 (Alaska 1988).

69. Analysis under the "no exclusive right of fishery" clause, as discussed earlier, applies only to situations where a portion of a user group is granted a privilege over the remaining members or potential members. The analysis is not applicable to differential treatment between resource uses, e.g., an advantage given to sport use over commercial use of a certain fish stock. These "preferences among beneficial uses" are the crux of fish and wildlife allocations, and they are specifically endorsed by the constitution. *See* ALASKA CONST. art. VIII, § 4; McDowell v. State, 785 P.2d 1 (Alaska 1989); Meier v. State 739 P.2d 172 (Alaska 1987); Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

70. *McDowell*, 785 P.2d at 3.

71. For example, the court came to this conclusion when comparing the competitive bidding system for allocating leases and exclusive concessions on state lands with the seniority system for granting EGAs. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988). The court found that a bidding system is constitutional because it allows a wider field of applicants than does a system based on prior use, occupancy and investment in the area underlying the private rights. *Id.* at 497.

from one where users register for areas (such as the superexclusive registration system). Even though a user may not have access to all areas, he or she is not initially excluded from any particular area. Thus, the apparent meaning of "equal access" is that no citizen enjoys guaranteed and exclusive use of a fish stock or wildlife population.

IV. THE "UNIFORM APPLICATION" CLAUSE

The third equal access clause, section 17 of Article VIII, is often called the "uniform application clause." It states:

> 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.[72]

The legislative history of the "uniform application clause" is sparse. The commentaries to the constitutional convention refer to it only once: "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."[73]

The Alaska Supreme Court recently interpreted the "uniform application" clause in *Gilbert v. State*.[74] There the court examined regulations allocating salmon among "intercept" and "destination" fisheries.[75] The regulations restrict harvest by fishermen who are further from spawning grounds in favor of fishermen who are closer to the grounds.[76] Drawing on principles derived from earlier decisions, the court articulated a test for satisfying the "uniform application" clause. Because the individual interest in equal access to fish and game resources is a "highly important interest running to each person within the state," the state must have an important purpose to countervail that interest.[77] The state then has the burden of proving that the means used to further its important purpose are carefully drawn and designed for the "'least possible infringement on article VIII's open access values.'"[78]

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72. ALASKA CONST. art. VIII, § 17.
73. 6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).
74. 803 P.2d 391 (Alaska 1990).
75. *Id.* at 393.
76. *See* ALASKA ADMIN. CODE tit. 5, § 18.260 (June 1988).
77. *Gilbert*, 803 P.2d at 399.
78. *Id.* (quoting McDowell v. State, 785 P.2d 1, 10 (Alaska 1989)).

A question left open by the *Gilbert* test concerns the meaning of "open access." One type of access not likely to be protected by this test involves access by one user group and a resulting denial of access to another user group. Inequality of access between user groups results from the need to allocate resources and derives support from the constitution's sanction of "preference among beneficial uses."[79] Due to the court's ability to distinguish user groups, it is unlikely that an allocation conflict would ever reach the potentially problematic final step of the *Gilbert* test. Competing groups will likely differ in meaningful ways and, thus, the issue would not qualify for analysis under the test. For example, the opposing fisheries in *Gilbert* differed in their biological spawning patterns, historic catch levels, and participation.[80] Thus, because the fisheries were not "similarly situated," there was not a "non-uniform classification," and the uniform application clause was not implicated.[81]

More likely, the *Gilbert* test applies to situations involving individual access to resource user groups. This inference derives from the court's distinction between allocation and limits on admission to these groups.[82] This interpretation of *Gilbert* is also consistent with the court's decisions in *McDowell* and the limited entry cases. All of these cases examined limits on admission to user groups, not inter-group allocations.

In *Kenaitze Indian Tribe v. State*,[83] however, which is presently pending before the Alaska Supreme Court, a superior court interpreted the *Gilbert* decision differently. *Kenaitze* arose from the prohibitions on subsistence fishing and hunting established by a 1992 statute.[84] That statute states:

> The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A non-subsistence area is an area or community where dependence

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79. ALASKA CONST. art. VIII, § 4.

80. *Gilbert*, 803 P.2d at 399.

81. Similarly, the *Gilbert* test also did not apply to the ban on fish spotting in Bristol Bay. Because the ban applied equally to all citizens, there was no "non-uniform classification" and, therefore, the uniform application clause was not implicated. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 804 (Alaska 1992).

82. *See McDowell*, 785 P.2d at 8.

83. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).

84. ALASKA STAT. § 16.05.258(c) (1992).

> upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.[85]

Residents of nonsubsistence areas challenged this provision, claiming it violated the equal access clauses.[86] Despite finding that the legislature's purpose for authorizing nonsubsistence areas was to allocate resources, the superior court struck down the provision under the *Gilbert* test.[87]

In *Kenaitze*, the superior court added a new condition for allocating natural resources. It held that, under the "least possible infringement" standard, the state could not prohibit subsistence activities in a certain area without first considering whether resources there could support some kind of balance between all possible uses.[88] Generally, this decision means that the state may not allocate resources so that one use is excluded in an area while maintaining others unless there is a finding that resource abundance will not support all uses simultaneously.

V. Unifying Themes Among the Equal Access Clauses

There are several common themes and principles unifying the equal access clauses. Among these common themes are the clauses' reference to territorial fish and wildlife management, their prohibition on exclusive or special privileges and their focus on individual admission to resources "user groups."

A. Reference to Territorial Fish and Wildlife Management

In several opinions construing the equal access clauses, the Alaska Supreme Court has referred to pre-statehood fish and wildlife management practices. The court has assumed that the framers of the constitution were aware of these practices, and has consistently concluded that they did not intend the clauses to prohibit contemporary practices that are equivalent to historic ones.

In *Owsichek v. State*,[89] for example, the court stated:

> We observe initially that, in guaranteeing people "common use" of fish, wildlife and water resources, the framers of the constitution clearly did not intend to prohibit all regulation of the use of these resources. Licensing requirements, bag limits, and seasonal restrictions, for example, are time-honored methods of conserv-

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85. *Id.*
86. *Kenaitze*, No. 3AN-91-4569, slip op. at 4.
87. *Id.* at 12.
88. *Id.* at 10.
89. 763 P.2d 488 (Alaska 1988).

> ing the resources that were respected by delegates to the constitutional convention.[90]

Similarly, in *State v. Hebert*,[91] the court observed that gear size and "time and area" limitations are among "time honored brakes" imposed on fishermen to achieve conservation.[92] The court upheld superexclusive registration for herring fisheries because convention debates did not reveal an intent to prohibit a comparable, pre-statehood management tool, namely exclusive registration for salmon fisheries.[93] The court came to a similar conclusion regarding the ban on fish spotting in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game*.[94] Because the framers of the constitution submitted the constitutional provision simultaneously with an ordinance prohibiting fish traps, the court concluded that the framers had found nothing inconsistent in adopting the common use clause while concurrently banning certain methods and means of harvest.[95]

Although the court has recognized historic conservation practices, it is not clear whether the existence of a general conservation purpose will excuse a violation of equal access principles. On the one hand, usefulness in wildlife conservation and management was not sufficient to save the EGA system from being declared unconstitutional.[96] On the other hand, the court implied in *McDowell* that an exclusionary system would be more acceptable if it served conservation purposes.[97]

B. Prohibition on Exclusive or Special Privileges

One principle that applies to all of the equal access clauses is reflected in the wording of the "no exclusive right of fishery" clause.[98] The court has interpreted this clause consistently, stating that "[a]lthough the ramifications of these clauses are varied, they

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90. *Id.* at 492.

91. 803 P.2d 863 (Alaska 1990).

92. *Id.* at 866-67.

93. *Id.* at 866.

94. 838 P.2d 798 (Alaska 1992).

95. *Id.* at 802.

96. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988).

97. *McDowell*, 785 P.2d at 9. "We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons." *Id.*

98. ALASKA CONST. art. VIII, § 15.

share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited."[99]

The court has not limited its "no exclusive right or privilege" analysis to the "no exclusive right of fishery" clause. The court has similarly held that the common use and the uniform application clauses were also intended to prohibit exclusive or special privileges.[100]

C. Individual Admission to Resource "User Groups"

The equal access clauses also scrutinize limits on admission to user groups.[101] In fact, the EGA system and the rural residency criterion, the only state actions struck down under the clauses, have both involved such user group admission limits.[102] Thus, it is important to understand the meaning of "user group" in fish and wildlife management in order to fully comprehend the application of the equal access clauses.

In the context of the common use clause, the court has defined user group according to "the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence)."[103] User groups include recreational hunters,

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99. *McDowell*, 785 P.2d at 6.

100. *See, e.g.*, State v. Hebert, 803 P.2d 863 (Alaska 1990).

101. *See, e.g.*, Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314 (Alaska 1994) ("[T]he 'common use' clause of article VIII, section 3, the 'no exclusive right of fishery' clause of section 15, and the 'uniform application' clause of section 17 are not implicated unless limits are placed on the admission to resource user groups.").

102. This principle was recognized in a recent superior court decision. In *Kodiak Seafood Processors Ass'n v. State*, No. 1JU-93-274 CI, slip op. (Alaska Sup. Ct. Sept. 14, 1993), seafood processors challenged an exploratory scallop fishing permit issued by the Department of Fish and Game to a commercial fisherman. The permit allowed the fisherman, under the control of department biologists, to operate a scallop dredge in an area closed to commercial scallop fishing. *Id.* at 2-3. Plaintiffs claimed, inter alia, that issuance of the permit violated the equal access clauses. *Id.* at 4-5.

The superior court found that the issuance of the permit did not constitute the opening of a "commercial fishery" because it occurred at an exploratory, test-fishing stage during which no user group had access to the resource. *Id.* at 20-21. "Until the resource is open to recognized user groups, and the plaintiffs are excluded from a particular user group, . . . there can be no violation of the 'equal access clauses.'" *Id.* at 22. This holding is presently being appealed to the Alaska Supreme Court. *Kodiak Seafood Processors Ass'n v. State*, No. S-5987.

103. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 803 (Alaska 1992).

subsistence hunters, sport fishermen, commercial fishermen, personal use fishermen, subsistence fishermen and even professional hunting guides.[104] However, the court has rejected a definition of "user group" that is based on a particular means or method of using the resource. For example, persons who operate aircraft for aerial fish spotting are not a user group for purposes of the common use clause.[105]

The court revisited the "user group" issue recently in *Tongass Sport Fishing Ass'n v. State*.[106] In 1991, the Board of Fisheries allocated chinook salmon in southeast Alaska between the commercial troll and sport fisheries by establishing a percentage of the harvestable stock which each group could catch. Several sport fishing groups filed a suit challenging the allocation scheme, claiming, *inter alia*, that the system violated both the common use and the no exclusive right of fishery clauses of Article VIII.[107]

In rejecting the Article VIII claim, the Alaska Supreme Court restated principles announced in earlier opinions on the equal access clauses. The court affirmed that the equal access clauses are not implicated unless the state places limits to admission on resource user groups.[108] The court cited several opinions, including *Gilbert* and *Alaska Fish Spotters Ass'n*, in which the Board's authority to allocate among different fisheries had been recognized, and distinguished allocating resources from placing limits on admission to resource user groups.[109]

VI. The Equal Access Clauses' Relation to Other Constitutional Provisions

The equal access clauses do not function in a vacuum. In fact, the clauses are significantly influenced by at least two other constitutional provisions. Specifically, the Alaska Supreme Court has had to square the equal access clauses with the "preferences among beneficial uses" clause of Article VIII, section 4. Addition-

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104. The court recognized that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." Owsichek v. State, 763 P.2d 488, 497 n.15 (Alaska 1988).

105. *Alaska Fish Spotters Ass'n*, 838 P.2d at 803.

106. 866 P.2d 1314 (Alaska 1994).

107. *Id.* at 1315.

108. *Id.*

109. *Id.* at 1318.

ally, because the equal access clauses have been called "a special type of equal protection guarantee," it is necessary to compare the standard of review used by the court to apply the equal access clauses with the equal protection test articulated by the court under Article I, section 1 of the state's constitution.

A. The "Preferences Among Beneficial Uses" Clause

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.*[110]

The Alaska Supreme Court has recognized the tension between the equal access clauses, which prohibit exclusive rights and special privileges, and the last phrase of section 4, which authorizes "preferences." In *McDowell v. State*,[111] Justice Moore rejected any implication in the majority opinion that all preferences, especially subsistence preferences, would violate the equal access clauses.[112] Justice Moore noted the apparent conflict between the clauses' prohibition against special privileges and section 4, which "clearly authorizes some preferences based upon uses."[113] Moreover, in his dissenting opinion, Justice Rabinowitz argued that the majority decision would conflict with the explicit language of section 4, which explicitly authorizes rural preferences.[114]

The court has attempted to clarify this apparent conflict by distinguishing between allocating resources among resource uses and limiting admission to resource user groups. In *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*[115] the court stated:

> While section 15 [the "no exclusive rights" clause] does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, 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.[116]

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110. ALASKA CONST. art. VIII, § 4 (emphasis added).
111. 785 P.2d 1 (Alaska 1989).
112. *Id.* at 13 (Moore, J., concurring).
113. *Id.* (Moore, J., concurring).
114. *Id.* at 17 (Rabinowitz, J., dissenting).
115. 628 P.2d 897 (Alaska 1981).
116. *Id.* at 904.

In *McDowell v. State*[117] the court stated that "[t]he state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group."[118] As an allocative system, such application is unauthorized under the "preferences" phrase of section 4.

B. Equal Access and Equal Protection

Because the uniform application clause requires that laws and regulations "apply equally to all persons similarly situated,"[119] it provides a clear equal protection guarantee for the use and disposal of natural resources. In *McDowell*, the court described the equal access clauses in general as "a special type of equal protection guarantee."[120] This raises the question of how analysis under Alaska's equal protection clause differs from analysis under the equal access clauses, and in particular, under the uniform application clause.

The equal protection clause in Article I, section 1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ."[121] When determining whether legislation comports with this clause, Alaska courts employ a "sliding" test that the Alaska Supreme Court has described as follows:

> We first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment, that is, the importance of the enactment. Depending on the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means.[122]

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117. 785 P.2d 1 (Alaska 1989).
118. *Id.* at 8.
119. ALASKA CONST. art. VIII, § 17.
120. *McDowell*, 785 P.2d at 11.
121. ALASKA CONST. art. I, § 1.
122. State v. Enserch Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989) (footnote omitted).

Before *McDowell*, the court had said very little about the test for applying the "uniform application clause," nor had it discussed the equal access clauses in terms of equal protection. In one instance, the court opined that in cases involving natural resources the "uniform application clause" may require more stringent review of a statute than does the general equal protection clause.[123] However, the court did not articulate a specific standard to be applied to natural resource cases.

In *McDowell*, the court implicitly followed an equal protection analysis in striking down the rural residency preference in the subsistence law. Placing the *McDowell* analysis into the equal protection framework leads to the conclusion that the "individual interest" at issue was the interest of each person in the state in participating in subsistence uses of renewable resources. The court said that this was a "highly important" interest.[124]

As for the competing state interest, the court said that it must be at least "important" to sustain legislation that burdens the equal access clause.[125] The court noted that an "important" state interest embodied in the subsistence law was "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."[126]

In analyzing the "nexus" between the state's "important" interest and the legislation's "means" for accomplishing it, the court held that the government's approach must be the "least possible infringement on article VIII's open access values."[127] When the court applied this standard, it concluded that the "means used to accomplish this purpose [were] extremely crude."[128] Specifically, the court pointed to evidence showing that there were "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."[129] Thus, the court's ground for striking down the rural-urban classification scheme was that it was

123. Gilman v. Martin, 662 P.2d 120 (Alaska 1983).
124. *McDowell*, 785 P.2d at 10.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 10-11.

both under-inclusive and over-inclusive.[130] In his *McDowell* concurrence, Justice Moore stated that he would have followed an explicit equal protection analysis under article 1, section 1 of the Alaska constitution. He argued that the individual interest at stake, access to wildlife for subsistence purposes, was "a species of the important right to engage in economic endeavor."[131] The subsistence law, therefore, would be subjected to "close scrutiny," and it would have to at least be "closely related to an important state interest."[132] Justice Moore called the state's interest more than "important"; it was "compelling."[133] Therefore, Justice Moore would have found the subsistence law defective because its classification scheme established only a modest correlation, rather than a close relationship, between those who resided in rural areas and those who were dependent on subsistence hunting and fishing.[134]

In dissent, Justice Rabinowitz maintained that the individual interest at stake, the right to participate in subsistence hunting and fishing, was not a fundamental right. Thus, Justice Rabinowitz argued, the "strict scrutiny" and "least restrictive alternative" standards were not applicable.[135] Justice Rabinowitz therefore concluded that the means-end fit of the subsistence criterion was sufficiently close to satisfy equal protection under both the "uniform application clause" and under the general equal protection clause of the constitution.[136]

Recently, the Alaska Court of Appeals addressed the issue of whether the Alaska Supreme Court had created a constitutional analysis for the equal access clauses that was distinct from its analysis for the equal protection clause. The Court of Appeals stated that the Alaska Supreme Court appeared to use the same

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130. *McDowell*, 785 P.2d at 10- 1. After striking down the "extremely crude" means for distinguishing persons who were eligible for subsistence uses, the court suggested a legislative solution: "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." *Id.* at 11.

131. *Id.* at 13 (Moore, J., concurring).

132. *Id.* (Moore, J., concurring).

133. *Id.* (Moore, J., concurring).

134. *Id.* (Moore, J., concurring).

135. *Id.* at 19 (Rabinowitz, J., dissenting).

136. *Id.* (Rabinowitz, J., dissenting).

approach for both, requiring the state to meet a rigorous test.[137] The state must demonstrate both an "important" legislative purpose and means narrowly tailored to accomplish that purpose.[138]

VII. Conclusion

The equal access clauses are unique to Alaska's constitution and, at the same time, based on established, historic principles arising under the public trust doctrine, pre-statehood fish and wildlife management policy and equal protection analysis. Although largely neglected in their first three decades, the clauses have recently been frequently scrutinized by the Alaska Supreme Court. In six opinions since 1987, the court has attempted to clarify the meaning of "equal access" as it applies to Alaska's fish and wildlife. While exclusive and special privileges to take subsistence resources are prohibited, these limitations are qualified by constitutional provisions that authorize limited entry to commercial fisheries and that enable the state to establish preferences among various uses. From among these provisions, one fundamental, consistently applied principle has emerged: Limitations on admission to fish and wildlife "user groups" are subject to strict judicial scrutiny under the equal access clauses.

Several other principles have evolved pertaining to the individual equal access clauses. The common use clause, for example, disallows the "privatization" of public fish and wildlife resources, especially if special privileges are long-term and do not compensate the public. The "no exclusive right of fishery" clause requires a "least possible infringement" inquiry when faced with a scheme that creates exclusive rights in fisheries, even if it is a form of limited entry. A similar test under the "uniform application" clause applies to nonuniform classifications among Alaskans who harvest these resources.

The pending Alaska Supreme Court decision in *Kenaitze Indian Tribe v. State*[139] affords the court an opportunity to clarify the nature of the "access" guaranteed by the constitution. *Owsichek v. State*[140] and *McDowell v. State*[141] hold that "access"

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137. Baker v. State, 878 P.2d 642, 644-45 (Alaska Ct. App. 1994).
138. *Id.*
139. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).
140. 763 P.2d 488 (Alaska 1988).
141. 785 P.2d 1 (Alaska 1989).

means access to membership in a user group. Other decisions hold that "access" does not mean equal opportunity among user groups to harvest fish and wildlife.[142] However, the issue of whether the state may limit access to fish and wildlife outside of the context of a user group has not been decided.[143] Another unanswered question is whether a restriction on a certain use of a resource may be justified by the availability of other uses of that resource.[144] With Alaska's finite resources and Alaskans' growing demand for fish and wildlife, the equal access provisions of the constitution will have a continuing, central role in providing answers.

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142. *See, e.g.*, Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

143. There is some support for the idea that the court may limit access outside of this context. In interpreting the White Act, the territorial predecessor to the "no exclusive right of fishery clause," the United States Supreme Court stated that "'[e]xclusive,' 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." Hynes v. Grimes Packing Co., 337 U.S. 86, 122 (1949) (emphasis added).

144. The answer to this question is probably yes. In *Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game*, one reason the ban on fish spotting was found not to violate the common use clause is because there were alternative ways that aerial spotters could still use the fisheries resource. 838 P.2d at 802.

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USE OF REPRESENTATIVES

ittee on Resources

Juneau, February 24, 1998

NOTE: INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME; THE PUBLIC TRUST DOCTRINE; AND EQUAL PROTECTION.

I. INTRODUCTION

The subject of this note is intrastate residential preferences in fish and game statutes. This note first briefly discusses the Public Trust Doctrine. It then briefly considers the doctrine of equal protection, which is found simultaneously with the Public Trust Doctrine in the Alaska Constitution, Article VIII.

It is beyond the scope of this Note to seek to resolve the dispute between those who argue that intrastate residential preferences are permitted because of the constitutional right to accord preferences among beneficial uses (SEE: Rabinowitz, dissenting, McDowell v State, 785 P.2d 1, 14-16 (Alaska 1988) and those who argue that the "common use" clause, the "equal access" clauses, and the Public Trust Doctrine forbid intrastate residential preferences.

II. THE PUBLIC TRUST DOCTRINE AND INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME

A. ALASKA'S VERSION OF THE PUBLIC TRUST DOCTRINE

The majority decision of the Alaska Supreme Court tells us that the "common use" clause and the "equal access" clauses of the Alaska Constitution forbid intrastate residential preferences. SEE: McDowell v State, 785 P.2d 1 (Alaska 1988).

Under Alaska's Public Trust Doctrine, Public Trust resources must be managed:

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...as a trust for the benefit of the people [as a whole] and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Gear v Connecticut, 161 U.S. 519, 529 (1896) **overruled** by Hughes v Oklahoma, 441 U.S. 322 (1979); but **see** Owsichek v State, 763 P.2d 488, 495 n.12 (Alaska 1988): "Nevertheless, the trust responsibility that accompanie[s] state ownership remains."

In Alaska constitutional law, the Public Trust Doctrine has been found to be implicit in the "common use clause" of the Alaska Constitution, Article VIII, § 3. SEE: CWC Fisheries v Bunker, 755 P.2d 1115, 1119 (Alaska 1988); McDowell v State, 785 P.2d 1, 15 (Alaska 1989); Owsichek v State, 763 P.2d 488, 493 (Alaska 1988); 4 Alaska Constitutional Convention Proceedings at 2492 (1955).

The State must manage fish and wildlife for the benefit of "all the people of the state." (emphasis added). Metlakatla Indian Community, Annette Island Reserve, v Egan, 362 P.2d 901, 915 (Alaska 1961), **affirmed**, 369 U.S. 45 (1962).

The State must provide for "...equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity." Id., at 932.

[T]he public trust doctrine dictates that...[public trust resources] must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

B. OTHER SOURCES OF THE COMMON LAW PUBLIC TRUST DOCTRINE

Slocum v Borough of Belmar, 569 A.2d 312, 316 (N.J. Super Ct., 1989) quoting Borough of Neptune City v Borough of Avon-by-the-Sea, 294 A.2d 47, 59 (N.J. 1972).

Common law principles of the law of trusts hold that one of the bedrock fiduciary duties of a trustee is the duty of impartiality. (Restatement (Second) of Trusts, §§ 170-199 (1959); Scott, The Law of Trusts, §171 (4th ed. 1987).

Under the State's fiduciary duty of impartiality, when it

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is dealing with Public Trust resources like fish, wildlife, waters, public lands, and unappropriated minerals, the State must act in favor of the interests of the state as a whole, not for the discrete advantage of one geographic region or ethnic group. SEE ALSO: Owsichek v State, 763 P.2d 488, 495 n.12 (Alaska 1988).

III. EQUAL PROTECTION AND INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME

A. INTRODUCTION

At the same time that it requires management according to the sustained yield principle, the Alaska Constitution also explicitly authorizes "preferences among beneficial uses." Alaska Constitution, Article VIII, §4, SEE ALSO Kenai Peninsula Fisherman's Marketing Ass'n v State, 628 P.2d 897, 9004 (Alaska 1981). The Alaska Constitution, Article VIII, §4, provides for preferences among "beneficial uses," not "users."

Preferences among beneficial uses of fish and game must nonetheless pass muster under equal protection analysis.

The "equal access" clauses of the Alaska Constitution, Article VIII, §§ 3, 15, and 17, contain an equal protection guarantee simultaneously with their Public Trust component.[1]

The cases discussed below were cited by Alaska Supreme Court Chief Justice Warren Matthews in the Court's majority opinion in McDowell v State, 785 P.2d 1, 11, fn 21, for the proposition that the "equal access" clauses of the Alaska Constitution, Article VIII, §§ 3, 15, and 17, and which are a "special type of equal protection guaranty," bar the residential discrimination that was at issue in McDowell, i.e., a preference for "rural" subsistence users in the allocation of fish and game.[2]

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[1] Article I, § 1, of the Alaska Constitution also guarantees equal rights, opportunities, and protection under the law.

[2] In McDowell, Justice Compton expressed no opinion as to the part of the Court's opinion discussing equal protection. Justice Moore concurred in that part of the opinion, but also wrote

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Since Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200 (Maryland App. 1971), and State v Bryan 99 So. 327 (Florida 1924) were each cited with approval by the Alaska Supreme Court in McDowell, it seems reasonable to review and analyze the facts and legal reasoning of those decisions in order to better understand the Alaska Supreme Court's interpretation of the Alaska Constitution's multiple guarantees of equal protection.

Each case is clearly distinguishable from the issue of the constitutionality under Alaska law of a rural preference. They nonetheless permit a better explication of the common law of equal protection in Alaska in the context of fish and game.

B. Bruce v Director, Dept. of Chesapeake Affairs

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200 (Maryland App. 1971) involved state laws restricting the commercial harvest of crab and oysters. Maryland residents were prohibited from commercial harvest of these shellfish outside the waters of their home county (except where the use of pots was involved).[3]

Maryland's residential requirements and territorial restrictions were HELD unconstitutional under equal protection analysis. Bruce at 208-209. No valid conservation purpose was found to support the residential discrimination among state citizens.[4]

The Maryland court blended equal protection considerations with Public Trust analysis.

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that he agreed with the court "to the extent that it holds that an intrastate geographical preference for the taking of wildlife violates §§ 3 and 15 of Article VIII of the Alaska Constitution." (McDowell at 13.) Justice Rabinowitz dissented from the entire decision of the Court in McDowell.

[3] Complex restrictions on methods and means of harvest exist for crabbing in Maryland, and pot fishing is not the only legal method.

[4] Crabs are a migratory species capable of very rapid migration. Oysters are not migratory, especially after spatfall. SEE: "More About Oysters Than You Wanted to Know," 30 Md. L. Rev. 199 (1970).

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> ...the State holds the title to fish in public waters in trust for the public, and all members of the public, regardless of where they may live in the state, have the right to take the fish subject to reasonable and nondiscriminatory regulations.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 207 (Maryland App. 1971).

> ...it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight for classification. Maryland Coal and Realty Co. v Bureau of Mines, 69 A.2d 471, 477 (Md. 1947), cited in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 211 (Maryland App. 1971).

The court in Bruce noted that although a rational basis exists for distinguishing tidewater from non-tidewater counties insofar as oyster and crab fishing are concerned, those fishery resources are nonetheless

> ...held in trust by the State for all of its citizens, no matter in which part of the state they may live. To that extent an otherwise legitimate classification of residents which may be made for many purposes, cannot be made if it affects a right (in this case to the enjoyment and use of natural resources) which, as citizens of this State, they enjoy equally.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 211 (Maryland App. 1971).

The Maryland Court in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 212 (Maryland App. 1971) distinguished, in dictum, the issue of discrimination between state residents from the issue of discrimination favoring the residents of one state over the non-residents.

> ...the States own the tidewaters themselves, and the fish in them...For this purpose, the State represents its

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people, and the ownership is that of the people in their united sovereignty. Martin v Waddell, 16 Pet. [367] 410...The right which the people of the State thus acquire arises not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship. citing McCready v Virginia, 94 U.S. 394-395.

The U.S. Supreme Court has never overruled McCready, but it has distinguished the situation of discrimination against non-residents regarding sedentary species of shellfish from that of discrimination against non-residents in the commercial harvest in the marginal sea, i.e., bounding the coastline of a state, as to free-swimming, migratory fish. Toomer v Witsell, 334 U.S. 401-402 (1948).

The Maryland Court in Bruce took the occasion to cite, with approval, the concurring opinions of JJ. Frankfurter and Jackson in Toomer, stating:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in McCready. The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the McCready doctrine by referring to the 'regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States.'

Toomer v Witsell, 334 U.S. 408-409, cited in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 213 (Maryland App. 1971).

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> Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate against persons lacking any beneficial interest. (emphasis added) Toomer v Witsell, 334 U.S. 385, 399-400 (1948), cited in Bruce, at 208.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 213 (Maryland App. 1971), can safely be said to stand for the proposition that in the allocation of opportunities to harvest fish or wildlife, a state may not discriminate among its citizens based solely upon their place of residence within the state.

C. State v Bryan

State v Bryan 99 So. 327 (Florida 1924), involved a challenge to a statute that involved discrimination in the amount of licensing fees paid by non-residents of certain Florida counties compared to the fee to be paid by residents of other Florida counties in order to hunt game in that county. The Florida Supreme Court HELD the intrastate geographical preference to be invalid and a violation of equal protection.

Bryan did not involve an absolute prohibition of use by non-residents; it involved disproportionate financial burdens. The county's legislation was based on a Florida statute which expressly provided that the ownership and title to all wild birds and game in the State of Florida is vested in the counties of the state.

The Florida Supreme Court, citing Geer 161 U.S. 519, wrote:

> The power to control and regulate the killing and use of game ...passed with the title to game in its natural condition to the several states as they became sovereigns, for the use and benefit of all the people of the states, respectively...
> ...the beneficial use of the game belongs to all the people of the state, and a regulation that unjustly discriminates against any of the people of the state may in effect be a denial of the equal protection of the laws to those so unjustly discriminated against.

Bryan at 329.

> ...when a statute...by its plain terms excludes from its benefits a portion of the residents of the state, or imposes upon some residents of the state burdens not put upon other residents of the state with reference to the subject regulated, and there appear to be no real differences in conditions with reference to the regulation to fairly justify the classification as made...it may deny equal protection.

Id.

The Florida Supreme Court used language from the common law of trusts when they wrote:

> All the bona fide citizens of the state, irrespective of the counties in which they live, have a qualified beneficial property interest, subject to lawful governmental regulations for the public good, in all wild game while it is in any county of the state, and not reduced to lawful possession of any one; and as the state cannot lawfully deny to any of its citizens substantially equal rights with all other citizens of the state, under like conditions, to lawfully hunt wild game in the state, the vesting of title to such game in the several counties is ineffectual to impair individual rights in the game or to relieve the state of the power and duty of just regulations for the good of all.

Bryan at 329.

The Florida Supreme Court followed its use of common law trust language with an equal protection analysis.

> Classifications ..for the purpose of prescribing regulations...that in effect impose burdens on some of the citizens of the state that in kind or extent are not imposed upon other citizens of the state under practically similar conditions, with no conceivably just basis for the classifications or discriminations, constitute a denial to those injuriously affected of the equal protection of the laws...(citations omitted)

Bryan at 329-330.

In sum, Bryan may be cited as authority for the proposition that in general, in the allocation of opportunities to hunt and fish, a state may not discriminate against certain of its residents on the basis of where, within the state, they reside.

Prepared for the Alaska State Legislature
House Resources Committee
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D. State v Norton

A third case cited by the Alaska Supreme Court in McDowell, yet cited without approval by the Alaska Court, was State v Norton, 335 A.2d 607 (Maine 1975).

Norton involved the validity of a municipal ordinance enacted by an island community and which closed a portion of Penobscot Harbor to shellfishing by non-residents of the municipality.

Relying on a unique and centuries-old history of shellfish management law, the Maine Supreme Court UPHELD the principle of intra-state discrimination as to clam and oyster harvest opportunities only, where the discrimination is based on a citizen's place of residence within the state, PROVIDED there is a reasonable conservation need for the restriction and the non-local resident is not completely excluded from the fishery.

Because the municipal ordinance bore no reasonable relation to conservation, it was OVERTURNED. The municipality had made no prior determination that the local clams were endangered from excessive harvest; exclusion of non-residents had had no demonstrable impact on clam abundance.

Norton analyzes in depth the pre-existing case law in Maine regarding the legal issue of whether or not a State can legitimately discriminate among its residents in the allocation of fishery resources, based on the location within the state of their residence.

In Maine, tidelands and the right to take shellfish are among the quintessential elements of the **jus publicum** and are protected by the Public Trust Doctrine. State v Norton, 335 A.2d 607, 610 (Maine 1975). The State of Maine holds those resources as trustee for the people of the entire State. Id.

Long-established precedent in Maine held that the State's responsibility is to regulate and control clam fisheries for the benefit of all the people of the State. Moulton v Libbey, 37 Me. 472 (Maine 1854), cited in State v Norton, 335 A.2d 607, 611 (Maine 1975).

Unlike Alaska, in Maine it has been the official policy since 1641 to consider the inhabitants of towns with clam flats as entitled to preferential treatment in their enjoyment for

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strictly non-commercial, personal, and family use, as well as to give those lucky municipalities some measure of responsibility in the management of those shellfish. Id.

In Norton, a Maine statute specifically authorized municipalities to determine the qualifications for shellfishing licenses. Case law from the Maine Supreme Court established that a complete exclusion of nonresident clam diggers was not authorized under the statute. Id.

The Maine Supreme Court HELD that municipalities may only exclude non-residents "only when and to the extent it is reasonably necessary for the proper conservation of this valuable resource." Norton, 335 A.2d 607, 613-614.

Under the State of Maine's constitution, equal protection is interpreted to allow a certain measure of inequality of treatment.

> ...inequality of treatment is not forbidden if it is based upon an actual difference bearing some substantial relation to a proper public purpose which is sought to be accomplished--when it is a 'proper discrimination based on the requirement of the commonweal.' " Norton, at 614.
>
> The Legislature, as the sovereign-trustee of the people's property, has obligation to manage the shellfish populations to preserve, as far as possible, their benefit for all the people. But this does not mean that every citizen in the State must have identical opportunity with every other citizen to harvest clams in every area where clams are found because equality of opportunity might result in the destruction of some vulnerable clam populations to the detriment of all the people.

Norton, at 614.

Bag limits, open and closed seasons, and limited entry, are all appropriate methods of conservation. In some areas, as to clams, daily bag limits might need to be so small in order to be effective that they would be of no practical value to individual diggers. Norton, at 614. For this special reason, and in this special context only, Maine has upheld intra-state discrimination based on residency.

In Norton, the Maine Supreme Court expressly distinguished the issue of clam management from the issue of management of free-swimming fish, for the reason that clams have fixed

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habitats in depletable beds. Norton, at 615, citing McCready v Virginia 94 U.S. 391 (1876) and Toomer v Witsell, 334 U.S. 385 (1948). (Those courts found no relationship between the purposes of conservation and discrimination against nonresidents.)[5]

E. State v Leavitt

State v Leavitt, 72 A. 875 (Maine 1909), is cited extensively in Norton. Leavitt is useful to better understand Maine's unique legal history. Leavitt also shows why Alaska's legal situation is not directly analogous to Maine's law of clam digging.

State v Leavitt, 72 A. 875 (Maine 1909), involved a Maine statute that granted a single municipality the unique right to close certain clam flats to clam digging, except by residents for their personal or family use, or by resident hotel keepers for use in their hotels.

Attacked on grounds that the statute violated equal protection, the Maine Supreme Court UPHELD the statute on grounds that it was reasonably necessary for resource conservation.

The Leavitt court concluded that the State's interest in the clam population was "an inalienable property right," and that the State, in the exercise of its power of regulation, may grant inequality of treatment of its citizens if for a proper governmental purpose and if the difference bears a just and proper relation to the classification.

> Since it must be assumed that the public interest required some limitation upon the right of clam fishing, it does not seem to us that it is unreasonable or arbitrary for the state having a proprietary interest as well as a governmental power all for the public benefit to give the preference to those whom the law for more than two hundred and fifty years has given a preference, and who were

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[5] The Norton court found that the right to travel was not improperly infringed upon because the plaintiffs did not seek to move to New Haven, the municipality whose clam-digging ordinance was at issue. Instead, the Norton plaintiffs wanted to remain as residents of their home towns and merely come to North Haven to dig clams when they chose. Norton, at 616.

> enjoying a preference when the fourteenth amendment was adopted, namely the inhabitants of the town within which the fisheries are located. The discrimination between them and the inhabitants of other towns seems to us to 'bear a just and proper relation' to the difference in situation, in locality, and in the actual enjoyment of prior legal rights or privileges. It is not unreasonable that they to whose doors nature has brought these 'succulent bivalves' shall be entitled to them before those who are less favorably situated whenever there must be restriction. And we do not think that the legislative recognition of this existing superiority in situation and privilege denies to others the equal protection of the law.

State v Leavitt, 72 A. 875, 879 (Maine 1909).

In sum, although Maine allows a limited amount of intrastate discrimination among its citizens in the allocation of harvest opportunities for certain "succulent bivalves," it does so in a legal context vastly different from Alaska's. I do not believe Maine's limited exception to the general rule of equal protection would be persuasive to the Alaska Supreme Court.

IV. CONCLUSION

In McDowell, the Alaska Supreme Court wrote that intrastate discrimination in the allocation of fish and wildlife harvest opportunities based solely on differences of intrastate residency was invalid and violated numerous provisions of Alaska's Constitution. The Alaska Supreme Court cited, with approval, several other state's decisions on this general issue. Those non-Alaska cases rested on a legal analysis that blended the Public Trust Doctrine with traditional equal protection analysis.

For this reason, it is possible to surmise that the advocates of a constitutional amendment[6] (new Article VIII, § 19), may not have paid sufficient attention to McDowell v State, 785 P.2d 1 (Alaska 1989).

HJR 46 (2d Sess., 1998) states that it would allow the Legislature to provide a subsistence preference "consistent with

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[6] SEE: House Joint Resolution 46, 2d Sess., 20th Legislature, introduced January 11, 1998, iteration under consideration as of February 24, 1998.

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the sustained yield principle." However, proposed § 19 says nothing about whether a subsistence preference would be consistent with the Alaska Constitution's special guarantee of equal protection that is found in the Article VIII "equal access" clauses.

The Alaska Supreme Court in McDowell ruled that a rural preference in the allocation of fish and wildlife violates three clauses of the Alaska Constitution: Article VIII, §§ 3, 15, and 17.

The McDowell Court held that a rural preference is invalid for two, discrete reasons:

1) special harvest privileges based on one's place of residence within Alaska unfairly restrict access to fish and wildlife and constitute an improper "special privilege" in violation of the § 3 common use clause, the § 15 no exclusive right of fishery clause, and the § 17 uniform application clause (McDowell v State, 785 P.2d 1, 9 (Alaska 1989)); and

2) special harvest privileges based solely on one's place of residence within Alaska violate the guarantee of equal protection of the laws which subjects intrastate residential classifications to strict scrutiny. (McDowell v State, 785 P.2d 1, 7 (Alaska 1989), citing Gilman v Martin, 662 P.2d 120, 125 (Alaska 1983); and Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U.Pa. L. Rev. 261, 274-275 (1987).)

The authority to allocate fish and wildlife does not imply a power to limit admission to a user group. Legislation that burdens the equal access clauses of Article VIII must be designed for the "least possible infringement" on Article VIII's open access values. McDowell v State, 785 P.2d 1, 10 (Alaska 1989), citing Ostrosky at 1191 and Johns v CFEC, 758 P.2d 1256, 1266 (Alaska 1988).

Limits on admission to user groups are subject to scrutiny under the article VIII equal access clauses. McDowell v State, 785 P.2d 1, 8, fn.14 (Alaska 1989), citing State v Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v State, 763 P.2d 488, 492 (Alaska 1988).

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The "urban-rural" antinomy, like most forms of discrimination based solely on one's place of residence within a State, is too crude a distinction to pass muster under traditional equal protection analysis. McDowell v State, 785 P.2d 1, 11 (Alaska 1989), see especially fn.21.

In my opinion, the guarantee of equal protection found in the Alaska Constitution, Article VIII, dovetails with the Public Trust Doctrine. The common law fiduciary obligations of a trustee include the duty to deal impartially with all the beneficiaries. (Restatement (Second) of Trusts § 183 (1959).

> 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. (citations omitted).

McDowell v State, 785 P.2d 1, 12 (Alaska 1989), citing Lewis v State, 161 S.W. 154, 156 (Arkansas 1913).

Perhaps the proponents of HJR 46 are relying on the strength of the principle of constitutional interpretation that would strive to harmonize proposed § 19 with other constitutional provisions with which HJR 46 conflicts. SEE: Abrams v State, 534 P.2d 91, 95 (Alaska 1975). The prudence of such a legislative strategy is certainly questionable, especially when explicit language of supremacy could easily have been included by the draftsman.

I believe that in order to permit intra-state discrimination in the allocation of fish and game by the Alaska Legislature, based on rural residency, it may be necessary to expressly state an intent to over-ride at least four protections of the Alaska Constitution: Article I, § 1, and Article VIII, §§ 3, 15, and 17.

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PUTTING THE PUBLIC TRUST DOCTRINE TO WORK

SECOND EDITION

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CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 1: Lands, Waters and Living Resources Generally Recognized as Subject to the Public Trust Doctrine

Summary

In general, public trust waters are the "navigable waters" in a State, and public trust lands are the lands beneath these waters, up to the ordinary high water mark. The living resources, *e.g.* the fish and aquatic plant and animal life, inhabiting these lands and waters are also subject to the Public Trust Doctrine.

To determine what lands, waters and living resources are subject to the Public Trust Doctrine in any specific State, however, one must understand the historical underpinnings of the doctrine, the process of the doctrine's perpetuation from the Thirteen Original States to the 37 new States, and the evolution of the keystone term "navigable waters" as defined under Federal and State law.

English common law recognized public rights in all tidewaters and the lands beneath. In England, the term "tidewaters" and "navigable waters" were synonymous. The presumption was that tidelands were owned by the king, although a grant of the *jus privatum* interest could be conveyed into private hands. In such a case, the *jus publicum* interest remained dominant to the *jus privatum* interest.

English common law became the law of the thirteen colonies, and then of the Thirteen Original States. Each of the Thirteen Original States held, and continues to hold, a public trust interest in its tidelands up to the ordinary high water mark. Each also had, and continues to have, the authority to define the boundaries of the lands held in public trust as well as the authority to recognize private rights in its trust lands, and thus diminish the public's rights therein as they see fit.

As the Thirteen Original States held their lands beneath navigable waters in trust, so did the 37 new States receive them on an equal footing with the Thirteen Original States. The

question of what lands each of the 37 new States, in contrast to the Thirteen Original States, received in trust upon entering the Union is a Federal question. Because the term 'navigable waters' has evolved and changed over time, one must look to the Federal law at the time the State entered the Union to determine what trust lands passed to the State upon statehood.

Living resources are also being recognized as trust assetts. Thus, not only is fishing a traditionally recognized public trust use (*see* Ch. III.A.2) but fish and all other aquatic wildlife form a part of the trust's assets.

After statehood, State law (if not in conflict with Federal law) applies to determine ownership of the lands beneath navigable waters, as well as the public rights in those waters. As a result, as the definition of navigable waters has changed and evolved on both the Federal and State level, so too has the area of lands and waters subject to the Public Trust Doctrine.

English common law has evolved into the American Public Trust Doctrine from colonial times to the present. A fundamental characteristic of the Public Trust Doctrine is its dynamic nature. Because the doctrine establishes public rights to fully enjoy and use public trust lands and waters — uses that change over time — the doctrine will continue to evolve as the needs and mores of society change, particularly in the face of the increasing pressures and demands placed on coastal resources.

To apply the Public Trust Doctrine to specific lands, waters or living resources, it must first be determined whether the lands or waters in question are indeed within the geographic scope of the doctrine. If the lands or waters lie within the scope of the doctrine, then the State can govern and manage the public's trust rights as a property owner, in contrast to regulating privately owned property through the State's police powers.

defined, either legislatively or judicially, what the term "ordinary high water mark" meant. Most of the Thirteen Original States determined this term to the "mean high tide line," in accordance with the 1789 English *Chambers* case. Others, such as Georgia, based on her laws, geography and usage, determined that her trust shorelands extend to the upper limit of the salt marsh, a boundary co-extensive with the upper reach of the regular ebb and flow of the tide that extends above the elevation of mean high water.[10] *See* Ch. II, § 2 for discussion of the upper boundary of public trust lands.

Further, "it has been long-established that the individual States have the authority to ... recognize private rights in such lands as they see fit."[11] As a result, "some of the original States, for example, did recognize more private interests in tidelands than did others of the 13 — more private interests than were recognized at common law, or in the dictates of our public trust cases."[12]

The United States Supreme Court, in a seminal American public trust decision, *Shively v. Bowlby*, reviewed and summarized the laws of the Thirteen Original States. After this summary the Court stated that "there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."[13] Therefore, the Supreme Court went on to say, "Great caution ... is necessary in applying precedents in one State to cases arising in another."[14]

Nonetheless, several core principles were common to all thirteen of the original States when the Constitution was ratified. These core principles, discussed and developed individually by both State and Federal courts, were passed on to the 37 'new' states that have since joined the Union. Generally, each State, through its legislature:

- Has public trust interests, rights and responsibilities in its navigable waters, the lands beneath these waters, and the living resources therein;

- Has the authority to define the boundary limits of the lands and waters held in public trust;

- Has the authority to recognize and convey private proprietary rights (the *jus privatum*) in its trust lands, and thus diminish the public's rights therein, with the corollary responsibility not to substantially impair the public's use and enjoyment of the remaining trust lands, waters and living resources;

- Has a trustee's duty and responsibility to preserve and continuously assure the public's ability to fully use and enjoy public trust lands and waters for certain trust uses; and

- Does not have the power to abdicate its role of trustee of the public's *jus publicum* rights, although in certain limited cases the State can terminate the *jus publicum* in small parcels of trust land.

In terms of applying public trust law in the Thirteen Original States, however, it is important to note that they differ from the 37 subsequent States in two significant ways. First, they received sovereignty, dominion, ownership and control over their tidelands and waters through military conquest upon the defeat of the British forces in the American Revolution; they were not admitted into the Union, they formed the Union.

Second, the Thirteen Original States, under the Articles of Confederation, did not cede their tidelands to the new Federal government as they did their western lands when they adopted the Articles of Confederation, or when the Confederated Congress enacted the Northwest Ordinance of 1787 (discussed below). Nor did this change when the first Congress reenacted the Northwest Ordinance on August 7, 1789.[15] Thus, at the time of the adoption of the Constitution, the Thirteen Original States reserved full sovereignty, dominion, ownership and control over their tidelands, "subject only to the rights surrendered by the Constitution of the United States."[16]

Because the Federal government never had original jurisdiction over the trust lands and waters of the Thirteen Original States, it never conveyed these lands to any of them. Thus, no Federal question arises as to what lands were held in trust by any of the original States when they formed the Union. This is in contrast to the situation of the 37 new states, as discussed below.

Nonetheless, as this public trust was "funded" and controlled by the Thirteen Original States at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the 37 "new" States that have since joined the Union.[17]

2. The Equal Footing Doctrine and the 37 "New" States

Just prior to the ratification of the U.S. Constitution in 1788, the Confederation Congress adopted the "Ordinance of 1787: The Northwest Territorial Government," known simply as the Northwest Ordinance. In general, the

Northwest Ordinance established guidelines for the government of the northwest territory and for the admission of new States, formed from the territory, into the Union. Specifically, it also provided that any State joining the Union "shall be admitted ... on an equal footing with the original States, in all respects whatever ..."[18] This provision became the model for the enabling legislation of all of the 37 new States entering the Union, albeit the actual terminology is often different. This practice of admitting new States as equals to the original 13 has long been referred to as the Equal Footing Doctrine.

In applying the Equal Footing Doctrine the United States Supreme Court has consistently found that "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the *tide waters*, and in the lands under them, within their respective jurisdictions."[19] Alternatively put, "First, The shores of *navigable waters*, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[20] These rights, sovereignty, and jurisdiction of the states were "subject only to the rights surrendered by the Constitution of the United States."[21] As can be seen by the word usage in the quotes above, these rights have been variously described as pertaining to lands beneath either "tidewaters" or "navigable waters," a dichotomy of definitions that would trouble and confuse courts for two centuries.

The Equal Footing Doctrine has served to perpetuate the Public Trust Doctrine from the Thirteen Original States to each of the 37 new States. As each new State entered the Union she received in trust those lands beneath "tidewaters" or "navigable waters," and the waters themselves, in trust for the citizens of the new State. What lands and waters were received by each of the 37 new States, in contrast to the Thirteen Original States, from the Federal Government upon Statehood is singularly a Federal question.[22] Thus, the Federal definition of "navigable waters" is of primary importance in determining what lands and waters were received in trust by each new State upon entering the Union.

But unfortunately, the confusion surrounding the term 'navigable waters' — whether it means only tidewaters regardless of the navigability of those waters, or all waters that are actually navigable regardless of the tide — has troubled courts from the founding of the country up to recent times. The 1988 United States Supreme Court case *Phillips Petroleum v. Mississippi* pivoted around whether Mississippi received in trust all lands beneath tidewaters, regardless of navigability of those tidewaters, when she entered the Union in 1817, or whether she received in trust only those lands beneath waters that were navigable-in-fact at the time of statehood. The Court ruled that all lands beneath tidewaters, regardless of

navigability of those tidewaters, were received by the State when she entered the Union.

Early on, however, English common law was strictly adhered to, and only tidal waters were considered navigable. But this legal definition defied reality in the United States with our large inland rivers and lakes. Courts recognized the problem, and grappled with the legal, commercial and practical ramifications of the confusion generated by the term 'navigable waters.' As a result, from the entry of Vermont into the Union as the fourteenth State on March 4, 1791, to the entry of Hawaii as the fiftieth State on August 21, 1959, the definition of the term 'navigable waters' has continued to evolve and change, both at the Federal and State level. Because of this evolving meaning, the Federal test of 'navigable waters' for title purposes is "determined as of the time of admission of the State to the United States."[23]

3. Evolution of the Term 'Navigable Waters'

The definition of the term 'navigable waters' is of critical importance; upon its interpretation rests the title claims and property interests of governments and private entities, and the application of the Public Trust Doctrine to lands, waters and living resources. It has been said that "The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters."[24] Confusion over the meaning of the term 'navigable waters' has resulted in a well-spring of contentious litigation nationwide over the ownership of bottomlands and submerged lands, and claims of exclusive use of the waters and living resources therein.

Precisely what is meant by the term 'navigable waters' depends upon whether the Federal or State government is inquiring, and for what purpose. There are Federal definitions of 'navigable waters' for title purposes, for admiralty court jurisdiction, and for constitutionally enumerated powers and authorities. In addition, there are State definitions of 'navigable waters' for title purposes, as well as defining those waters wherein the public has trust rights.

For title purposes, the Federal definition of 'navigable waters' is of primary interest, although State definitions have an important bearing on the matter. The situation is confounded, however, due to the changing and evolving Federal definition of 'navigable waters.' To discuss the evolution of the meaning of this term, it is best to start with English common law.

longer be ignored. The Court finally recognized that while the common law rule may be adequate for a country where the rivers are small and rarely navigable above the tidal ebb and flow, "beyond the coast, the English standard of navigability does not fit the American continent with its great rivers and lakes."[39] As a result, the Court held that the Act of 1845 was constitutional, and thus the term "navigable waters," for purposes of admiralty court jurisdiction, included not only tidal waters, but also all waters "navigable-in-fact."

For another 25 years, however, in terms of title ownership, in contrast to admiralty court jurisdiction, the Federal law remained in confusion as to whether land beneath 'navigable waters' meant land beneath tidewaters only, or land beneath waters that were actually navigable. As noted by the United States Supreme Court in the 1877 case *Barney v. Keokuk*:

> "The confusion of navigable with tide water, found in the monuments of common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy."[40]

The Court went on to hold that "all waters are deemed navigable which are really so."[41] Recognizing the clear logic in holding non-tidal waters to be navigable if they "are really so," the Court went on to find that "there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty."[42]

Having found that non-tidal waters may be "navigable" for Federal admiralty court jurisdiction, as well as for bottomland title purposes, the Supreme Court took the final step 15 years later, in the 1892 case of *Illinois Central Railroad v. Illinois*, and held that the bottomlands beneath the Great Lakes are subject to "the same doctrine as to the dominion and sovereignty over and ownership of" lands beneath tidal waters,[43] and that "the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."[44]

In the 1988 case of *Phillips Petroleum v. Mississippi*, the United States Supreme Court presented a modern perspective on the question. The Court stated that "it came to be recognized as the 'settled law of this country' that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union."[45]

Thus, after 1876, for title purposes, lands beneath navigable waters, *i.e.* all tidal waters and 'navigable-in-fact' freshwaters, passed to the new States as they entered the Union on an equal footing with the Thirteen Original States. Today, the term 'navigable waters,' for title purposes, is defined under Federal law as follows:

> "[Waters] which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had — whether by steamboats, sailing vessels or flatboats — nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the [water] in its natural and ordinary condition affords a channel for useful commerce."[46]

c. State Definitions of 'Navigable Waters'

As the Federal courts were wrestling with the meaning of the term 'navigable waters' so too were State courts. From the States' perspective, the definition of 'navigable waters' is important for two reasons: (1) title ownership of the lands beneath these waters, and (2) the division of waters into public and private.

Although it is a Federal question as to what lands and waters were received in trust by a State upon entering the Union,[47] "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[48] For bottomland title purposes, States may apply their own definition of 'navigable waters' as long as there is no conflict with Federal law.[49] For purposes of public use of the navigable waters, without regard to ownership of the bed, the State may adopt different (and less stringent) tests of 'navigable waters,'[50] tests that need not be evaluated as of the time of Statehood, but afterwards.[51]

Thus, for questions concerning title ownership of land beneath navigable water, once title has vested in one of the 37 new States through the Equal Footing Doctrine, State law controls whether the title (1) remains in the State, (2) can be granted to private ownership, or (3) originally vests in the riparian owner upon Statehood in accordance with the English common law.

the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."[52]

In other words, the Federal definition of 'navigable waters' for title purposes is controlling when determining what lands and waters passed to each new State at the time of her admission to the Union, but subsequent State definitions, if not inconsistent with the Federal definition, are controlling for determining ownership after the date of statehood.[53]

Generally, State courts were quick to reject the English common law ebb-and-flow test of navigability in favor of the navigation-in-fact test. For example, Pennsylvania, one of the Thirteen Original States, discarded the English common law years before Congress passed the Act of 1845. In 1803, a farmer on the shores of the Susquehanna River asserted exclusive rights of fishing in the river adjacent to his land. This assertion led to "force and arms" against a fellow townsman who insisted that he, as a member of the public, had an equal right to seine for shad as did the riparian farmer. The disagreement, which raised the complex legal issues of bottomland ownership, was fought all the way to the Pennsylvania Supreme Court. In 1810, the court stated:

> "This [ebb-and-flow] definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches."[54]

Nonetheless, two of the Thirteen Original States, New Jersey and Massachusetts, continue to limit the definition of navigable waters, for title purposes, to only those waters which are subject to the ebb and flow of the tide.[55] Mississippi, which joined the Union in 1817, does likewise.[56]

For purposes of establishing public rights in navigable waters, regardless of the ownership of the lands beneath, each State has established its own definition, either judicially or statutorily, of the term "navigable waters."[57]

Roman civil law. To the contrary, English common law clearly recognized public rights in the lands beneath tidal waters, including those beneath "rivers, bays and arms of the sea."[67] It is unclear how far seaward the common law recognized the king's dominion of the submerged lands, but it is clear that the claim did extend further than the ordinary low water mark.

Each of the Thirteen Original States claimed ownership and control of the submerged lands off their coasts.[68] Likewise, the new ocean-bordering States that subsequently entered the Union on an equal footing also claimed ownership and control of the submerged lands off of their coasts. However, in 1947, the United States Supreme Court overruled these original State claims, and held that the "Federal Government rather than the State has paramount rights in and power over [the submerged lands within three nautical miles], an incident to which is full dominion over the resources of the soil under that water area."[69] In 1953, however, Congress affirmed State ownership and control over submerged lands extending from the coastline out three geographic miles[70] (or three leagues[71] in the case of the Gulf of Mexico boundaries of Florida and Texas), when the 1953 Submerged Lands Act was enacted.[72] Although the Submerged Lands Act, which applies only to the States of the Union,[73] is silent regarding any public trust rights or duties imposed upon an adjacent coastal State, many ocean-bordering States do hold their submerged lands out three miles (or three leagues) in the public trust, either through judicial determination or constitutional or statutory provision.[74]

In contrast to the 1953 Submerged Lands Act, where the conveyance of the submerged lands from the Federal Government to the States is silent regarding any public trust rights or duties, the 1974 conveyance by the Federal Government to the three U.S. territories, the Virgin Islands, Guam and American Samoa, expressly provides that these submerged lands shall "be administered in trust for the benefit of the people thereof."[75] Thus, those lands "permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines"[76] were recognized by the Federal Government to be trust lands, and were so conveyed.

2. Freshwater Bottomlands

Under the common law of England, public rights were confined to only those waters and lands subject to the ebb and flow of the tide. Rights in freshwaters were held exclusively by abutting landowners.[77] In most of the Thirteen Original States, the far greater part of the navigable waters were tidewaters. "And indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters

C. Waters Within the Public Trust

In addition to tidelands, submerged lands and bottom lands, the waters above public trust lands are likewise part and parcel of the trust corpus. "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters ... within their respective jurisdictions."[87] Unlike trust lands, however, trust waters can not be privately owned.[88]

1. Tidewaters

English common law did not clearly state whether water that ebbed and flowed with the tide could be considered tidal if it lacked salt.[89] For the most part, however, it is recognized that "although the water is fresh at full tide, yet the river is still an arm of the sea, if it flows and reflows."[90] Thus the salt content of the water generally does not determine whether water is tidal. The presence of salt is a factor of tidality, but the lack of salt is not conclusive. Rather, the fluctuation of the water, as shown by its daily rise and fall as a result of the influence of the oceanic tide, characterizes waters as tidal.

2. Navigable Freshwaters

In the 1877 case of *Barney v. Keokuk*, the United States Supreme Court recognized that "waters which were nontidal [could be] nevertheless navigable."[91] Fifteen years later, in *Illinois Central Railroad v. Illinois*, the Supreme Court was confronted with deciding the legitimacy of a State's conveyance, and subsequent revocation of nearly all of Chicago's harbor to the Illinois Central Railroad. In affirming the revocation of the grant, the Court recognized that all lands beneath navigable waters, as well as the water itself, were within the public trust. However, at that time the term "navigable waters" was synonymous with "tidal waters", and the Great Lakes were, of course, not tidal. The Court, however, ruled that the Great Lakes were "navigable-in-fact" and therefore the waters of the Great Lakes, and the lands beneath, are held in trust for the people of the state.[92] This single United States Supreme Court decision clearly established that the corpus of the Public Trust Doctrine includes not only tidelands and tidewaters, but the tremendous inland network of Great Lakes, rivers and lakes — all freshwaters that are "navigable-in-fact" — as well as the bottomlands beneath such waters.[93]

In contrast to lands beneath tidewaters, where the ebb and flow of the tide is the test, navigability of freshwaters is currently the sole measure of the expanse of such waters subject to the Public Trust Doctrine. *See* this section, parts B.1. and B.2.

3. Extent of "Navigable Waters" from Shore-to-Shore

It is sufficient that only some portion of the water body be influenced by tides or navigable-in-fact in order for the entire waterbody to be within the public trust. In other words, "All lands and waters bordering on navigable rivers and lying between ordinary low and high water marks fall within the reach" of the term navigable waters.[94] Otherwise "areas [that] by no means could be considered navigable, as is always the case near the shore,"[95] would not be within the trust.[96] "Where a stretch of river is navigable lengthwise, ... all of the waters between the opposite shores or banks are comprehended within the term 'navigable waters'" whether the water is "one inch or several feet deep."[97] Thus, "so long as by unbroken watercourse--when the level of the waters is at mean high water--one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the ... trust."[98]

4. Non-navigable Tributaries Flowing into Navigable Freshwaters

Special mention should be made of one California case, *National Audubon Society v. Superior Court of Alpine County*, where the Public Trust Doctrine was applied to non-navigable waters above the "ordinary high water mark" because the diversion of non-navigable tributaries to navigable waters downstream would harm a protected use of the navigable water body.[99] Thus, the California court held that although the Public Trust Doctrine did not directly apply to non-navigable fresh waters or the land beneath, to the extent that the diversion causes harm to the public's protected uses of navigable freshwaters that are subject to the Public Trust Doctrine, the diversion of these waters could be regulated by the doctrine. In Washington State, however, a 1993 attempt by the Attorney General to apply the Public Trust Doctrine to non-navigable waters and associated groundwaters was, not persuasive to the Supreme Court of Washington, although the court was careful to expressly state that they were not "addressing the scope of the doctrine today."[100]

D. Living Resources Within the Public Trust

Several State courts have recently stated that the scope of the Public Trust Doctrine includes the aquatic wildlife living in trust waters,[101] most notable of which are fish. Thus, not only is fishing a traditionally recognized public trust use (*see* Ch. III.B.2) but fish and all other aquatic wildlife form a part of the trust's assets.

The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.[102] At least one State court has held that this trust ownership of the fish creates "a sovereign right primarily and essentially of

Notes

1. Institutes of Justinian, Liber 2, Tract 1, Section 1, as reprinted in Angell, J.K., *A Treatise on Tide Waters* (1826), at 16.

2. Angell, J.K., *A Treatise on Tide Waters* (1826), at 17.

   DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 598 (1967)("The preservation of peace and security of society calls for the fixing of lines of demarcation between rights which are public and held in common and others which are private.").

   NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867)("The policy of the common law is to assign to everything capable of ownership a certain and determinate owner, and for the preservation of peace, and the security of society, to mark by certain indicia, not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common, and private rights.").

3. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

   NY: *Fulton Light, Heat & Power Co. v. State of New York*, 200 N.Y. 400, 412-13 (1911)("In adopting the common law of England, the people of this state took over such of its rules as were applicable to, and consistent with, their conditions and circumstances. It became, and is, the law of the state and the basis of its jurisprudence, except so far as its principles and rules of action have been modified by Constitution, statutes, or usages; or were inapplicable to our situation.").

4. *Shively v. Bowlby*, 152 U.S. 1, 14, 15 (1894). *See also Martin v. Waddell*, 41 U.S. 367, 410 (1842)("When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.").

   PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869)("[B]y the revolution and the acknowledgement of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several states.").

5. *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810).

6. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

7. *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789).

99. *See National Audubon Society v. Superior Court of Alpine County*, 189 Cal.Rptr. 346, 658 P.2d 709 (1983), *cert. denied sub nom. City of Los Angeles Dep't of Water & Power v. National Audubon Society*, 104 S. Ct. 413 (1983). *See also Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal.App.3d 402, 244 Cal. Rptr. 830 (1988)(The Public Trust Doctrine does not extend or apply to non-navigable waterways absent some impact on the public trust uses of navigable waters fed by the non-navigable waters).

100. *Rettkowski v. Department of Ecology*, 858 P.2d 232, 237, 122 Wash.2d 219 (1993)("First, we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater." Noting in note 5 that "We similarly do not need to address the scope of the doctrine today.").

101. *See* W. Rodgers, ENVIRONMENTAL LAW, 172-73 (1977).

102. The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.

US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977)("A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. ... The "ownership" language of such cases must be understood as no more than a Nineteenth Century legal fiction expressing the "importance to its people that a State have power to preserve and regualte the exploitation of an important resource." ... Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and the Constitution." Citations omitted.) This case draws into question the validity of the progeny of cases following *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)(Following the English common law, the court held that "ownership" of fish and game is in the State not in a proprietary sense but in its sovereign capacity, and must be exercised "as a trust for the benefit of the people." Citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the "ownership is that of the people in their united sovereignty."). *Geer* was also expressly overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

CA: *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state."); *People v. K. Houden Co.*, 215 Cal. 54, 56 (1932)("The property right in the fish of our waters is in the State in trust for the whole people."); *People v. Glenn Colusa Irr. Dist.*, 15 P.2d 549, 552 (1932)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state.").

a. Land Bordering the Great Lakes

Michigan, by statute, has defined the upper boundary of its public trust shorelands as the "ordinary high water mark," a term which is then defined as a fixed elevation above sea level that does not fluctuate with the water level.[32] In Ohio, also by statute, the upper boundary of the public trust lands is defined as the "southerly shore of Lake Erie"[33] a term which has not been defined further either in statute or case law.[34] In Illinois, the upper boundary has been judicially defined as being at the water's edge, which fluctuates based on water level, erosion or accretion.[35]

Like some of the tidewater States, two Great Lakes States, Pennsylvania and Wisconsin, allow for private ownership of shorelands down to the "ordinary low water mark."[36] However, the riparian owner has only a qualified title between ordinary low and ordinary high water, with the public retaining trust rights for navigation and fishing.[37]

b. Land Bordering Navigable Rivers and Inland Lakes

(i) River Bottomlands

> "The great size of many of the freshwater rivers of this country, and their capability of navigation, have induced some of the highest courts of several of the States to attach to them the common law consequences of navigability, thereby abrogating the common law distinction between them and those in which the tide ebbs and flows, so that grants bounded on such rivers stop at their margin. ... According to this view, in the case of large fresh water rivers which are navigable in fact, the riparian owners do not take to the middle of the river, but the State is the owner of the subjacent soil, and the public have an easement in the river."[38]

The majority of States follow English common law, and provide for private ownership of navigable river bottomlands to the center of the stream or river (*usque ad filum*).[39] Partial private ownership of river bottomlands also occurs, with private title extending only to the ordinary low water mark, with the balance of the river bed owned by the State.[40] In the remaining States, the bottomlands are owned exclusively by the State up to the "ordinary high water mark."[41] The "ordinary high water mark" has been defined as the permanent banks of the waterway that confine the waters at their highest level,[42] but does not include the point reached by "unusual floods".[43] A few States expressly prohibit private ownership of bottomlands.[44] Only in one State, Hawaii, is there no general rule due to the near

LA: LA. CIV. CODE Art. 450 (The bottoms [beds below the low water mark] of navigable rivers and streams are public things not susceptible of private ownership); LA. CIV. CODE Art. 456 (West 1979)("The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water. The banks of navigable rivers or streams are private things that are subject to public use."); LA. CONST. Art. IX, § 3 ("The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.").

MN: *Miller v. Mendenhall*, 43 Minn. 95, 96, 44 N.W. 1141 (1890)("The State holds the title to low-water mark in its sovereign capacity.").

PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901)("[I]t has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low watermark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream, between ordinary high and ordinary low watermark.").

TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935)(The border between the private upland and the State-owned land within the trust exists halfway between the high and low levels of waterflows); *State v. Bradford*, 121 Tex. 515, 549, 50 S.W.2d 1065, 1078 (1932)("The decisions of this state announce the rule that the state can grant soil beneath navigable public waters.").

41. Many States exclusively own their bottomlands, setting the boundary of the upland owner at the "ordinary high water mark."

US: *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945)("[A]n owner has no private rights in the stream or body of water which are appurtenant to his land."); *Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 198 (1937)("Title to the riverbed ... [is] in the state."); *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 (1937)("The title to the beds of ... rivers [is] in the state.").

AK: ALASKA STAT. 38.05.965(18)("[S]horeland means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to the ordinary high water mark as modified by accretion, erosion or reliction.").

FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276 (1927)("Upon the admission of Florida into the Union, ... the state, by virtue of its sovereignty, became the owner of all lands under the navigable waters within the state, including the

and the number of pre-Statehood conveyances of *prima facie* trust land into private hands, one should be aware of this possible argument.

C. Federal Acquisition of State Public Trust Land

By cession, condemnation or purchase, the Federal Government can and has obtained public trust land, often for military purposes. In the case where trust lands have been conveyed by agreement between the State and Federal Governments, the language in the conveyance should control the effect of the conveyance on the public's trust interests in the land. When the Federal Government exercises its power of eminent domain and condemns State trust lands, the federal district court case law is split on the question of the impact on the public's trust rights.

Two federal district courts, one in Massachusetts and the other in California, have addressed the effect of federal condemnation of trust land on the public's trust interests. The Massachusetts federal district court held that "the Federal Government is as restricted [as the States] in its ability to abdicate to private individuals its sovereign *jus publicum* in the land. So restricted, neither the [State's] nor the federal government's trust responsibilities are destroyed ... since neither government has the power to destroy the trust ... ."[11] The trust land remained subject to the Public Trust Doctrine, although the federal, not the State, government is the trustee and holder of the *jus publicum*. The federal district court for the northern district of California held that because the land was subject to the tides at the time of condemnation, it remained burdened with the public trust, and the Federal Government could not convey the trust land to a private party.[12]

In another case, however, the same California federal district court came to the opposite conclusion. The Federal Government had condemned trust land held by a California city, which had received it in trust from the State. Because the State had conveyed the trust lands to the city in trust, the land was still subject to the Public Trust Doctrine, even though much of the land had been filled.[13] But the court found that "the United States' power of eminent domain is supreme to the State's power to maintain tidal lands for the public trust ... ."[14] As a result, the court concluded "that the United States' condemnation of these lands extinguishes the State's public trust easement."[15]

The scope of the term "commerce" has likewise expanded and evolved in both Federal and State law. At least one State court has noted that commerce is not ited to activities for economic gain, but also includes activities for pleasure and recreation.[12] The Supreme Court of Alaska has held that mining, on filled lands still subject to the public trust doctrine, is not a "public use" protected by the doctrine.[13]

2. *Fishing*

Fishing is a natural incident of the public right to use public trust lands and waters,[14] as well as incidental uses such as fowling[15], and shellfishing.[16] The public right of fishing has been closely related by the courts to the public right of navigation.[17] Numerous claims of exclusive fishing rights of upland owners owning the bottomlands of navigable lakes and rivers have been defeated on public trust grounds.[18]

The fish inhabiting navigable waters are not owned by the riparian owners, even if the bottomland is privately held. "Fish in the stream [are] not the property of the [riparian owner] any more than the birds that [fly] over its land."[19] Rather, the State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.[20] *See* Ch. II, §1.D "The state holds the propriety of [bottomland] for conservation of public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether."[21]

Some States do provide for exclusive fishing rights in private parties, generally for shellfish beds or aquaculture. In some States, such privately held rights (e.g. a license or lease) to a fishery may revert back to the public if these rights are not continuously exercised,[22] or if the license or lease is unlawfully registered.[23]

3. *Other Traditional Uses*

From the early days of the United States, the public's trust interests recognized by the courts have been much broader than merely commerce, navigation and fishing. For example, in the 1821 New Jersey case *Arnold v. Mundy*, the State Supreme Court recognized "fishing, fowling, sustenance and all other uses of the water and its products"[24] were rights assured to the public.

Many other traditional uses of the nation's public trust lands and waters have been ed by the courts. Among these are boating, hunting, bathing, swimming, nude

PA: *Carson v. Blazer*, 2 Binn. 475 (1810)("The cases cited on the argument abundantly show, that every man may of common right fish with lawful nets in a navigable river; that the proprietors of the land on each side have not the exclusive right of fishery therein, but that the fishery is common and public.").

WI: *Willow River Club v. Wade*, 100 Wis. 86, 102-03, 76 N.W. 273 (1898)("Fish in the stream were not the property of the [riparian owner] any more than the birds that flew over its land." Thus, although the riparian owner owned the bottomland of a navigable stream, "defendant was not guilty of trespass by going upon [the stream], as he did, catching the fish in question.").

19. *Willow River Club v. Wade*, 100 Wis. 86, 102-103, 76 N.W. 273 (1898).

20. The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.

US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977)("A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. ... The "ownership" language of such cases must be understood as no more tha a Nineteenth Century legal fiction expressing the "importance to its people that a State have power to preserve and regualte the exploitation of an important resource." ... Under modern analysis, the question is simp0ly whether the State has exercised its police power in conformity with the federal laws and the Constitution." Citations omitted.) This case draws into question the validity of the progeny of cases following *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)(Following the English common law, the court held that "ownership" of fish and game is in the State not in a proprietary sense but in its sovereign capacity, and must be exercised "as a trust for the benefit of the people." Citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the "ownership is that of the people in their united sovereignty."). *Geer* was also expressly overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

CA: *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state."); *People v. K. Houden Co.*, 215 Cal. 54, 56 (1932)("The property right in the fish of our waters is in the State in trust for the whole people."); *People v. Glenn Colusa Irr. Dist.*, 15 P.2d 549, 552 (1932)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state.").

STATE POWERS, DUTIES, LIMITATIONS AND PROHIBITIONS UNDER THE PUBLIC TRUST DOCTRINE

Summary

State and federal courts have long recognized that the Public Trust Doctrine devolves upon the States, as trustees of the public trust lands, waters and living resources, certain powers and corollary duties, along with limitations and prohibitions on these powers for managing the "assets" of the public trust. The courts have elucidated these powers, duties, limitations and prohibitions in order to assure the preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

State powers under the Public Trust Doctrine include the authority to protect the trust lands, waters and resources, govern the public's trust rights in trust lands, waters and resources, exercise continuous control over public trust lands, waters and living resources, define the limits of the lands and the navigability of the waters held in public trust, convey the *jus privatum* title to public trust lands, revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land, require leases for structures on State's public trust lands, and restrict or prohibit fishing.

State duties under the Public Trust Doctrine include the obligations to supervise the trust, preserve, so far as consistent with the public interest, the uses protected by the trust, and protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

Of the powers and authorities listed above, the courts have only circumscribed a State's power to convey trust lands into private ownership. The limitations on a State's conveyance of the *jus privatum* title into private ownership provide that there must be clear legislative authority for the conveyance, a definite furtherance of public trust purposes, and no substantial impairment of the public's use of the remaining public trust lands, waters or living resources.

Finally, the Public Trust Doctrine prohibits a State from abdicating its sovereignty or dominion over public trust lands, waters and living resources. Nonetheless, complete termination of the public's trust rights in certain parcels of public trust lands can be accomplished by a State, but only if there is legislation with the clear intent to convey a certain parcel of trust land out of the trust.

CHAPTER VI

A. State Powers and Authorities Under the Public Trust Doctrine

Over the last two centuries the American Public Trust Doctrine has evolved significantly as a basis for managing public trust lands, waters and living resources within each State. Over the decades the courts have found that under the doctrine the States, as trustees, have certain powers and corollary duties, along with limitations on these powers. Of central importance, however, is that the common intent and purpose of each power, duty or limitation is the full preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

There is no one seminal case enumerating all of the powers and duties of the States, or the concurrent limitations and prohibitions, devolved upon them by the Public Trust Doctrine. So many factual circumstances and situations render that impossible. Thus, in order to circumscribe the general body of these trustee powers, duties, limitations and prohibitions, the entire collection of State and federal case law may be analyzed. To that end, the powers, duties, limitations and prohibitions that are discussed herein are all derived from cases discussed elsewhere in this book.

Nearly every State in the Union is now cognizant of, and implementing, the Public Trust Doctrine. In some States, however, decades have passed since the State asserted its authority as a trustee under the doctrine. The U.S. Supreme Court recognized in the 1988 *Phillips Petroleum v. Mississippi* case that the State was not precluded from asserting ownership of tidelands under the doctrine, for the first time since it entered the Union in 1817.[1] As succinctly put by the Arizona Supreme Court:

> "That generations of trustees have slept on public rights does not foreclose their successors from awakening."[2]

A State's powers, duties, limitations and prohibitions are as viable today as they were "at the instant it achieved the constitutional status of a State."[3] Under the Public Trust Doctrine, States have the power and authority to:

- Govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine;[4]
- Exercise a continuous supervision and control over public trust lands, waters and living resources;[5]
- Define the limits of the lands held in public trust;[6]
- Convey the *jus privatum* title to public trust lands;[7]

- Revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land;[8]
- Require leases or easements for structures on State's public trust lands;[9] and
- Restrict or prohibit fishing.[10]

B. State Duties and Obligations Under The Public Trust Doctrine

The Public Trust Doctrine has been described as "an affirmation of the duty of the State to protect the people's common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[11] This duty of protecting public trust resources is central to the Public Trust Doctrine, for as stated by an Oregon court "These resources, after all, can only be spent once. Therefore the law has historically and consistently recognized that rivers and estuaries, once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee."[12]

As one reviews the following duties and obligations of States under the doctrine, it becomes clear that each of the powers and authorities listed in the preceding section has a corollary duty to implement the authority through some affirmative action. Indeed, more and more States are recognizing duties upon the State trustees to implement the trust for the benefit of the public and future generations. Accordingly, under the Public Trust Doctrine each State has the duty and obligation to:

- Supervise the trust;[13]
- Preserve, so far as consistent with the public interest, the uses protected by the trust;[14] and
- Protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.[15]

C. Limitations and Prohibitions on State Powers and Authority

Under the Public Trust Doctrine, States are completely prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.[16] Of the powers and authorities listed in section A. above, the courts have only circumscribed a State's power to convey trust lands into private ownership. All other powers and authorities appear to remain plenary.

The complete termination of the public's trust rights in certain parcels of trust land can be accomplished by a State, although only in accordance with several conditions. There must be legislation authorizing the conveyance of trust lands out of the trust.[17] The legislation must be clear in its intent to convey the parcel out of the trust.[18] At a minimum the intent must be "necessarily implied."[19] Establishing that termination of the trust is necessarily implied, however, is a heavy burden, for if a court can interpret the statute so as to retain the public's interest in tidelands, the statute should be so construed.[20] This placement of the burden on the claimant is also bolstered by the rule of statutory construction that, in the cases of a claimed grant from a State to a private owner, the conveyance is to be construed most favorably for the State. *See* Ch. V.A.4. The legislation authorizing the termination of the public's trust rights in trust land must clearly further the public's trust interests.[21] *See* Ch. V.D.

Finally, all State public trust powers and authorities must be exercised consistently with State and U.S. Constitutional limitations, such as prohibitions on gifts of public assets to private entities. This "gift" prohibition is in many (if not all) State constitutions and has been raised to challenge purported conveyances of public trust lands, as have equal protection and due process clauses.[22]

15. Each State has the duty and obligation to protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

    CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441, 658 P.2d 709, 189 Cal.Rptr. 346, *cert. denied*, 464 U.S. 977 (1983)(The Public Trust Doctrine is "an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.").

    FL: *Hayes v. Bowman*, 91 So.2d 795 (1957)("[I]t is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof(land between high and low water marks). As a common law this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, towit: the service of the people.").

    HI: *State By Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725 (1977)("Under public trust principles, the State as trustee has the duty to protect and maintain trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.* recreation.").

16. States are prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.

    US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)("The State can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace.").

    CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 226 (1981)("It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust."); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 482 (1970)("Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers 'only bare legal title' and the property remains subject to the public trust easement.").

    NJ: *Arnold v. Mundy*, 6 N.J.L. 1, 39 (1821)("[T]he king cannot, by alienation, destroy the *jus publicum* ... .").

17. There must be legislation authorizing the conveyance of trust lands out of the trust.

    AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("Before any tideland grant may be found to be free of the public trust under the 'public trust purposes' theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.").

    CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871)("State can probably sell the [tide]land ... but this must be done in the interest of commerce and that must first be determined by the Legislature."); *Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-16 (1928)(City of Oakland had no power to convey trust land: "unless such power was conferred by the legislature ...").

    MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857)(General authority to take land for highways does not include taking tide flats beneath navigable waters. Such authority "must appear by express words or necessary implication. Citations omitted. The legislature alone have that power.").

    MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960)("Noone ... has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes ... unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands.").

    NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889)("The purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.").

    TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410 (1943)("No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.").

18. The legislation must be clear in its intent to convey the parcel out of the trust.

    AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.").

CHAPTER VII

THE CONFLUENCE OF RIPARIAN RIGHTS AND THE PUBLIC TRUST DOCTRINE

Summary

The law has recognized the co-existence of public and private rights in navigable waters, tidelands and submerged lands for hundreds, if not thousands, of years. In the United States there is a long history of these two interests being reconciled such that both may exist to the reasonable satisfaction of the other. Nonetheless, with the rapid intensification of demand on coastal resources and the corresponding advent of environmental management and regulation, public and riparian rights are thrown into more frequent conflict.

"Riparian" and "littoral" rights derived from the English common law, and are part and parcel of the property rights enjoyed by owners of land adjoining navigable waters, including both tidal and non-tidal waters. In modern usage the term "riparian rights" is understood as encompassing both riparian and littoral rights. For purposes of this discussion, the term "riparian rights" is used in its general sense encompassing both.

Under the English common law, the bundle of riparian rights included the rights of access to the water, to wharf out, to gain by accretions (and lose by erosion) and to replace land lost by avulsion. The right of access to the water is the most basic right of the riparian owner under which other riparian rights are created and protected.

Today, nearly every State has modified the English common law, either by Constitution or legislatively, to such an extent that what were previously regarded as riparian "rights" can best be described today as merely riparian "privileges." But though States have broad authority to modify or nullify unexercised riparian rights, this discretion is limited once these rights are "vested" in the riparian owner. Riparian rights, once vested to a riparian owner, can only be deprived in accordance with due process, and with just compensation.

There is a pyramid of authority over navigable waters. At the top, and operating within a narrow scope of "improvements to navigation" is the federal navigational servitude. Next is the State authority, as trustee, to manage its trust lands, waters and resources for the benefit of the public's various trust uses, including the authority to reasonably regulate riparian rights, or to deny them altogether. Finally, riparian owners have certain rights, of which some, such as filling-in shorelands, are regulated to such an extent that today they have been described as a mere franchise.

A State may accord special consideration to riparians. At the same time, when a riparian owner desires to "improve" the shorelands the State can best safeguard the public's trust rights if it affirmatively regulates these riparian improvements.

the Property Clause and the federal power of eminent domain. The Commerce Clause provides the Federal Government with regulatory powers, whereas the Fnclave Clause, the Property Clause and power of eminent domain provide the . is for and govern its property ownership and use. Each of these is discussed below.

1. Regulatory Powers: The Commerce Clause

Under the Commerce Clause of the U.S. Constitution[6] the Federal Government has the paramount power to regulate interstate and foreign commerce. As noted in prior chapters, commerce in the early days of the country was almost exclusively conducted by navigation. Thus, it is not surprising that a central power that has unfolded from the federal commerce clause is the authority to regulate the use of navigable waters, known as the "federal navigational servitude". Today, even though the conduct of "commerce" is much broader than maritime commerce, the navigational servitude remains of central importance when dealing with public trust lands, waters and resources.

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a. The Federal Navigational Servitude

The navigational servitude[7] is a dominant servitude over navigable waters and the lands beneath that allows the United States to regulate the use of the waters and submerged lands for purposes related to navigation and commerce, and to do so without compensation.[8] The navigational servitude, which is interpreted as an incident of the historical public right of navigation,[9] the *jus publicum*, has become a doctrine of federal power under the Commerce Clause.[10] Because the federal navigational servitude emanates from the Commerce Clause power, the scope of the servitude is strictly limited to the scope of Commerce Clause purposes, even though the scope of the Commerce Clause is broadly construed by the federal courts.

The federal navigational servitude confers only regulatory power, not ownership.[11] Exercise of the navigational servitude by the Federal Government, or any of its agencies, does not effect a transfer of title.[12] As the constitutional delegatee of the national *jus publicum* interest in navigation and commerce, the United States has a public use interest in public trust lands and waters. The States, on the other hand, hold not only title to the public trust lands and waters, but are also vested with sovereignty. The States have both ownership and regulatory power over these resources.

State/Federal authority occurs, bringing into play the equal footing doctrine. *See* Ch. II, §1.A.2. After Statehood, certain federal enclaves may be owned outright by the Federal Government, through the Enclave Clause, or the government may condemn land and take ownership through its powers of eminent domain.

a. Pre-Statehood

i. Property Clause

Under the Property Clause, Congress has exclusive power over the territory and property of the United States.[23] Neither the Ninth nor the Tenth Amendments, which together limit the powers of the Federal Government to those enumerated in the U.S. Constitution and reserve for the people all other powers, affect this Property Clause power. A State cannot circumscribe the title of the United States.[24] Because the Property Clause gives the United States exclusive power over its territory and property, there are, presumably, no latent powers remaining that could belong to a State under the Tenth Amendment.[25] Under the Supremacy Clause, furthermore, the Property Clause supersedes any State laws that conflict with the exclusive control of the United States.[26]

When it comes to public trust lands and waters, however, the Property Clause does not delegate exclusive federal control. As the U.S. Supreme Court said in the 1845 case of *Pollard's Lessee v. Hagan*: "First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[27] Thus, public trust lands are outside the scope of the Property Clause power, except when the United States acts as trustee prior to Statehood. This lack of exclusive Property Clause power over public trust lands has generally been distinguished from the exclusive power of the Federal Government to dispose of uplands.[28]

This is in accord with Congressional policy. Congress has never treated public trust lands as part of the "public domain" of the United States. "Congress has never undertaken by general laws to dispose of [lands below high water mark of navigable waters in any Territory of the United States]",[29] and "the general legislation of Congress in respect to public lands does not extend to tide lands."[30] Public trust lands were not included within the classifications in statutes relating to sales of public land and were not covered by the Swamp Land Act.[31] When the boundaries of regular federal patents of the public domain included public trust lands as a result of the imprecision of meandering (*i.e.* the general depiction as opposed to

specific delineation of small water course) they did not pass title to the public trust lands of their own force, but as a result of ratification by the State.[32]

Congress appears to have acquiesced to the common law vesting of sovereign ownership in the several States and its non-preemption by the Constitution.[33] Furthermore, before and after Statehood, all navigable waters of the United States were to be always and forever common highways.[34] As a result, the beds and shores of navigable waters were not subject to survey and disposition by the United States.

The lands in the public domain granted by the United States to States in their enabling acts included only uplands.[35] Lands under navigable waters are not explicitly addressed, but covered by the admission of the State on an equal footing.[36] The equal footing doctrine recognizes that, upon admission to the Union, the "new" State acquires, as an incident of its sovereignty, all lands lying under navigable waters. The United States, thus, did not convey ownership of trust lands at Statehood in the same manner as it conveyed the uplands, but rather acknowledged the State's ownership, by virtue of its sovereignty, of the trust lands which had been held in trust by the Federal Government during territorial times.[37]

ii. International Obligations

As trustee of trust lands in a territory prior to Statehood, the United States could convey these lands in order to perform an international obligation.[38] Although the United States had full power to convey these lands, Congress historically has refrained from making general pre-Statehood grants of public trust lands.[39] Their dominion and propriety, with a few exceptions, was preserved intact for the future State, on an equal footing with the original thirteen States. The United States as trustee confined itself to exercise its power in the areas of commerce, international obligations, public exigencies, and purposes related to the territory.[40]

However, a prior Sovereign's grant of exclusive ownership, confirmed by the United States, has been interpreted as excepting the lands from the public use easement.[41] *See* Ch. II, §4. For example, when the United States acquired California from Mexico, it was obligated under international law to recognize grants that the Mexican government had made to certain *pueblos* of tidelands, most notably to the pueblo of San Francisco. By confirming title, the United States fulfilled an international duty to protect previously created property rights.[42] The power and duty of the United States to do so under a treaty is considered superior to any rights of the State, which arise subsequently.[43] As a result, where the tidelands of California would have, as an incident of State sovereignty, been held in trust for

the benefit of the people, certain tidelands that were part of the Mexican *pueblo* grants were not subject to the public trust doctrine.

b. Post-Statehood

After a State is admitted to the Union, the Federal Government can acquire land through two constitutional powers. One is the power to purchase "places" with the consent of the Legislature of the State where the place is located. This is commonly known as the "Enclave Clause" and is akin to when a willing buyer and willing seller make a transaction.

The other power is that of eminent domain, or the power of condemnation. It is an implied power of the Federal Government, flowing from the Fifth Amendment's express prohibition against taking private property for public use without just compensation.[44] The U.S. Supreme Court has reasoned that since the government is prohibited from taking private property without just compensation, then there is a tacit recognition that the government has the power to take private property for public use *with* just compensation.[45] Use of the eminent domain power is akin to when a person or State is unwilling to sell property, so the Federal Government takes it and pays "just compensation."

i. *Enclave Clause*

Under the Enclave Clause, the United States has exclusive jurisdiction over any "places" acquired for enumerated purposes by purchase with the consent of the State Legislature.[46] These places, or enclaves, are expressly described in the Constitution as those areas which are needed "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Generally speaking, the Enclave Clause gives the United States exclusive jurisdiction over the "place" only for the specified public purpose for which the land was purchased.[47] However, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired for purposes other than those enumerated above.[48] In the event of a State conveyance of qualified jurisdiction, the Supreme Court has recognized the validity of "concurrent jurisdiction" over the place.

Only when either the State or the Federal Government immediately and directly exercises its own sovereign powers is it immune from the jurisdiction of the other.[49] Neither may substantially curtail the exercise of the other's power.[50] According to Enclave Clause jurisprudence as it has developed, consistent with *Pollard's Lessee*

v. Hagan,[51] the Clause empowers the United States to acquire exclusive control over property only to the extent of fulfilling one or more of its specific delegated powers.[52]

The question has seldom been raised as to whether the State has any right of reversion if the Federal Government abandons the use of the property for governmental purposes. One instance where the issue will become important, however, is when the Federal Government closes military bases, many of which are coastal properties. *See* Ch. IX, §3.D for further discussion.

ii. Eminent Domain

When a State Legislature is unwilling to convey property, the Federal Government has the power of eminent domain, *i.e.* the power to condemn the land as an incident of sovereignty. This power can be exercised by the Federal Government only so far as is necessary to exercise one or more of its enumerated powers.[53] Although a State cannot prevent the Federal Government from acquiring property by eminent domain, a question exists in the federal courts as to whether a State's sovereign title and authority over public trust lands can be extinguished by the Federal Government's taking of trust lands by eminent domain, or if there are any reversionary public trust interests still held by the State.

In the 1988 case *United States v. 11.037 Acres of Land*,[54] one federal district court held that the power of eminent domain allows the United States to take complete title to public trust land, extinguishing all easements and other interests, including the public trust. The court held that even though a State has exclusive power of eminent domain within its own jurisdiction, it cannot, under the Supremacy Clause, use that power to impress a public trust easement where it would frustrate or limit the exercise of eminent domain essential to the sovereign government of the United States.[55]

In rendering its decision the court overruled its 1986 decision in *City of Alameda v. Todd Shipyards*.[56] In *City of Alameda*, the court held that the United States by condemnation acquired full fee simple title without destroying the public trust, because neither government has the power to destroy the trust or the other sovereign. The United States simply acquired the land subject to the public trust, as though no other party had held an interest in the land.[57]

The *City of Alameda* court cited *United States v. 1.58 Acres of Land, Etc.*,[58] a federal district court case in Massachusetts, which the *United States v. 11.037 Acres of Land* court declined to follow. The U.S. District Court for the District of Massachusetts found that our system of dual sovereignty modified common law public trust

theory.[59] Sovereignty was divided between the United States and a State according to the aspect of the interest in public trust lands that is within the respective constitutional power of each. The United States acts as trustee over commerce and the other constitutional powers delegated to the Federal Government, while the State acts as trustee over all other non-preempted matters reserved to the States.[60] Thus, "[w]hen the Federal Government takes such [public trust] property by eminent domain ... [it] obtains the fullest fee that may be had in land of this peculiar nature: the *jus privatum* and the federal government's paramount *jus publicum*."[61] The court further noted that the Federal Government cannot abdicate its *jus publicum* any more than the State can; nor can either trust responsibility be destroyed.[62]

The *1.58 Acres of Land* decision is more consistent with traditional notions of concurrent State and Federal authority. The Supremacy Clause has been interpreted by the U.S. Supreme Court in numerous cases as operating only within the sphere of enumerated powers granted to the Federal Government by the States through the U.S. Constitution.[63] The federal power of eminent domain is an incident of federal sovereignty, the same as a State's public trust authority over trust lands and waters is an incident of State sovereignty.[64] The federal sovereign through its paramount, though limited, powers should not be able to destroy an incident of sovereignty of a State.[65] Nonetheless, a conflict on this question exists at the federal district court level. None of the federal appellate courts or the U.S. Supreme Court has addressed the question.

C. Submerged Lands Act

The 1953 Submerged Lands Act[66] was a reaffirmation by Congress of title in the States to lands beneath navigable waters.[67] The act reversed the 1947 decision of the U.S. Supreme Court in *U.S. v. California*[68] that held that the Federal Government had paramount rights in, and full dominion and power over the navigable waters, submerged lands, and resources therein, seaward of the ordinary low-water mark.

The concurrent jurisdiction of the Federal and State governments over the navigable waters, the submerged lands and the natural resources within these lands and waters is recognized by the Submerged Lands Act. The act retains the paramount authority of the Federal Government to the "use, development, improvement, or control . . . arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."[69] The act also affirms the right and power of the States to

"manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law ... "[70] Thus, the dual sovereignty described by the Supreme Court in the 1845 case *Pollard's Lessee v. Hagan* is retained in the basic framework of the Submerged Lands Act.

The Submerged Lands Act in and of itself is neither an explicit or implicit preemption of any State authority. Rather, it is an affirmation of concurrent State/Federal jurisdiction. Any area of alleged conflict is subject to standard preemption analysis.[71]

D. Federal Supremacy and State Preemption

No preemption of State action can occur in the absence of affirmative action by the Federal Government.[72] When the Federal Government does act, in furtherance of constitutional purposes, federal preemption must be explicit, implicit, or the result of an actual conflict of laws.[73] In practice, State regulations should generally prevail against the likely preemptive effect of the paramount power of Congress over navigation, when there is no specific congressional act, no need for national uniformity, and no evidence that the State action impedes interstate commerce.[74] When a State attempts to protect its public trust resources, it is less likely to lose on claims of federal preemption because the State is acting in an area of its traditional power.[75] The Supreme Court maintains a presumption against federal preemption when Congress legislates in an area of traditional State power.[76] Property law, including the public trust doctrine, is one such area. Two recent federal decisions are instructive as to how the courts analyze questions of preemption

In the 1993 case of *Murphy v. Department of Natural Resources,*[77] the residents of "Houseboat Row" off of Key West, Florida, alleged that the State of Florida was trying to evict them from their homes through the State's implementation of submerged land leases. The houseboat owners claimed that Florida was barred by federal law from implementing the submerged land leases. The federal district court carefully analyzed the question of federal preemption, both explicit and implicit, and whether there was an "actual conflict" between the exercise of the State authority and federal authority. The court found that the federal navigation regulations were not explicitly preemptive of State leasing of aquatic lands and the water column above them.[78] They were also not implicitly preemptive, because they were not so comprehensive as to leave no room for supplemental State action.[79] There was also no actual conflict of State and federal laws because the federal laws

Section 1: Using The Public Trust Doctrine To Enhance Coastal Resource Management

Thirty two of a possible 35 States, Territories and Commonwealths of the United States now have federally approved Coastal Zone Management (CZM) Plans[1] under the Coastal Zone Management Act.[2] In addition, there are 28 estuaries that have completed or are in the process of developing management plans under the National Estuary Program (NEP) through section 320 of the Clean Water Act.[3] Many of the CZM programs already have incorporated the Public Trust Doctrine in their federally approved programs, although more can be done. The NEP program could also benefit by incorporating the Public Trust Doctrine, as implemented by the appropriate State, in the management plans.

A. Sources of Public Trust Authority in State Law

As has been fully discussed, the Public Trust Doctrine came to the United States through the English common law. The doctrine is well embedded in the common law of each State, and remains the law of the State until it is modified by the State Constitution or State legislation. *See* Ch. II, §1.A.

1. State Constitutional Provisions and the Public Trust Doctrine

Several coastal States have constitutional provisions which, although they often do not use the term "public trust," clearly recognize the responsibilities of the State to manage and preserve its public trust lands, waters and resources. A few are included here.

California. California has taken the approach of specifically providing in its constitution for public access to public trust lands:

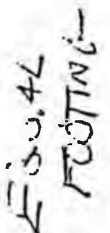
> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."[4]

Any analysis of whether land involved in a military base closure is subject to the Public Trust Doctrine must start by asking the factual question: What lands were Public Trust lands at the establishment of the military installation, and how have these lands been modified? This is a question requiring a factual determination to be made through review and analysis of records and evidence that existed at the time of establishment. All of the issues and methodologies discussed in Chapter II, §4 regarding the determination of trust boundaries should be considered in developing this factual record.

Whether the Public Trust Doctrine applies to any of these *prima facie* public trust lands may depend upon how the land in question became federal land. Therefore, the next question is: How, and for what purpose, did the Federal Government acquire the land in question? The Federal Government has become the vested owner of land through the Constitution's Property Clause, Enclave Clause, and through eminent domain. *See* Ch. VIII.B.2.

1. Federal Acquisition: How and for What Purpose?

Property Clause: If the Federal Government acquired the land through the Property Clause, such as for military bases in the U.S. Territories, there seems little question that the Public Trust Doctrine would apply. All of the land formerly held by the Federal Government as U.S. Territory (*i.e.* that land which became the 37 "new" States) was held by the Federal Government under the Property Clause. The Equal Footing Doctrine brought the 37 new States into the Union on par with the original 13 States. The United States Supreme Court has consistently found that "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[65] *See* Ch. II, §1.A.2. Thus, the Public Trust Doctrine is applicable in all 50 States, as well as the U.S. Territories.



There seems no legal or policy reason, nor is there any precedent, for military installation land acquired by the Federal Government through the Property Clause not to be subject to the Public Trust Doctrine. In the event such federal lands are conveyed back to State or private control, the trusteeship (*jus publicum*) for the public's trust rights in trust lands and waters should pass back from federal to State hands, even if the *jus privatum* ends up in private ownership. If these federal trust lands are conveyed into private ownership, they will once again be burdened by the Public Trust Doctrine.

Enclave Clause: The Federal Government acquires land through the Enclave Clause when a State willingly conveys by legislation to the Federal Government the

affirm its public trust rights and obligations without violating the property rights of the private owner.

Specifically, does a State's reaffirmation of the public's trust rights and its obligations as trustee give rise to a "taking" of private property for public use without just compensation? Private property owners may raise potential "takings" claims where a State, in affirmation of its role as trustee, either (1) imposes restrictions on privately held trust lands; (2) requires public access to trust lands across these privately owned lands, or (3) expands the scope of public activities encompassed by the Public Trust Doctrine.

1. The "Takings" Doctrine

The Fifth Amendment of the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation*. (Emphasis added.)

The Fifth Amendment applies to the several States through the Fourteenth Amendment, which provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth and Fourteenth Amendments were traditionally applied to physical takings of private property by government entities. However, beginning in the early 1900s, courts began to recognize takings claims where a government entity so severely restricted the use of private land that those restrictions had the practical effect of taking the property, hence the term "regulatory takings."

The United States Supreme Court laid the groundwork for the concept of a "regulatory taking" in 1922 in a challenge to Pennsylvania's Kohler Act, which prohibited coal companies from removing coal from beneath the surface in a way that would cause the land to subside.[20] The Supreme Court found the Kohler Act was an unconstitutional taking without just compensation because it made the mining of certain coal "commercially impracticable." In what has become a famous and oft-quoted holding, the Court stated "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes *too far* it will be

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THE PUBLIC TRUST DOCTRINE IN ALASKA

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I

Introduction

A. *The Public Trust Doctrine In A Nutshell*

The public trust is one part of our government's complex system of checks and balances. It is a strong tradition in American government which enables the judicial branch to restrain the legislative and executive branches from alienating certain "common property" public resources comprising the wealth of the state.

At its simplest level, the public trust doctrine revolves around the concept that government owes its citizens special duties of care, or stewardship, regarding certain natural resources which the state holds in trust for the public. At this most basic level, the public trust doctrine holds that government must act as a fiduciary in its management of the resources which constitute the corpus of the trust. The beneficiaries of the trust are the citizens of the state, including future generations.

For purposes of the public trust, state-owned property is conceptually divided into two categories: 1) property held by the state as a "proprietor," or *"jus privatum,"* and 2) property held by the state in its "soveriegn capacity, or *"jus publicum."*[1]

Resources which the state holds as a proprietor would include, for example, cars in the motor pool, office furniture, computer equipment, books, and the like. Such resources are not subject to the public trust. In contrast to proprietary resources, "common property" resources like fish, wildlife, waters, minerals, and land, are held by the state in its soveriegn capacity and subject to the public trust.

The import of this distinction is set forth in one leading case as follows:

> The title of both of these [classes of property], for the greater order, and perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose; it is the domain of the crown, a source of revenue; *so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation,*

[1] *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 993-94 (Wash. 1987), *cert. denied*, 484 U.S. 1008 (1988).

the enjoyment of it is a natural right which cannot be infringed or taken away . . . .[2]

The development of the public trust doctrine in the United States historically has been marked by consistent recognition of this elemental distinction between rights and duties of state governments vis-a-vis public trust resources, and the rights and duties of the state when it deals with non-trust resources.

A more modern case rephrases the historic formulation more prosaically, but with greater brevity: "Traditionally, the [public trust] doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with [public] trust purposes."[3]

The fundamental characteristic of lands and resources held by the state in trust is that states as trustees act "not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common."[4]

B. A Short History of the Public Trust Doctrine

The historical antecedents of the public trust doctrine reach back at least as far as Roman times.[5] In the sixth century A.D., the Emperor and jurist Justinian wrote that by "the law of nature, the air, running water, the sea, and consequently the shores of the sea" were "common to mankind."[6] This indefeasible public interest in certain natural resources remains the heart of the public trust doctrine as we prepare to enter the twenty-first century A.D.

In American jurisprudence, courts facing public trust issues look

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[2] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 361 (N.J.), *cert. denied*, 469 U.S. 821 (1984) (alteration in original) (citation omitted).

[3] District of Columbia v. Air Fla., 750 F.2d 1077, 1082 (D.C. Cir. 1984) (footnotes omitted).

[4] Organized Village of Kake v. Egan, 174 F. Supp. 500, 504 (D. Alaska 1959).

[5] A variety of fascinating academic surveys exist for the student seeking extensive historic treatment of the public trust doctrine. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); THE PUBLIC TRUST AND THE WATERS OF THE AMERICAN WEST: YESTERDAY, TODAY AND TOMORROW (Nov. 18-19, 1988) (Continuing Legal Education Program, Lewis & Clark Northwestern School of Law); MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 37 (1983).

[6] J. INST. 2.1.1.pr; *see also* 2 WILLIAM BLACKSTONE COMMENTARIES 403.

primarily to English law, including the Magna Carta, to explain the scope and impact of the public trust doctrine.[7]

Federal law in the United States has a long and continuing history of public trust jurisprudence. Nonetheless, the public trust doctrine in America is primarily a creature of state common law:

> There is no universal and uniform law on [the public trust doctrine] . . . each State applies the doctrine to the lands under the tide waters within its borders according to its own views of justice and policy. . . . Great caution, therefore, is necessary in applying the precedents in one State to cases arising in another.[8]

II

History of the Public Trust Doctrine in Alaska

A. *The Alaska State Constitution*

In Alaska, the evolution of the public trust doctrine is not as historically elaborate as in many other states. Because of Alaska's relatively recent admission to the Union (1959), it is not possible to describe adequately the purview of the doctrine in Alaska without some

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[7] *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842). *See generally* Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Okla., 441 U.S. 332 (1979).

Spanish law, and subsequently Mexican law, recognized the public trust doctrine. *See* City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 794 (Cal. 1982). Some commentators suggest that public trust rights guaranteed by the Treaty of Guadalupe Hidalgo serve as independent basis for the public trust doctrine in California. *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195, 197 (1980); Dion G. Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 Ecology L.Q. 571 (1972).

[8] Shively v. Bowlby, 152 U.S. 1, 26 (1894). *See also* Gilbert v. State, Dept. of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); McDowell v. State, 785 P.2d 1, 12-18 (Alaska 1989); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-496 (Alaska 1988); District of Columbia v. Air Fla., 750 F.2d 1077, 1082 (D.C. Cir. 1984); Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1003-05 (Alaska 1977); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962); City of Madison v. State, 83 N.W.2d 674 (Wis. 1957); State v. Longyear Holding Co., 29 N.W.2d 657 (Minn. 1947) (offering different examples of state interpretations of the public trust doctrine).

For a review of most Alaska statutes governing administration of natural resources in Alaska, see generally Alaska Bar Ass'n Symposium, Natural Resources and the Public Trust Doctrine (1986). This symposium antedates and therefore does not discuss the key Alaska cases of *CWC Fisheries*, 755 P.2d 1115, and *Owsichek*, 763 P.2d 488. Also, the 1986 ABA Symposium omitted discussion of Alaska's public trust umbrella statute, Alaska Stat. § 38.05.502 (1992).

reference to jurisprudence from neighboring jurisdictions. Nonetheless, Alaskan public trust law is already surprisingly well-developed.[9]

Even before statehood, Alaska recognized the force of the public trust doctrine. It is understandable that this would be true in a large, undeveloped territory facing the imminent prospect of statehood and the attendant responsibilities of managing and developing immense natural resource wealth.

To protect the patrimony of Alaska against intemperate disposal, Alaskans adopted a state constitution with exceptional provisions regarding natural resources.[10] In those constitutional provisions, one finds the genesis of the public trust doctrine in Alaska law.

The Alaska Constitution, adopted by the Alaska Constitutional Convention on February 5, 1956, and ratified by the people of Alaska on April 24, 1956, is the primary source of the public trust doctrine in Alaska.[11]

The framers of the Alaska Constitution were conversant with the nature and obligations of the public trust doctrine.[12] Although the framers did not elect to explicitly incorporate the public trust doctrine into the Alaska Constitution,[13] they intended the "common use" clause of Article VIII, Section 3, to implicitly adopt the public trust doctrine.[14] The "common use" clause provides: "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use."[15]

Since statehood, a host of decisions by the Alaska Supreme Court have recognized the force of the public trust doctrine in Alaska and have consistently expanded the scope of the public trust.[16] These decisions of the Alaska Supreme Court have established beyond debate

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[9] *See infra* note 16 and accompanying text.

[10] *See* ALASKA CONST. art. VIII.

[11] The Alaska Constitution did not become operative until statehood was formally proclaimed on January 3, 1959.

[12] *See* COMMITTEE PROPOSAL No. 8, 6 ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS 75-103 (1955) [hereinafter CONVENTION PROCEEDINGS].

[13] The Alaska Constitution, art. VIII, § 6, as originally proposed, would have placed all state lands "in trust." *Id.* at 78.

[14] Often what is implied is as much a part of the Alaska Constitution as what is expressed. *See* Wade v. Nolan, 414 P.2d 689 (Alaska 1966).

[15] ALASKA CONST., art VIII, § 3.

[16] *See e.g.*, Hayes v. A.J. Assocs., Inc., 846 P.2d 131 (Alaska 1993); Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); McDowell v. State, 785 P.2d 1, 18 (Alaska 1989); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-96 (Alaska 1988); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117-21 (Alaska 1988); Herscher v. State, Dept. of State, 568 P.2d 996, 1003, 1005 (Alaska 1977); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

that the public trust doctrine is implicit in the "common use" clause.[17] In *Owsichek v. State,* the Alaska Supreme Court stated:

> We begin by examining the constitutional history to determine the framers' intent in enacting the common use clause. This was a unique provision, not modeled on any other state constitution. Its purpose was antimonopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.[18]

The court also noted that "title [to fish and wildlife] is reserved to the people, or the state *on behalf of the people,*"[19] and:

> [T]he power or control lodged in the state . . . is to be exercised like all other powers of government *as a trust for the benefit of the people*, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.[20]

The *Owsichek* Court held that "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people."[21] Finally, the court concluded:

> In light of this historical review (e.g., Geer v. Connecticut, 161 U.S. 519, 529 (1896), and Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892)), we conclude that the common use clause was intended to engraft on our constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state.[22]

To recapitulate, since the earliest days of statehood, the Alaska Supreme Court has recognized the constitutional stature of the public trust doctrine in Alaska and its integral role in Alaskan law in the preservation of our natural resources.[23]

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[17] *See, e.g., CWC Fisheries*, 755 P.2d at 1119; *McDowell*, 785 P.2d at 15.

[18] *Owsichek*, 763 P.2d at 493 (quoting 4 CONVENTION PROCEEDINGS, *supra* note 12, at 2492) (footnote omitted).

[19] *Id.* (quoting 4 CONVENTION PROCEEDINGS, *supra* note 12, Folder 210) (emphasis added).

[20] *Id.* at 494 (quoting Geer v. Connecticut, 161 U.S. 519, 529 (1896)).

[21] *Id.* at 495 (footnote omitted).

[22] *Id.* at 496.

[23] *See* Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

B. *The Alaska Statutes*

In Alaska, the Lieutenant Governor must present the electorate with explanatory material to accompany intiatives that qualify for state-wide ballots. Perhaps in recognition of its status as the cynosure of Alaskan resource law, the public trust doctrine in Alaska has been explicitly recognized by our state's electorate. Through the citizen initiative process of the Alaska Constitution,[24] the voters of Alaska in 1983 proposed and adopted an initiative containing an express statutory statement of the public trust doctrine: "[A]ll land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state."[25]

This extraordinary initiative — reiterating the most fundamental tenet of law regarding management of the main source of Alaska's current and future wealth — has not yet been the basis for a reported decision by the Alaska Supreme Court. As this statute springs directly from the citizens, virtually no legislative history exists to help interpret it, either. Lacking judicial gloss as well as a reliable indication of the animus behind the trust portion of the 1983 Intiative, popularly known as the "Sagebrush Initiative," one must rely on other tools of statutory interpretation to explicate the statute. Interpretation will call for judicial recourse to the rule of law that is most advisable in light of reason and public policy.

As a matter of statutory interpretation, courts should not assume that Alaska Statute section 38.05.502 is a mere redundancy.[26] Section 38.05.502 must be seen as expanding the purview of the public trust doctrine beyond that which is contained in the Alaska Constitution and as strengthening the affirmative obligations of stewardship imposed upon the state as trustee.

Section 38.05.502 enlarges the scope and purposes of the public trust in Alaska by clearly applying the doctrine to minerals and all publicly owned land, regardless of the land's relationship to the ebb and flow of the tides. Although it did not cite section 38.05.502 specifically, Alaska's Supreme Court recently signalled a substantial expansion of the public trust doctrine as it applies to tidelands.[27]

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[24] ALASKA CONST. art. XI, §§ 1-4.

[25] 1983 Initiative Proposal No. 5, § 1, codified at ALASKA STAT. § 38.05.502 (1992). The public trust doctrine, however, was certainly not the focus of the 1983 initiative. Most of the public debate regarding the initiative dealt with tension between the land management roles of the federal government and the State of Alaska in keeping with the general tenor of the "Sagebrush Rebellion."

[26] Alaska Transp. Comm'n v. AIRPAC, Inc., 685 P.2d 1248, 1253 (Alaska 1984).

[27] *See* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).

The usual rule applied by the Alaska Supreme Court is to construe initiatives broadly.[28] A broad judicial construction of section 38.05.502 would result in the conclusion that the statutory component of Alaska's public trust doctrine protects all state-owned land in Alaska, including the fish, wildlife, timber, and water resources found on the land, and all state-owned minerals not appropriated prior to adoption of the 1983 initiative.

Although ambiguity is in the eyes of the beholder, it may be useful to speculate how the Alaska Supreme Court would interpret the statute. When a statute is unambiguous, legislative history generally is not used to determine the statute's meaning.[29] The language of section 38.05.502 appears unambiguous as to the fact that one purpose of this initiative was to state unequivocally that all state-owned land in Alaska and all unappropriated minerals[30] are held in trust for the people of the state.

There is at least a latent ambiguity in the statute insofar as the meaning intended to be given to the term "land." That ambiguity disappears, however, when section 38.05.502 is construed in conjunction with Alaska's pre-existing statutory definition of "land" or "state land."[31] The term "land" has been given an extremely broad definition in Alaska: "'state land' or 'land' means all land, including shore, tide and submerged land, *or resources* belonging to or acquired by the state."[32] The 1983 Initiative's application of the public trust doctrine

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[28] City of Fairbanks v. Fairbanks Convention & Visitors Bureau, 818 P.2d 1153, 1154 (Alaska 1991); Thomas v. Bailey, 595 P.2d 1, 3 (Alaska 1979).

[29] State v. City of Haines, 627 P.2d 1047, 1049 n.6 (Alaska 1981); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

[30] Under Alaska law, the mineral estate is the dominant estate and carries with it the right to make such use of the surface estate as is reasonably necessary to remove the minerals. Norken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991).

Nonetheless, the "rights of the mineral estate 'are to be exercised with due regard for the rights of the owner of the servient estate.'" *Id.* at 628 (quoting Getty Oil Co. v. Jones, 470 S.W. 2d 618, 621 (Tex. 1971)); *see generally* Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly so Providing, the Right to Remove the Minerals by Surface Mining,* 70 A.L.R. 3rd 383 (1976).

Where mineral extraction would be wholly incompatible with public trust uses of the land, a strong argument could be made that the mineral extraction is forbidden. Under Alaska law, gravel is not a mineral. Norken Corp. v. McGahan, 823 P.2d at 628. Gravel is the essence of the surface estate, and its extraction can render land unsuited for public recreation or wildlife or fisheries habitat. Courts are virtually unanimous in holding that gravel is not a "mineral" in the legal sense of that word. *See, e.g.,* Anchorage Sand & Gravel Co. v. Schubert, 114 F. Supp. 436, 437-38 (D. Alaska 1953); Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001, 1003-04 (Wyo. 1988).

[31] *See* ALASKA STAT. § 38.05.965 (1992).

[32] *Id.* (emphasis added); *see also* Op. Alaska Att'y Gen. 166-136-85, at 6-7 (1985).

to all "land" therefore should be interpreted logically to mean that the public trust doctrine extends beyond tidewater and includes state-owned uplands *and* resources found thereon, such as fish, wildlife, timber, and water.

Although the precise contours of the public trust doctrine itself are not subject to "bright line" delineation, there is no ambiguity at the bedrock level: the public trust in Alaska is meant to apply to *all* state land and all unappropriated minerals. Thus, in interpreting and applying section 38.05.502, the only interpretive tasks arguably presented for a court to determine are the extent of the state's fiduciary obligations under the public trust and the extent of the resources included within the ambit of the term "land."[33]

To summarize, the public trust doctrine in Alaska, including government's fiduciary role in management of trust resources, is one of the hallowed principles of Alaskan law. This tradition has been vigorously and repeatedly upheld in Alaska by our constitutional framers, by the Alaska Supreme Court, and by the electorate at large.

The Alaska legislature has plenary authority over state-owned natural resources, including lands conveyed to the state under the terms of the express, statutory, or university trusts.[34] The authority of the legislature is not so great, however, as to enable it to ignore or violate its legal responsibilities as fiduciary for the public trust.

The public trust also imposes an affirmative duty on the executive branch of state government. State agencies must thoroughly consider the public trust ramifications of their actions, especially where disposal of state land, forest resources, water, or unappropriated minerals are concerned. Any disposal of trust resources must be strictly construed

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[33] *See* Moore v. State, 553 P.2d 8, 25 (Alaska 1976) (quoting ALASKA STAT. § 38.05.365 (16), renumbered as § 38.05.965 (19)).

Assuming that the word "resources" is not a mere redundancy, the conclusion seems reasonable that land-tied resources, such as timber, come within the ambit of the definition of "lands."

Title 38 of the Alaska Statutes contains an additional definition of "state lands" that reinforces the very broad sweep of the term. Alaska Statute § 38.50.170 defines "state land" as: "including shore, tide, and submerged land or unsevered resources belonging to or acquired by the state excluding interests in land severed or constructively severed from the land."

Thus, a court should logically give an expansive definition to the term "land" as used in section 38.05.502, so that it includes, *inter alia*, state-owned uplands, fish and wildlife habitat, waters, recreation, scientific, educational, scenic, and aesthetic values. The Alaska Supreme Court recently reinforced this premise in *Hayes v. A.J. Assocs., Inc.*, 846 P.2d 131 (Alaska 1993).

[34] *See* ch. 181, 38 Stat. 1214; ch. 181, 45 Stat. 1091 (1959).

pursuant to the obligatory nature of the trust.[35] State agencies must clearly communicate to the Alaskan public the potential impacts of actions that may harm those resources. State agencies should also observe standards of prudent self restraint where disposal or exchange of state resources is at issue, in order to assure protection of public trust resources.

All three branches of government have public truct responsibilities. Therefore, the Alaskan courts should sedulously protect the values embodied in the trust. It also means the courts should broadly construe the purposes of the public trust, since a narrow construction would risk the loss, through alienation of the *jus publicum,* of the inherently public resources that constitute the corpus of the trust.

III

THE PURPOSE AND SCOPE OF THE PUBLIC TRUST DOCTRINE

A. *The Public Trust Doctrine in the United States*

As defined in the various state courts of the United States, the objectives of the public trust have evolved in concert with changing public perceptions of the values and uses of the trust resources that are managed by state government.

In the context of state-owned lands, the public trust doctrine has most frequently been applied to tidelands.[36] During the nineteenth century, the purposes of the tidelands trust were traditionally defined in terms of navigation, commerce, and access for commercial fisheries.

Yet the public trust doctrine has never been so constricted. The public trust doctrine was never the exclusive creature of littoral states, and the purposes of the public trust have never been limited to the triad of commerce, navigation, and fishing.[37]

As society and its needs have evolved, the scope and purposes of the public trust doctrine have also evolved and expanded. This evolution should be expected to continue:

> There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the

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[35] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 394-98 (1892).

[36] *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842); Shively v. Bowlby, 152 U.S. 1 (1894); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988).

[37] As discussed, Alaska's public trust doctrine does not lose its force at the mean high tide line; the scope of the doctrine stretches far beyond the capacious mud flats of Bristol Bay or Cook Inlet.

tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[38]

What has been the result of this doctrinal evolution? The purposes of the public trust doctrine in the United States have been held to include at least:[39]

— protection of navigational and commercial fishing rights over tidelands;[40]
— recreational fishing, boating, swimming, water skiing, and other related purposes;[41]
— protection of the public's right to hunt;[42]
— protection of fish and wildlife habitat;[43]
— recreational access to the ocean;[44]
— sunbathing, swimming, other shore activities, and access to and use of shorelands and upland dry sand beaches;[45]
— enjoyment of scenic beauty;[46]

[38] Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993) (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)).

[39] This list does not purport to be complete. The public trust doctrine almost certainly has been held to protect additional resources and uses thereof; the author does not pretend to have exhausted all avenues of research. In addition, the doctrine is likely to be expanded as years go by and public habits and needs change. Nonetheless, this list should provide the reader with an appreciation of the current status of the public trust doctrine as expressed in different states.

[40] *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842).

[41] *See, e.g.*, Wilbour v. Gallagher, 462 P.2d 232 (Wa 1969), *cert. denied*, 400 U.S. 878 (1970); *See also* Act of June 3, 1985, ch. 82, § 1(.., 1985 Alaska Temporary & Special Acts 30.

[42] *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); Opinion of Justices to Senate, 424 N.E.2d 1092 (Mass. 1981); Delmarva Power & Light Co. v. Eberhard 230 A.2d 644 (Md. 1967); Hartford v. Gilmanton, 146 A.2d 851 (N.H. 1958); Swan Island Club Inc. v. White, 114 F. Supp. 95 (E.D.N.C. 1953), *aff'd sub nom.* Swan Island Club, Inc. v. Yarborough, 209 F.2d 698 (4th Cir. 1954).

[43] *See, e.g.*, Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983); People of Smithtown v. Poveromo, 336 N.Y.S.2d 764 (N.Y. Dist. Ct. 1972), *rev'd on other grounds*, 359 N.Y.S.2d (N.Y. 1973); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

[44] *See, e.g.*, County of Haw. v. Sotomura, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974).

[45] *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

[46] *See, e.g.*, City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957); Obrecht v. Nat'l Gypsum Co., 105 N.W.2d. 143, 149-51 (Mich. 1960).

- conservation of fishery resources;[47]
- conservation of wildlife resources;[48]
- waters and minerals;[49] and
- existing and future recreational uses.[50]

B. Alaska Law and the Public Trust

1. Purposes of the Public Trust in Alaska

Like most common law doctrines, the public trust doctrine in Alaska is flexible.[51] As certain natural resources have become progressively more scarce, the purposes for which the public trust has been judicially invoked in Alaska have expanded. In 1985, the Alaska Legislature recognized the necessity of endowing the public trust doctrine with sufficient flexibility to accommodate future uses in the context of recreational aspects of the public trust.[52]

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[47] *See, e.g.*, Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); McDowell v. State, 785 P.2d 1, 12-18 (Alaska 1989); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-96 (Alaska 1988); Nathanson v. State, 554 P.2d 456, 458 n.9 (Alaska 1976); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

[48] *See, e.g.*, Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1005 (Alaska 1977); *Owsichek*, 763 P.2d at 492-96; *McDowell*, 785 P.2d at 12-18; *Gilbert*, 803 P.2d at 398-99; *Matthews*, 471 A.2d at 361.

[49] *See, e.g, Herscher*, 568 P.2d at 1003.

[50] *See* 1985 Alaska Sess. Laws 82 § 1(c). In *Matthews*, the New Jersey Supreme Court found a public trust right of access to all municipally-owned beaches above and below the high tide line. 471 A.2d at 364. The court wrote: "Beaches are a unique resource and are irreplaceable." *Id.* The remaining unlogged, old-growth rainforests of Southeast Alaska are no less unique a resource than the sandy beaches of New Jersey. Given the fact that once an Alaskan old-growth forest is logged, it takes 300 to 500 years to regenerate old-growth conditions, the boreal rain forests of Alaska are clearly "irreplaceable" subsistence and recreational resources.

[51] The Alaska Constitution, which is the source of the public trust doctrine in Alaska, is adaptable to changing circumstances. Waarwick v. State, 548 P.2d 384, 391 (Alaska 1976). Thus, Alaska's courts would be likely to agree with this statement: "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" *Matthews*, 471 A.2d at 365 (quoting Neptune City v. Avon-by-the Sea, 294 A.2d 47, 54 (N.J. 1972)).

[52] *See* 1985 Alaska Sess. Laws 82 § 1(c). Although it is unwise to attempt to create a single statement of the purposes of the public trust doctrine, the need to exercise wise stewardship over Alaska's natural resource patrimony commands, at a minimum, that attention be paid to the public trust purposes enunciated by the California Supreme Court, sitting *en banc*, in *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 719 (Cal. 1983) "The principle values plaintiffs seek to protect . . . are recreational and ecological . . . . [I]t is clear that protection of these values is among the purposes of the public trust." *Id.* This same concept was recently embraced by the Alaska Supreme Court. *See* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133-34 (Alaska 1993).

It is to be expected that Alaskan courts will continue to recognize that new uses of public trust resources deserve the legal guaranty of the public trust.

Since the trust is only implicit in the "common use" clause of the Alaska Constitution,[53] how can the purposes of the public trust under Alaska law be discerned? In interpreting Article VIII (the Natural Resources Article) of the Alaska Constitution, the Alaska Supreme Court has recognized the value of the three-volume series on constitutional studies prepared by the Public Administration Service on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention.[54] It is useful to refer to this document to discern the purposes of the public trust doctrine as it exists at the state constitutional level in Alaska.[55] The Alaska Supreme Court wrote of the document: "We can envision no more cogent expression of the intent of the drafters and of those voting for ratification of the Constitution."[56]

On a constitutional level, the public trust doctrine in Alaska was intended by the framers to function as a safeguard against inappropriate sales or disposals of public resources.[57] Thus, the portion of the Report cited below has particular poignancy when it is read in the context of Alaska's recurring proposals to dispose of and develop old-growth forest lands at the expense of fish and wildlife which depend on the forest.[58]

The Alaska Constitutional Convention wrote in its Report: "At no point is the need for thoughtful judgment more necessary than in establishing the basic policy for the management *and disposal* of the tremendous resources which have been given him (the Alaskan citizen) as his patrimony."[59] The Report continued:

> In the first flush of statehood, the average Alaskan will react, and very justifiably so, against the unnecessary restrictions which have

[53] ALASKA CONST. art. VIII, § 3.

[54] *See* State v. Lewis, 559 P.2d 630, 637-38 (Alaska 1977), *cert denied*, 432 U.S. 901 (1977) (citing A REPORT TO THE PEOPLE OF ALASKA FROM THE ALASKA CONSTITUTIONAL CONVENTION (1955) [hereinafter CONST. REPORT]).

[55] *The State and its Patrimony*, I CONST. REPORT, *supra* note 54, § III, at 54.

[56] *Lewis*, 559 P.2d at 638.

[57] Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 493-95 (Alaska 1988).

[58] The following words were directed at private individuals who own forests, but they are just as appropriately applied to the State of Alaska as trustee of the public's forest wealth: "It is a scurvy trick of Fortune when she gives large wealth to a man with no feeling for trees." REV. HUDSON STUCK, TEN THOUSAND MILES WITH A DOG SLED 154 (Wolfe Pub. Co. 1988) (1914) (Stuck was Archdeacon of the Yukon and made the first ascent of Denali).

[59] *The State and its Patrimony*, I CONST. REPORT, *supra* note 54, § III, at 54 (emphasis added).

bound him for so many years. He will not take kindly to the substitution of state red tape for federal red tape, nor should he. But the Alaskan will, as he thinks over his situation, be aware that any state control over resources which his judgment tells him is necessary is *his* control, ordained by him through the political process and subject to control and change through the same media.

Psychologically, the emphasis in the first days of statehood, so far as land and resources policy is concerned, will be in the direction of disposing of the patrimony as rapidly as possible, to get it into private hands so that immediate, and long-delayed, development may commence at once. Yet precipitate action could easily result in a situation which the people would have cause to regret in a few years.

This will be the critical point in Alaskan development, not alone for resources policy but for the entire future of the State of Alaska. The stakes are huge, and they will attract persons and corporations interested in them. Some of the ventures will be legitimate, some speculative, and some insidious. If the drive is for slam-bang disposal, without discrimination in the choice of terms of sale or lease, the interests of *all* the people of Alaska will suffer. If disposition of the land and its resources is made at ridiculously low prices, the parable of Jacob, Esau, and the bowl of pottage will be repeated; Alaska's patrimony will have been dissipated for the small-benefit of exploitation, or the non-benefit of fraud.

Lord Acton in a rather indelicate but expressive and oft-quoted statement pointed out that "Where the body is, there will the vultures be gathered." The expression is aptly applied, in part, to the Alaskan resources picture. Fortunately, an alert and enlightened citizenry can serve as a counterbalance; fortunately, too, not all developmental interests operate solely on the exploitational level, but sincerely seek to benefit permanently the society of which they are a part as well as to take the profits which are a basic and recognized part of the American system.

No constitutional provisions can be devised which will present a perfect and complete barrier to the determined commission of land and resources fraud or to "giving away" the resources of the people to interests for the purpose of exploitation rather than orderly development. But provisions can be devised which will make it easier for the public officials of the state to carry their

burdens. If there are constitutional provisions to which they can point when some lobby urges them to take action which they know full well is not to the ultimate benefit of the people, the strain of maintaining moral as well as strictly legal honesty is less.[60]

The foregoing quotation is an important part of the context out of which the "common use" clause, and Alaska's public trust doctrine, arose. It demonstrates that Alaska's public trust doctrine was intended to function as a safeguard against ill-advised sales or disposals of public resources.[61] It also implicitly recognizes the need for close judicial scrutiny of attempted alienation of public resources in order to protect long-term public interests.[62] Courts should look with considerable skepticism on any state conduct calculated to transfer public resources to private hands.[63]

The constitutional history of the "common use" clause of Article VIII, section 3, is by no means the only source to which one can turn to discern the broad contours of the public trust doctrine in Alaska. Much useful case law and judicial gloss also exist. In explication of the clause, the Alaska Supreme Court has favored a broad interpretation of the scope of protection afforded by the public trust doctrine in Alaska, stating that "the common use clause was intended to guarantee broad public access to *natural resources*," not merely to wildlife.[64]

The pivotal importance of guaranteeing the right of public access

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[60] *Id.* at 54-56.

[61] Considering timber sales such as Icy Cape, or the Alaska Department of Natural Resources' plan to trade old-growth forest at Leask Lakes for the stumps at White River, one might argue that, psychologically, Alaska is still in the risky, pro-disposal, stage which the Alaska Constitutional Convention referred to as "the first flush of statehood." *Id.* at 54.

[62] The duties of the public trust require courts to exercise a high level of scrutiny over the actions of the *cestui que trust*. Metlakatla Indian Community, Annette Island Reservation v. Egan, 362 P.2d 901, 908 (Alaska 1961). The proposed Leask Lakes exchange (Alaska Div. of Lands (ADL) No. 12,535) demands close judicial scrutiny to prevent permanent loss of important public resources. *See* Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1091 (Idaho 1983) (cited with approval in CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988)).

[63] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

[64] Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 493 (Alaska 1988) (emphasis added); *accord* Herscher v. State, 568 P.2d 996, 1003 (Alaska 1977); Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133-36 (Alaska 1993).

> [T]he article VIII provisions were designed to ensure to the public the broadest possible access to wildlife.... [T]he 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.... [A] minimum requirement of this duty is a prohibition against any . . . special privileges.

to natural resources, and to navigable or public waters in particular, was recognized by the Alaska Legislature in 1985:

> Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the State to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public interest.[65]

One key purpose of the public trust doctrine in Alaska, then, is to serve as a safeguard against inappropriate sales, exchanges, or other disposals of public lands, natural resources, or other public trust resources. In particular, permanent impairment of public access to natural resources is forbidden by the public trust.[66]

As trustee, the state stands in a fiduciary relationship to all Alaskans. As a fiduciary, the state must zealously protect the corpus of the public trust from needless attrition. As a fiduciary, the state must also ensure that the options for future generations to use and manage trust resources are not unnecessarily diminished.[67]

What is a fiduciary relationship? The general law of trusts answers that question:

> [It is o]ne founded on trust or confidence reposed by one person in the integrity and fidelity of another. Such relationship arises whenever confidence is reposed on one side, and domination and influence result on the other. . . . Out of such a relation, the law raises the rule that neither party may exert influence or pressure

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McDowell v. State, 785 P.2d 1, 6 (Alaska 1989) (citations omitted). The public trust's prohibition against "special privileges" is especially important in Alaska at this point in history due to the ongoing allocation battles between subsistence users, commercial users, recreational users, and non-consumptive users.

[65] 1985 Alaska Sess. Laws 82 § 1(c).

[66] "[A] state has constitutional power to insist that its natural advantages shall remain unimpaired . . . ." Obrecht v. National Gypsum Co 105 N.W.2d 143, 150 (Mich. 1960).

In *Owsichek*, the Alaska Supreme Court, in dictum, stated that leases and exclusive concessions on state land do not violate the public trust. The Court premised its dictum on the principle that leases and concessions are of finite duration and subject to competitive bidding. 763 P.2d at 496-97. In contrast to *Owsichek*, exchanges of state land bear *neither* of those indicia. Therefore, the constitutionality of Alaska's state land exchange program, ALASKA STAT. § 38.50 (1992), may very well violate the public trust.

[67] Southeast Alaska Conservation Council, Inc.v. State, 665 P.2d 544, 557 (Alaska 1983) (Rabinowitz, J., dissenting).

upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other . . . .[68]

Impairment of the corpus of the public trust would be a violation of the most fundamental of the state's fiduciary duties. Any disposal of state-owned natural resources must be closely scrutinized by courts to ensure that short-term, "small-benefit" resource exploitation is not the net result.[69] If the alienation of state resources results in a significant diminution of the public's patrimony, the state has failed to fulfill its fiduciary duties as trustee.

This is not to imply that every violation of the public trust will be judicially enjoined. Courts will always apply traditional equitable principles to weigh the advisability of judicial invalidation of the legislative or executive act at issue. Constitutional provisions, including the public trust, are "given a reasonable and practical interpretation in accordance with common sense."[70]

Although the public trust doctrine in Alaska has strong constitutional underpinnings, the potential for tension exists within the Alaska Constitution between the public trust provisions and other provisions of Article VIII. This is particularly true with regard to provisions for minerals in Alaska's statutes[71] and Constitution.[72] The different provisions of Article VIII should be interpreted in a manner that makes

[68] BLACK'S LAW DICTIONARY 626 (6th ed. 1990).

[69] I CONST. REPORT, *supra* note 54, § III, at 54-56.

> Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. . . . [T]his court will take a "close look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action. In making such a determination the court will examine, among other things, such factors as the degree of effect of the project on public trust uses . . . ; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092-93 (Idaho 1983). *See also* Stone Creek Channel Improvements v. N.D. Wildlife Soc'y, 424 N.W.2d 894, 902-03 (N.D. 1988).

[70] Kochutin v. State, 739 P.2d 170, 171 (Alaska 1987) (citing Warren v. Thomas, 568 P.2d 400, 401 (Alaska 1977)).

[71] ALASKA STAT. § 38.05.502 (1992).

[72] ALASKA CONST. art. VIII, §§ 11, 12.

them consistent with one another.[73] Nonetheless, the following sections of Article VIII might be viewed as having the potential to conflict with the public trust obligations of the "common use" clause of Article VIII, section 3:

> SECTION 8. *Leases.* The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

> SECTION 9. *Sales and Grants.* Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

> SECTION 10. *Public Notice.* No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

> SECTION 11. *Mineral Rights.* Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these materials and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface use of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress.

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[73] Abrams v. State, 534 P.2d 91, 95 (Alaska 1975).

> The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.
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> SECTION 12. *Mineral Leases and Permits*. The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.
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> SECTION 13. *Water Rights*. All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.[74]

These provisions indicate that the framers of Alaska's Constitution clearly anticipated that state-owned land could legitimately be conveyed out of the public domain by lease, sale, or grant, and that development of state resources was high on the list of reasons for statehood. Yet, at the same time, the framers provided that conveyances by lease must be "subject to reasonable concurrent uses."[75]

> The framers of [Alaska's] constitution were united in the view that the lands and other natural resources of this abundant state are among its most prized assets. Although favoring productive use of these resources, the framers believed that development should proceed only when it benefitted the people of the state and only in compliance with applicable constitutional and statutory processes.[76]

In leasing land pursuant to Article VIII, section 8, the State of Alaska must ensure that this will not prevent public use of those lands for

[74] Alaska Const. art. VIII, §§ 8-13.

[75] *Id.* § 8.

[76] Moore v. State, 553 P.2d 8, 30 (Alaska 1976) (Rabinowitz, J., dissenting).

purposes of navigation, fishing, and hunting, by retaining easements for those public uses. It is unclear to what extent the framers intended public trust uses to be subsumed within section 8's "reasonable concurrent uses" provision, but there is certainly no inherent conflict between the power to lease and the duty to safeguard trust resources.

The framers also clearly authorized the legislature to sell or grant state land, pursuant to section 9.[77] Yet, that power is limited. All conveyances by sale or grant "shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources."[78] On its surface, this provision appears to accommodate the public trust doctrine rather than to diminish it.

Section 10 provides for procedural protections against rash disposals or leases of state lands and interests in land.[79] The state must give prior public notice, and the legislature is expressly authorized to require "other safeguards of the public interest."[80] The purpose of this mandate is "to safeguard the public's interest in the disposition of state natural resources."[81] The constitutional history of section 10 does not explicitly tie it to the "common use" clause of section 3. The only explicit purpose of the public notice provisions was to ensure that the new state would receive top dollar for its land, timber, mineral, water, and other resources if they were sold.[82]

The constitutional requirement of prior public notice could, however, easily complement the goals of the public trust if it is used to protect the public's beneficial interest in state lands and resources. To comply with the state's fiduciary responsibilities, the public notices given under section 10 should include, among other things, discussions of the degree of effect of the project on public trust uses; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, e.g., commerce, navigation, fisheries, wildlife, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.[83]

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[77] ALASKA CONST. art. VIII, § 9.
[78] *Id.*
[79] *Id.*, § 10.
[80] *Id.*
[81] *Moore*, 553 P.2d at 25.
[82] CONVENTION PROCEEDINGS, *supra* note 12, at 2469-70.
[83] Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1092 (Idaho 1983).

Meaningful public participation in the land disposal or exchange process is thwarted where citizens lack key factual information.[84] The state's failure to provide the information outlined in the preceding paragraph could be interpreted as a violation of the Alaska Constitution.

Water rights in Alaska's Constitution are shaped around the western states' common principle of prior appropriation.[85] Yet section 13 expressly subordinates private appropriation of water to "the general reservation of fish and wildlife."[86] There seems to be no reasonable debate as to whether this provision was intended to augment the power of the public trust doctrine or diminish it: it reinforces the public trust doctrine.

In conclusion, it seems fair to say that although there is a potential for conflict between the public trust responsibilities imposed by the "common use" clause of Article VIII, section 3, and several of the other provisions of that Article, it is also possible to interpret the different clauses of Article VIII synergistically and to harmonize those sections so that they complement one another.

2. The Scope of the Public Trust in Alaska: What Resources and Uses Are Protected?

The public trust was confined to tidelands and tidewaters in the original thirteen states during the early days of our Republic. Today, it is well settled in the United States generally that "the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams."[87]

In Alaska, the scope of the resources covered by the umbrella of the public trust doctrine is far broader than in most other states; it is *not* limited to tidelands and submerged lands. As befits their prerogative,[88] the people of Alaska have broadly defined Alaska's trust resources to

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[84] Alaska Survival v. State, Dept. Natural Resources, 723 P.2d 1281, 1291 (Alaska 1986).

[85] ALASKA CONST. art. VIII, § 13.

[86] *Id.*

[87] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719-720 (Cal. 1983) (citations omitted).

[88] The rights of the public in trust resources is a question of property law, and it is the general principle that "the law of real property is, under our Constitution, left to the individual States to develop and administer." Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). Thus, states "have the authority to define the limits of the lands held in public trust and to recognize such private rights in such lands as they see fit." Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) (citations omitted).

include all state land and all unappropriated minerals.[89] Perhaps the Alaskan electorate's decision to extend the protection of the public trust doctrine in Alaska to all state land is due to the fact that Alaska is radically different from most other states in the Union in the extent of the natural resource wealth that is held by the state as sovereign.

In any event, in Alaska the resources protected by the public trust include, at a minimum:

✓ a) Wildlife and fish (*ferae naturae*), plus the habitat that supports those resources, and navigable and non-navigable waters, wherever occurring in the natural state;[90]

✓ b) *All* state-owned land — including both tidelands and uplands — and all minerals not previously appropriated;[91]

✓ c) Recreational uses of navigable or public waters or any other public purpose for which the water is used or is capable of being used consistent with the public trust, e.g., wildlife habitat, fishery habitat, scientific or educational value, or scenic beauty.[92]

In all likelihood, the aegis of the public trust doctrine in Alaska extends beyond the foregoing list of resources. The resources cited above are only the bare minimum corpus of the *jus publicum* in Alaska, and the Alaska Supreme Court may eventually interpret the Alaska Constitution and statutes as providing protection for additional resources.

Other state supreme courts have extended the scope of the public trust doctrine to include protection for activities considered by those courts necessary and proper to the use and enjoyment of trust resources which have yet to be considered by the Alaska Supreme Court. Those

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[89] *See* ALASKA STAT. § 38.05.502 (1992).

[90] ALASKA CONST. art. VIII, § 3; Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 13 -33 (Alaska 1993); Gilbert v. State, Dept. Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-96 (Alaska 1988); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

[91] ALASKA STAT. § 38.05.502; CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1119 (Alaska 1988); Op. Alaska Att'y Gen., No. 566-230-85, at 7 (Apr. 25, 1985). The Alaska Supreme Court, referring to ALASKA CONST., art. VIII, § 10, has noted several times the high value the framers of the Alaska Constitution placed on the state's land resources. *See* Alaska Survival v. State, Dept. Natural Resources, 723 P.2d 1281, 1289 (Alaska 1986); North Slope Borough v. Leresche, 581 P.2d 1112, 1114 (Alaska 1978); Moore v. State, 553 P.2d 8, 30-32 (Alaska 1976); McCarrey v. Comm'r of Natural Resources, 526 P.2d 1353, 1357 (Alaska 1974); Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1011 (Alaska 1967).

[92] 1985 Alaska Sess. Laws 82, § 1(c). *Hayes*, 846 P.2d at 133 n.6.

state supreme courts have found public trust protection for such resources and uses as sunbathing,[93] and dry sand beach use and access.[94]

3. Duties of the State as Trustee for the Use and Benefit of the Public

a. General Principles of Trust Law Define State Obligations as Trustee

Courts historically have exercised equitable jurisdiction over trusts.[95] Within this historic context, courts will decree the scope and extent of equitable rights and duties appurtenant to the public trust doctrine. Courts may also define the nature of the state's fiduciary duties, and may create any remedy that furthers the cause of justice.[96] As with other aspects of the public trust doctrine, each state, including Alaska, is free to develop its own unique body of law regarding the obligations of the state as trustee.[97]

Alaska's Supreme Court, however, has yet to articulate the standard of care owed by the state as trustee in the context of the public trust doctrine. Fundamental questions have not yet been decided in Alaska, such as whether and how the state's fiduciary duties as trustee overseeing public resources differ from those of an ordinary trustee who oversees private resources.[98] "The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined."[99]

Decisions from other jurisdictions may help define the obligations of the state as trustee of the public trust in Alaska. In *Slocum v. Borough of Belmar,*[100] a New Jersey court considered a municipality's delegated duties as trustee over its beach area, and held that in the absence of a trust document specifying the duties of a trustee, "[a] public trustee is endowed with the same duties and obligations as an

[93] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J.), *cert. denied,* 469 U.S. 821 (1984).

[94] State *ex rel.* Thorton v. Hay, 462 P.2d 671 (Or. 1969).

[95] *See* Clews v. Jamieson, 182 U.S. 461, 479 (1901).

[96] Alaska State Employees Ass'n v. Alaska Public Employees Ass'n, 825 P.2d 451, 455 (Alaska 1991).

[97] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988).

[98] The law of private trusts has, however, been applied in Alaska to funds derived from lands held by the state in trust for schools and university lands. *See* State v. University of Alaska, 624 P.2d 807, 813 n.6 (Alaska 1981). The Alaska Supreme Court also has applied the general law of private trusts to federally-designated trust lands in Alaska. *See* State v. Weiss, 706 P.2d 681, 683 (Alaska 1985).

[99] Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 495 (Alaska 1988).

[100] 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989).

ordinary trustee."[101]

Also helpful is the large body of common law on the traditional, equitable role of the judicial branch in supervising a fiduciary's performance of his trust duties. It seems probable that the common law traditions of equity would provide the framework Alaska's Court would be most likely to adopt.

> In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice. . . . Where a new condition exists, and the legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, . . . for that purpose.[102]

Briefly summarized, a trustee owes the following duties to the beneficiaries of the trust:

1. A duty of loyalty, that is, the duty not to engage in self-dealing;
2. A duty not to delegate;
3. A duty to furnish information;
4. A duty to maintain control of trust corpus property;
5. A duty to preserve the trust property;
6. A duty to deal impartially with beneficiaries;
7. A duty to enforce the claims of beneficiaries;
8. A duty to make trust property productive.

Each of these duties is discussed separately below.

Loyalty: "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."[103]

For example, if a state exercises its authority as trustee for the benefit of the state itself by selling public trust lands primarily to increase tax revenues, or for the benefit of an individual or a small group of individuals, or by exchanging land or timber principally to benefit a private corporation, the state's action could be seen as violating the trustee's fiduciary duty of loyalty.

Non-delegation: A fundamental duty owed by the trustee to the beneficiaries of the trust is the duty not to delegate to others the job

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[101] *Id.* at 317.

[102] Alaska State Employees Ass'n v. Alaska Pub. Employees Ass'n, 825 P.2d 451, 455 (Alaska 1991) (quoting JOSEPH STORY, 1 STORY'S EQUITY JURISPRUDENCE § 4 (14th ed. 1918)).

[103] RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

of administering the trust.[104] This duty is not absolute, however; certain, limited duties may properly be delegated by a trustee.[105]

Under general principles of constitutional and administrative law, a legislature may not delegate its functions to an agency without establishing reasonably clear standards for the agency to follow.[106] Nor may a legislature delegate powers it does not possess, or delegate certain "non-delegable" powers intended by the Constitution to be exercised only by the legislature itself.[107]

While the legislature may properly delegate administration of the public trust to executive branch agencies, it must do so with clear guidelines. Where the guidelines are insufficiently clear, or contravene the mandates of the public trust doctrine, a court of equity could intervene to clarify the trustee's obligations pursuant to the public trust.[108]

Productivity: "The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."[109] While this responsibility competes to some extent with the trustee's duty of preservation,[110] these duties are not mutually exclusive, and the duty of productivity does not diminish the trustee's obligations of resource conservation under the public trust doctrine.[111]

Preservation: "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."[112] Where loss to the estate is the result of the trustee's failure to use proper care or skill, or is due to the trustee's negligence, the trustee is liable to the beneficiaries for the loss.[113] This "black letter" duty is similar to the public trust's mandate of "equitable and wise" management of public trust resources.[114]

Information: "The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the adminis-

[104] Austin Wakeman Scott, The Law of Trusts § 171 (4th ed. 1987).
[105] *Id.*
[106] Indust. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980).
[107] *See generally* Laurence H. Tribe, American Constitutional Law §§ 5-17 (1978).
[108] *Am. Petroleum Inst.*, 448 U.S. at 675.
[109] Restatement (Second) of Trusts § 181 (1959).
[110] *See infra* notes 112-14 and accompanying text.
[111] *See* Alaska Stat. §§ 38.04.005-.015 (1989) (setting forth Alaska policy to balance land available for public and private uses).
[112] Restatement (Second) of Trusts § 176 (1959); *see also* State v. Weiss, 706 P.2d 681, 683 (Alaska 1985); Scott, *supra* note 104, § 176.
[113] Restatement (Second) of Trusts §§ 197-99 (1959).
[114] *See* Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

tration of the trust."[115] The trustee must supply beneficiaries with complete and accurate information regarding the administration of the trust upon request and within a reasonable time.[116]

The state's duty as trustee to provide information to the public is an area where substantial legal activity may reasonably be expected in the future. Although Alaska case law on fiduciary duties is still a bit sparse, the Alaska Supreme Court might well follow the track taken by the Supreme Court of Washington:

> [T]he trustee's fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests . . . . If the beneficiaries are [to be] able to hold the trustee to proper standards of care and honesty and procure the benefits to which they are entitled, they must know of what the trust property consists and how it is being managed.[117]

One interpretation of the scope of the state's fiduciary duty to provide information could be that the State of Alaska must provide the Alaskan public with regular reports assessing the extent, current status, and future of public trust resources. This would possibly require extensive information-gathering, whereby the state would compile benchmark data upon which future public reports could be made. Pending compilation of that information, most disposals and exchanges of public trust resources should probably be held in abeyance. A "rule of reason" would likely provide limits to the state's duty to compile and disseminate information on trust resources.

The wisdom of delaying alienation of Alaska's public trust resources until full information can be disclosed to the public and digested by Alaska is simple: how can we know what we are giving away if we are unaware of what the public resources are worth? A trustee has the duty to determine, usually through appraisal, the fair market value of trust assets before any sale or other transfer of those trust assets.[118] To prevent impairment of the corpus of the trust, it is essential that no alienation of trust resources be permitted in the absence of a full and complete public disclosure of the full value of the trust resources involved.[119]

Yet in Alaska, there is a general paucity of information that would

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[115] RESTATEMENT (SECOND) OF TRUSTS § 172 (1959).

[116] AUSTIN WAKEMAN SCOTT, 2A SCOTT ON TRUSTS § 173 (4th ed. 1987).

[117] Allard v. Pacific Nat'l Bank, 663 P.2d 104, 110 (Wash. 1983) (citations omitted); *see also* GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES § 961 (2d ed. 1962).

[118] Hatcher v. U.S. Nat'l Bank, 643 P.2d 359, 364-65 (Or. App.), *rev. denied*, 648 P.2d 854 (Or. 1982).

[119] *Allard*, 663 P.2d at 110-11; *Hatcher*, 643 P.2d at 364-66; BOGERT, *supra* note 117, § 961.

constitute a fair and complete appraisal or inventory of all the public assets involved in a land sale or timber sale.[120] Under these legal principles, the State of Alaska, through its Natural Resources and Fish and Game Departments, should make periodic reports to the Alaskan public regarding the value and extent of public trust resources. The state also must work sedulously to ensure that it knows and discloses the full extent and value of all of the resources involved in a land sale, land exchange, timber sale, or other transfer of public trust resources. Facets such as cumulative impacts of land disposals should logically be part of this process.

In addition to avoiding impairment of the trust, this full disclosure process would enable the Alaskan public to enforce its rights as beneficiary of the public trust. It would also be in the state's best interests to gather and disseminate this information, to avoid charges of fraud and breach of fiduciary duty.[121]

Impartiality: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."[122]

The state thus cannot prefer the interests of one segment of its population over those of another segment. The state's fiduciary duties require it at all times to act in favor of the interests of the state as a whole, not for the discrete advantage of one geographic region, ethnic group, or other faction.

This includes the fiduciary duty to avoid actions whose primary motivation is to benefit state government.

> [T]he power or control lodged in the state . . . is to be exercised . . . as a trust for the benefit of the people and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.[123]

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[120] Wildlife and fishery values are rarely assessed, in monetary or other terms, in the same detail paid to land, mineral or timber values.

[121] "Fraud can be established by silence or non-disclosure when a fiduciary relationship exists between the parties . . . . The fiduciary has a duty to fully disclose information which might affect the other persons's rights and influence his action." Carter v. Hoblit, 755 P.2d 1084, 1086 (Alaska 1988) (citations omitted). "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests." Greater Area Inc. v. Brookman, 657 P.2d 828, 830 (Alaska 1982).

[122] Restatement (Second) of Trusts § 183 (1959).

[123] Geer v. Connecticut, 161 U.S. 519, 529 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979). Although *Hughes* overruled *Geer*, the Alaska Supreme Court noted that "[a]fter *Hughes*, the statements in the Alaska Constitution regarding sovereign ownership . . . are *technically* incorrect. Nevertheless, the trust responsibility that accompanie[s] state ownership remains." Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 495 n.12 (Alaska 1988) (emphasis added).

b. Common Law Obligations of the State of Alaska as Trustee

The essence of judicial enforcement of the public trust doctrine is to guarantee that state government fulfills its fiduciary duties to current and future generations of Alaskans. The fiduciary duties of trustees have been defined over centuries of experience by courts of equity, and they provide safeguards that should protect against dissipation of the natural resource wealth Alaskans are privileged to enjoy.[124] The state's fiduciary duties as a trustee define the legal standard of wise stewardship over Alaska's common property resources.[125] The Alaska Supreme Court has not yet given detailed attention to the state's common law obligations as trustee in the context of the public trust, but it has given some general guidance in this area.

What the law has labeled the "fiduciary duties" of trustees is, in many respects, nothing more than an attempt to codify some basic rules of common sense. The paramount duty of the state is to "equitably and wisely" regulate the harvest of Alaska's wildlife and fisheries resources.[126] An inescapable corollary of this mandate is the state's obligation to maintain the habitat it controls and on which the vitality and abundance of many public trust resources depend. The importance of habitat protection is, unfortunately, too often underrated.

> When game begins to get scarce, people generally think and act in the order of (1) preservation of breeding stock by means of game laws restricting the harvest; (2) artificial stocking; and (3) habitat improvement, which is sometimes unfortunate, since the third item is often more important than the first two. If suitable habitat is lacking, . . . protection or stocking is useless.[127]

The state is obligated to "equitably and wisely" manage Alaska's wildlife and fisheries resources at all times, not merely during the public's limited harvest opportunities. The state must also manage fish and wildlife for the benefit of "all the people of the state."[128]

Although the Alaska Supreme Court has not yet directly addressed the issue, it seems reasonable to anticipate that it would apply the standard of "equitable and wise" management beyond the sphere of fish and wildlife to include all of the other resources within the pro-

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[124] *See supra* notes 5-8 and accompanying text.

[125] *See supra* note 8 and accompanying text.

[126] Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

[127] EUGENE P. ODUM, FUNDAMENTALS OF ECOLOGY 433 (1959). *See also* PETER MATTHIESSEN, WILDLIFE IN AMERICA 205 (1977).

[128] *Metlakatla*, 362 P.2d at 915.

tection of the public trust doctrine in Alaska.[129] Whenever the state deals with fish, wildlife, timber, state land (regardless of whether or not the lands are washed by the tides), waters that occur in the natural state, or unappropriated minerals, the state owes public trust fiduciary duties of equitable and wise management.

What is meant by "equitable and wise management?" Although the Alaska Supreme Court's choice of terminology was probably deliberately general and not susceptible of precise definition, some fundamental management principles can reasonably be imputed to the state as trustee under those broad standards. Perhaps the most useful guidance is found in the following statements: "[F]ish and game resources are permitted to be harvested, but at the same time must be conserved to avoid depletion and extinction;"[130] and

> Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation or annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity.[131]

The Alaska Supreme Court has held that, as a trustee, the state does not have the right to manage natural resources as if it were a private, individual owner, seeking to maximize the income it can derive as quickly as possible.[132] Rather, the state as trustee must manage its resources for the benefit of the beneficiary of the trust: *all* the people Alaska.

> Alaskans will not want, and above all else do not need, a resources policy which will prevent orderly development of the great treasures which will be theirs. But they will want, and demand, effective safeguards against the exploitation of the heritage by persons and corporations whose only aim is to skim the gravy and get out, leaving nothing that is permanent to the new state except, perhaps, a few scars in the earth which can never be healed.[133]

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[129] *See* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).

[130] Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1005 (Alaska 1977).

[131] *Metlakatla*, 362 P.2d at 932; *see also* City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957) (addressing potential permanent impairment of Lake Monona).

[132] *Metlakatla*, 362 P.2d at 915; *see also* Organized Village of Kake v. Egan, 174 F. Supp. 500, 529 (D. Alaska 1959); *Herscher*, 568 P.2d at 1003, 1005; Gilbert v. State, Dep't of Fish & Game, Bd. Fisheries, 803 P.2d 391, 398-399 (Alaska 1990); McDowell v. State, 785 P.2d 1, 12, 16, 18 (Alaska 1989); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-96 (Alaska 1988); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988).

[133] E.L. Bartlett, Address to the Delegates of the Alaska Constitutional Convention, *in* VI CONVENTION PROCEEDINGS, *supra* note 54, App. II.

The power to manage public trust resources lies with the state, as sovereign, but "like all other powers of government as a trust for the benefit of the people."[134] In a case nullifying a grant of a license to construct a hydroelectric power plant on the Snake River, the United States Supreme Court held:

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including further power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.[135]

Similar considerations could be relied upon by the Alaska Supreme Court to evaluate the propriety of state action in the public trust context. Although it arose in the context of discussion of the Alaska Constitution's sustained yield requirement in Article VIII, § 4, rather than the common use clause of Article VIII, § 3, the duty to prevent erosion of the quality of Alaska's public trust resources was well-expressed by Alaska Supreme Court Chief Justice Rabinowitz: "Quality as well as quantity of available resources must be considered in determining whether sustained yield requirements have been met. The framers and legislature must have intended that the level of timber available to future generations . . . be undiminished."[136] Governor Jay Hammond, the foremost conservationist among all Alaska's Governors, aptly stated the importance of considering the needs of future generations of Alaskans regarding public trust resources: "While a particular species of . . .. wildlife may have little relative value now, the future may find it suddenly in great demand. If the land is incapable of producing it to the demand level, an important land management option is lost, to the detriment of the public welfare."[137]

c. Who Are the Beneficiaries of the Public Trust in Alaska?

The beneficiaries of Alaska's public trust doctrine are all the people of the State of Alaska, including future generations.[138] The state has

[134] *Owsichek*, 763 P.2d at 494 (citing Geer v. Connecticut, 161 U.S. 519, 529 (1896)).

[135] Udall v. Fed. Power Comm'n, 387 U.S. 428, 450 (1967).

[136] Southeast Alaska Conservation Council v. State, 665 P.2d 544, 557 (Alaska 1983) (Rabinowitz, J., dissenting).

[137] *Id.* (quoting Gov. Jay Hammond).

[138] *Id.*; Shively v. Bowlby, 152 U.S. 1, 16 (1894) ("a public trust for the benfit of the whole community.").

a fiduciary obligation to manage public trust resources for the benefit of "all the people of the state" of Alaska.[139] "[T]he public trust doctrine dictates that . . . [public trust resources] must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."[140] "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."[141]

d. Exchange or Disposal of State Land and the Continuing Obligations of the Public Trust

Can the State of Alaska free itself of its obligations under the public trust doctrine by selling or exchanging public trust resources to private parties? The answer in almost all circumstances is "No." The public trust entails governmental responsibilities that cannot be disregarded, delegated, sold, or otherwise alienated. "The public trust doctrine . . . requires the state to maintain its dominion in trust for the people."[142]

"The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace."[143] Although the state may convey a *jus privatum* interest in trust resources, the public's *jus publicum* (public trust) interest cannot ordinarily be alienated.[144]

The state has an affirmative fiduciary obligation to prevent unnecessary diminutions in the corpus of the public trust, and must ensure that there is no avoidable, significant reduction of the rights of the public to resources held by the state in trust for the benefit of the

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[139] Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

[140] Slocum v. Borough of Belmar, 569 A.2d 312, 316 (N.J. Super. Ct. Law Div. 1989) (quoting Borough of Neptune City v. Borough of Avon-by the Sea, 294 A.2d 47, 59 (N.J. 1972)).

[141] McDowell v. State, 785 P.2d 1, 16, n 9 (Alaska 1989) (Rabinowitz J., dissenting) (quoting Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 493-95 (Alaska 1988)); *see also* Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398 (Alaska 1990).

[142] Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987) (*en banc*), *cert. denied*, 486 U.S. 1022 (1988); *see also* CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988).

[143] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

[144] *Id.*; Brusco Towboat Co. v. State, 567 P.2d 1037, 1043-44 (Or. 1978); *see also* State v. Superior Court of Lake County, 625 P.2d 239, 248 (Cal. 1981) ("It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust.").

public.[145] "Under the public trust doctrine, the State . . . [has] the right and the duty to protect and preserve the public's interest in wildlife resources."[146]

Briefly summarized, the public trust imposes the following limitations on the power of the state to convey public trust resources free of the public trust:

1. Clear legislative authority and intent are required. Conveyances of public trust resources are interpreted strictly against the grantee.

2. The conveyance should not be made to further private interests; it should further the public's trust interests.

3. There should be no substantial impairment of the public's use of the remaining trust resources.

4. A private owner's use of trust resources may be restricted or prohibited in order to protect public uses of public trust resources.

5. Conveyances of public trust resources are revocable by the state.

In Alaska there are many procedural safeguards regarding the disposal, sale, or lease of state land.[147] Special, additional, protections govern disposal of state-owned timber resources.[148]

In accordance with the mandate of the Alaska Constitution, Article VIII, section 10, the first Alaska Legislature enacted the Alaska Land Act, Alaska Statutes section 38.05, which contains at least two provisions — sections 38.05.035 and 38.05.285 — requiring that any disposition of state-owned land must be consistent with the best interests of current *and future generations* of Alaskans. One of the procedural prerequisites of a best interests finding is "a reasoned evaluation of the wisdom of a proposed disposition of land . . . ."[149] The Alaska Department of Natural Resources' record of decision for any land disposal or land exchange must demonstrate that the agency made a reasoned evaluation of the available evidence; otherwise its decision will be arbitrary and capricious.[150]

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[145] BEAN, *supra* note 5, at 41.

[146] *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980).

[147] *See* Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1014 (Alaska 1967); Moore v. State, 553 P.2d 8, 30 (Alaska 1976); ALASKA CONST., art. VIII, § 10.

[148] *See* ALASKA STAT. tit. 38 (1992).

[149] *Moore*, 553 P.2d at 31.

[150] *Id.* at 36.

The Alaska Supreme Court has not yet applied a public trust analysis to a state land disposal or exchange. In the seminal public trust case *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court stated that "the ownership and dominion and sovereignty over lands . . . within the limits of the several States, belong to the respective states . . . to use or dispose of any portion thereof, when that can be done *without substantial impairment of the interest of the public* . . . ."[151] The Court explained that "this follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested."[152] The Court further stated that "there can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."[153]

Many state supreme courts that have considered the effect of the public trust doctrine on attempts by a state to alienate public lands have concluded that the state has continuing obligations from which it can be freed only under rare circumstances.[154] For example, the Hawaii Supreme Court wrote:

> Under public trust principles, the state as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.[155]

The Minnesota Supreme Court similarly stated:

> [I]n the exercise of . . . [the public] trust the state may dispose of a partial interest in such lands, in the interest of all the people

[151] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (emphasis added). The proposed conveyance of public trust resources at Leask Lakes (ADL No. 12,555) would violate the rule of "no substantial impairment." The proposed conveyance would result in a substantial net loss and impairment of wildlife habitat by trading unlogged land for largely cut-over land and stumps nearby at White River. The proposed exchange would promote fragmentation of wildlife habitat and substantially reduce the wildlife habitat value of public trust land at George River, adjacent to the Leask Lakes tract. *See* Memorandum from Richard Reed, Alaska Dept. of Fish & Game, to Andy Pekovich, Dept. of Natural Resources (May 14, 1991); Memorandum from Matt Kirchoff, Dept. of Fish & Game, to Dave Anderson (Sept. 17, 1991).

[152] *Illinois Cent. R.R. Co.*, 146 U.S. at 456.

[153] *Id.* at 460.

[154] As with most aspects of the public trust doctrine, individual states are free to formulate the rule they deem most appropriate. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81 (1988).

[155] State *ex rel.* Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977) (footnotes omitted).

> of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby . . . . [The state] . . . cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held.[156]

These principles have been stated by the Michigan Supreme Court as well:

> When lands are owned by the State for the public trust, it is the State's duty to protect the trust and not surrender the rights thereto. It is thus the public policy of this State with respect to [public trust] submerged lands . . . that they may be disposed of only when the Department of Conservation determines that such lands are of no substantial public value for hunting, fishing, swimming, pleasure boating, or navigation, and that the general public interest will not be impaired.[157]

The formulation of the state's public trust duties in Michigan was based on interpretation of the public trust set forth in Michigan's State Constitution.[158] The Alaska Constitution's public trust, augmented by the Sagebrush Initiative, cannot reasonably be said to impose obligations that are any weaker than Michigan's.

A decision by the state to trade public lands cannot stand unless the trade is clearly in the public interest. A determination that a land exchange pursuant to Alaska Statutes section 38.50 is in the public interest can only be made after evaluating and making known to the public a reasonable quantum of information so the public may reach rational conclusions about the value of the respective parcels of land to be exchanged.[159]

One of the fundamental obligations of a trustee is that he or she must not permit the wasting away of the corpus of the trust.[160] The trustee must exercise discretion in making day-to-day management decisions,

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[156] State v. Longyear Holding Co., 29 N.W.2d 657, 669-70 (Minn. 1947) (footnotes omitted). *Cf.* Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 121-23 (Mass. 1966) (public trust land is not to be diverted to inconsistent uses without plain and explicit legislation).

[157] People *ex rel.* MacMullan v. Babcock, 196 N.W.2d 489, 497 (Mich. 1972) (citations omitted).

[158] *Id.*

[159] Examples of the type of information that should be made public prior to a § 38.50 land exchange would include (but would not necessarily be limited to) supply and demand data, including current value, for all of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be exchanged. This is a hefty burden, but making a decision to trade away state land and resources in the absence of this sort of fundamental information would certainly be a breach of the state's fiduciary duties to manage the public lands.

[160] RESTATEMENT (SECOND) OF TRUSTS §§ 176, 181 (1989).

and must base decisions on reliable and reasonably complete information.[161]

Although a modicum of impairment of public trust uses is probably permissible when it is appurtenant to a land transfer, courts should apply the "hard look" doctrine in assessing infringements of public trust values. "Hard look" judicial review of state efforts to alienate public trust resources ensures that arbitrary decisions will not be permitted, and will ensure the agency has "genuinely engaged in reasoned decision making" of all the salient issues.[162]

One key purpose of the public trust doctrine is to police attempted dispositions of public lands by state legislatures. If courts simply rubber-stamp legislative determinations that proposed dispositions are in the public interest, the public trust doctrine will have no teeth. Consequently, there is a longstanding judicial policy of closely scrutinizing legislative declarations that a proposed disposition of public land is "in the public interest."[163] "[T]he self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such a purpose."[164] Alaskan courts should adopt this salutary policy of judicial skepticism and should strictly scrutinize all proposed exchanges and disposals of public trust resources.

A state normally may not convey public trust land if the disposal will substantially impair the public's trust rights.[165] A trustee is at all times accountable to the beneficiaries of the trust.[166] A decision to alienate public trust resources, including land, should be preceded by a thorough governmental assessment of all the public values affected. Public notice should include the degree of effect of the project on public trust uses; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which

[161] Hatcher v. U.S. Nat'l Bank, 643 P.2d 359, 364-66 (1982).

[162] Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398 (Alaska 1990) (citations omitted).

[163] Martin v. Waddell, 41 U.S. 366, 411 (1842).

[164] People *ex rel.* Salem v. McMackin, 291 N.E.2d 807, 812 (Ill. 1972). *See also* Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, *supra* note 5, at 489-91.

[165] Illinois Cent. R.R. Co. v. Ilinois, 146 U.S. 387, 428-50 (1892); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1119 (Alaska 1988); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 709-11 (Or. 1979); Mannor Marine Realty v. Wachtler, 232 N.E.2d 657 (N.Y. 1968); Riviera Ass'n v. North Hempstead, 52 Misc.2d 575 (N.Y. 1967).

[166] RESTATEMENT (SECOND) OF TRUSTS, §§ 172, 176, 181 (1959).

the resource is suited (e.g., commerce, navigation, fishing, etc.); the degree to which broad public uses are set aside in favor of more limited or private ones; and clear, advance public disclosure of the pertinent facts and data.[167]

For example, a decision to exchange public for private land pursuant to section 38.50 must be based on reasonably complete information about the range, quantity, and quality of resources wrapped up in the parcels to be exchanged. All such information must be timely communicated to the public, in a manner satisfying the safeguards of the Alaska Constitution.[168] A state may not trade public lands unless the trade is clearly in the public interest. Before determining whether the trade is in the public's interest, the state must first evaluate and disclose to the public supply and demand data, arguably including current economic and non-economic values for all of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be exchanged.

A grantee may acquire a right to use former trust property free from trust restrictions only in rare cases.[169] According to the Alaska Supreme Court, the key factor to consider in determining the significance of a conveyance is not the size or location of the particular parcel, but the scope of the authorizing legislation and the potential for *all* conveyances made pursuant to those statutes.[170]

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[167] CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988) (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1091 (Idaho 1983)).

[168] The Alaska Constitution provides:

> Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. *All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources.* Reservations of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

ALASKA CONST. art. VIII, § 9 (emphasis added). It also provides: "No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." *Id.*, § 10; *see also* Hatcher v. U.S. Nat'l Bank, 643 P.2d 359, 364-66 (Or. 1982) (trustee has duty to determine fair market-value of corporate stock before selling); Alland v. Pacific Nat'l Bank, 663 P.2d 104 (Wash. 1983) (trustee must inform beneficiaries of all material facts in connection with transfer which significantly effects the trust estate and interests of the beneficiaries); BOGERT, *supra* note 117, § 961.

[169] *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 723 (Cal. 1983) (en banc) (the state retains continuing supervisory control over its navigable waters).

[170] The federal rule is somewhat more lenient. It allows transfers of small parcels that advance public trust purposes, such as the small amount needed for piers, wharves, docks, etc. *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

In *CWC Fisheries, Inc. v. Bunker*, the Alaska Supreme Court announced a twofold test for permitting alienation of land subject to the public trust, free of trust duties:

> [W]e must ask, first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest . . . . If either of these questions can be answered in the affirmative, conveyance free of the public trust would be permissible.[171]

In applying this test, the court specifically rejected the argument made by CWC that since the state's conveyance was made in furtherance of navigation and commerce, the conveyance should be free of the public trust.[172]

> Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.[173]

In evaluating a proposed conveyance of state-owned resources subject to the public trust to determine whether or not the conveyance may be made free of the burdens of the public trust, one must also apply the second prong of the CWC test: can the property be disposed of without any substantial impairment of the public interest?[174]

The Alaska Legislature has not clearly indicated that the trust is *not* to be considered in land exchanges.[175] Section 38.50 provides the authority under which the Department of Natural Resources effects land exchanges.[176] The Alaska Legislature clearly did *not* authorize land exchanges free of the public trust; it merely authorized exchanges:

> Subject to the requirements of this chapter, the director, with the concurrence of the commissioner, is authorized to dispose of state land or interest in land by exchanging it for land, interest in land,

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[171] *CWC Fisheries*, 755 P.2d at 1119 (citations omitted).
[172] *Id.*
[173] *Id.* (citations omitted).
[174] *Id.*
[175] *But see* ALASKA STAT. § 38.08.060(a) (legislature specified conveyance of "unencumbered title").
[176] *Id.*, § 38.50.010.

> or other consideration. Exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes.[177]

It can reasonably be argued, by implication, the legislature intended that the public trust be integrated into land exchanges. When the Alaska Legislature adopted section 38.50.060, it provided general authority for reservation of public trust easements, stating: "Conveyances . . . by the state under this chapter are subject to valid existing rights . . . ."[178] The public trust is certainly a set of "valid existing rights" for which easements should be retained.

Any exchange of state lands should include an explicit retention of public trust easements for *jus publicum* purposes, including but not limited to fishing, hunting, recreation, and wildlife viewing. As a result of the public trust doctrine, however, the public retains those rights by implication even if the state fails to make an express reservation.

The public trust doctrine does not prevent the state from making policy choices between trust uses.[179] In Alaska, the legislature will generally be afforded broad authority to favor one trust use over another.[180] The exception for legislative policy decisions, however, is not intended to swallow the rule of non-impairment of public trust uses. An overly broad conception of state authority would result in an absence of practical restrictions on the state's ability to alienate public trust property, so long as the state could articulate *some* public trust-related benefit associated with a proposed conveyance.

No authority supports such broad governmental discretion, even if the proposed conveyance is alleged to produce some alternative public trust benefit. The California Supreme Court has held:

> [N]o one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of

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[177] *Id.*

[178] *Id.*, § 38.50.070.

[179] CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1121 n. 15 (Alaska 1988) (citing Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723 (Cal. 1983) (en banc)).

[180] *CWC Fisheries*, 755 P.2d at 1121.

> the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[181]

This reasoning is equally applicable to land exchanges under section 38.50. Thus, the state may not exchange uplands or minerals to any private grantee free of the public trust merely because the exchange may serve "some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use."[182] For example, where the principal "public benefit" supporting a land exchange is a benefit to private, commercial logging, no valid public purpose would support the exchange, nor would fostering private, commercial logging generally be a purpose consistent with the state's trust responsibilities.[183]

The public trust includes the state's duty to protect the common heritage of all Alaskans in ancient, old-growth forests, together with the wildlife, fisheries, waters, and mineral resources found thereon.[184] The state may not surrender the public's right to the preservation of old-growth forest lands of high value to fish and wildlife if the land to be received in exchange is of substantially inferior quality from the standpoints of wildlife habitat, fishery habitat, scenic value, and recreational potential. The Alaska Supreme Court, in *CWC Fisheries Inc., v. Bunker*, held these public trust values cannot be abandoned without specific legislative language of cession.[185] In other words, before a conveyance of state-owned land will fall into the exception for transfers "in furtherance of some specific public trust purpose," there must be clear evidence that the legislature intended to take action which, on its face, would be inconsistent with the plain wording of the Alaska Constitution's mandate regarding "common use" and the public trust.[186] Arguably, it is only where state-owned land, subject to the public trust, is more or less useless to the public, small in area,

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[181] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983) (en banc).

[182] *Id.*

[183] The primary motive articulated by the State Department of Natural Resources (DNR), in support of its proposal to convey the old growth forest of Leask Lakes to the Cape Fox Corporation, is that it will directly benefit the Ketchikan timber industry and thereby increase local tax revenues. The DNR also states that local recreation will benefit, since ten years after the exchange, a road may be built at White River that would allow public access. *See* ADL No. 12,555, *supra* note 62.

[184] ALASKA STAT. § 38.05.502.

[185] *See* CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1120 (Alaska 1988).

[186] *Id.*; *see also* ALASKA CONST. art.VIII, § 3.

and part of an overall scheme dominated by a true "public purpose" that the legislature may remove the public trust burdens.[187]

The executive branch of government in Alaska, through the Department of Law, reached a similar conclusion prior to the Alaska Supreme Court's holding in *CWC Fisheries.*

> [I]t is clear that any state agency with the power to dispose of land must attempt to secure as consideration for such disposal the maximum benefit for the citizens of the state as a whole. A transfer which may benefit the citizens of one community may nevertheless violate the public trust doctrine where the state receives less than adequate consideration on behalf of the citizens of the state as a whole. Absent some showing that a land transfer would benefit the state as a whole, even legislation authorizing a transfer would be invalid. On the other hand, a transfer which may specifically benefit citizens of a particular area will not be invalid *if* it is also demonstrated that the transfer represents the "most desirable and advantageous solution to multiple issues confronting the state as a whole."[188]

The Oregon Court of Appeals, discussing state-owned land, reasoned that public trust resources "can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee."[189]

Judicial protection of the public trust certainly extends to old growth forest lands.[190] Ancient, old-growth forest lands "can only be spent once." Their value as extraordinarily productive wildlife habitat depends on unique properties which a southeastern Alaska forest only begins to acquire after approximately three hundred years.[191] To actively promote private clearcutting of old growth forests would, for all practical purposes, destroy their unique value to the public as wildlife habitat. This result would be diametrically opposed to the

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[187] *See, e.g.*, City of Long Beach v. Mansell, 476 P.2d 423 (Cal. 1970).

[188] State v. Lewis, 559 P.2d 630 (Alaska 1977), *cert. denied*, 432 U.S. 901. *Accord* Op. Alaska Att'y Gen. 566-230-85, at 4-5 (Apr. 25, 1985). "Opinions of the Attorney General, while not controlling on matters of statutory interpretation, are entitled to some deference." State v. City of Haines, 627 P.2d 1047, 1049, nn.6-7 (Alaska 1981); *see also* Carney v. State, 785 P.2d 544, 548 (Alaska 1990).

[189] Morse v. Oregon Div. of State Lands, 581 P.2d 520, 524 (Or. App. 1978).

[190] *See* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).

[191] *Wildlife and Old Growth Forests in Southeastern Alaska*, 8 NATURAL AREAS J. 138-45 (1988).

public trust doctrine.

In summary, before the State of Alaska may make any substantial disposition of its public trust resources, the state must meet a stiff, two-pronged test. First, the state must show that the lands it wishes to dispose of are of no substantial value for Alaskan public trust purposes. Second, the state must show that the disposition will not impair the general public interest.

It is important to keep in mind, however, that a grant of state land is probably not automatically illegal merely because it causes a reduction in traditional, public trust uses. Instead, this author believes that courts facing public trust doctrine issues retain considerable discretion, within the historical context of courts of equity, to decide how significant an impairment of public trust uses must be present to require judicial invalidation of the state's land grant or other land use decision.[192]

e. The Public Is Entitled to an Easement Protecting Public Trust Rights in Alienated State Lands

The public trust resembles "a covenant running with the land (or lake or marsh or shore) for the benefit of the public *and the land's dependent wildlife.*"[193] The United States Supreme Court has noted that lands which a state holds in trust can be conveyed to private parties, free of the public trust, only under very limited circumstances. The Court in *Illinois Central* stated:

> The control of the state for the purposes of the trust *can never be lost*, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[194]

If the public trust doctrine forbids alienating public trust resources of an entire harbor, bay, or lake, as in *Illinois Central*, it just as surely

[192] For example, the Alaska Constitution requires the Alaska Legislature to utilize, develop, and maintain all "replenishable resources belonging to the State . . . on the sustained yield principle, *subject to preferences among beneficial uses.*" ALASKA CONST. art. VIII, § 4 (emphasis added). There is an inherent tension among competing beneficial uses, which necessarily requires payment of some opportunity cost almost every time a resource use decision is made. It would be absurd to posit that no legally valid diminution of public trust uses or resources could occur in light of Article VIII, § 4.

[193] Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986) (emphasis added) (cited with approval in Orion Corp. v. State, 747 P.2d 1062, 1072-73 (Wash. 1987) (en banc)).

[194] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892), *quoted in* CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988).

forbids alienating public trust resources of an entire drainage. "The rights of the private owner extend only as far as will allow the public to have full benefit of its trust uses of the privately held land."[195]

The Alaska Supreme Court, in *CWC Fisheries, Inc. v. Bunker*, adopted the federal rule regarding conveyances of public trust property and the enduring rights of the public that emanate from the public trust.[196] *CWC Fisheries* involved a conveyance by the state of tidelands, which are held by the state subject to the public trust.[197] The *CWC Fisheries* Court held that "any state tidelands conveyance which fails to satisfy the requirements of *Illinois Central,* will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce, and fishery."[198]

Unless there is specific legislative language abjuring the public trust in a conveyance of public land, the State of Alaska may not convey public land — tideland or upland — free of continuing public easements that protect and guarantee the exercise of the full bundle of public rights appropriate to the qualities of the land in question. This conclusion follows from examining Title 38 of the Alaskan Statutes,[199] which contains no explicit language freeing such conveyances from ongoing public trust easements.[200] Without such legislative language, the grantee will hold the property subject to the public trust. While the grantee may assert a vested right of use, and to any improvements he may erect, these rights are subject to the public trust. The grantee can claim no vested right to bar state action to carry out the purposes of the public trust.[201] Nor can a recipient of state-owned land enjoin the public from utilizing the property for public trust purposes.[202]

The Alaska Supreme Court has not yet considered the impact of the public trust doctrine on uplands or minerals, but there is no clear reason for the court to rule that a conveyance of uplands or minerals may be made free of the dominant public trust responsibilities the state owes its citizens. Allowing uplands or minerals to be conveyed free of the public trust would probably be analyzed similar to a conveyance of

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[195] Marks v. Whitney, 491 P.2d 374, 385 (Cal. 1971).

[196] 755 P.2d 1115, 1118 (Alaska 1988).

[197] *Id.*; *see also* ALASKA STAT. § 38.05.502 (1992).

[198] *CWC Fisheries*, 755 P.2d at 1118.

[199] ALASKA STAT. § 38.50 (land exchanges); ALASKA STAT. § 38.05 (Alaska Land Act).

[200] *CWC Fisheries*, 755 P.2d at 1119-20.

[201] *See* Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 723 (Cal.), *cert denied*, 464 U.S. 977 (1983).

[202] *CWC Fisheries*, 755 P.2d at 1118 (citing People v. California Fish Co., 138 P. 2d 79, 88 (Cal. 1913); Orion Corp. v. State, 747 P.2d 1062, 1072-73 (Wash. 1987)).

tideland.

There is no reason for courts to treat uplands differently from tidelands insofar as the burdens of the public trust are concerned. All state-owned land in Alaska tideland and upland is subject to the public trust.[203] Similarly, the argument that a conveyance of land is so small as to be *de minimis* has been expressly rejected by the Alaska Supreme Court.[204]

Thus, any state conveyance of land—uplands as well as tidelands—must include a reservation of public easements of use and enjoyment of the *jus publicum*. In fact, the public's rights in uplands, deriving from the public trust, will necessarily be broader than its rights appurtenant to tidelands. The public trust on uplands extends beyond purposes of navigation, commerce, and fishery, to include protection of public use of and access to the wildlife, recreation, minerals, and waters occurring on the public lands.

In the context of tideland grants, the Alaska Supreme Court, in *CWC Fisheries*, clearly stated that the state may not easily escape the duties of the public trust:

> Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.[205]

Since the public trust applies equally to tidelands, submerged lands, uplands, and their fish, wildlife, and mineral resources, any conveyance by the state of uplands, including timber and water, is "impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein."[206] The *CWC Fisheries* Court based its holding on the broad public trust requirements of the Alaska Constitution:

> At least in the absence of some clear evidence to the contrary, we will not presume that the legislature intended to take action which would, on its face, appear inconsistent with the plain wording of

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[203] ALASKA STAT. § 38.05.502 (1992).
[204] *CWC Fisheries*, 755 P.2d at 1120.
[205] *CWC Fisheries*, 755 P.2d at 1119 (citations omitted).
[206] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (1972).

this constitutional mandate [Art. VIII, § 3, "common use" clause].

. . . .

. . . To hold that persons receiving title . . . hold the fee free of any public trust obligations would, we believe, amount to a substantial impairment of the public's interest in state tidelands as a whole.[207]

It is critical for the state to maintain public rights of *access* for the continued exercise of public trust purposes whenever the state exchanges, sells, or otherwise disposes of the alienable portion of its interest in public trust lands.[208] This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied by "reasonable access."[209]

There is clearly a tension, if not an irreconcilable conflict, between Alaska Statute sections 38.50.050 and 38.05.502 regarding the state's responsibilities in attempted disposal of publicly-owned mineral resources. According to the canon of statutory construction that the more recently-adopted of two "irreconcilably conflicting" statutes will control,[210] the public trust responsibilities of section 38.05.502 must take precedence. Thus, the Department of Natural Resources' ability to alienate publicly-owned, unappropriated mineral resources is far more limited than appears from section 38.50.050.[211]

C. Principles of Republican Government and Enforcement of the Public Trust

As with any trust, the strength of the public trust is largely a function of the vigilance, good judgment, and integrity of the trustee. When a trustee behaves in a manner inimical to the interests of the beneficiaries, courts of equity are historically summoned to intervene in the management of trusts.

The effectiveness of the public trust doctrine requires that the judiciary be willing to vigorously assert its traditional role in equity as supervisor of trusts and, consequently, as an overseer of the legislative and executive branches' administration of the common property

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[207] *CWC Fisheries*, 755 P.2d at 1120 (footnotes omitted).

[208] *Id.* at 1118; Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

[209] *Matthews*, 471 A.2d at 364.

[210] Watt v. Alaska, 451 U.S. 259, 266-67 (1981).

[211] Assuming, *arguendo*, that the State of Alaska has no legal ability to alienate publicly-owned mineral resources in the face of its trust responsibilities.

resources comprising the public trust. Without strong judicial oversight, the public trust is a sham. There is a tendency in current American political rhetoric to decry "judicial activism."[212] The current cant holds that the judiciary should be subordinate to the legislative and executive branches. Such a political perspective would minimize or deny the judicial branch's duty to grant relief from infringement of the public's beneficial interest in public trust resources.

Examination of the roots of republican political philosophy in America indicate that the appropriate role for the judicial branch is one of coequal importance with the legislative and executive branches of government.[213] The Framers of the U.S. Constitution saw the republican form of government as requiring a blending of powers between the different branches of government so that each branch could serve as a check on the others. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[214]

Like all powers, the power of the executive and legislative branches to transfer common property resources is limited. The practical limits to this power are defined principally through our common law heritage; they are enforced by the judicial branch in response to citizens' formal complaints. The supervisory power of the judicial branch exercised in the name of the public trust doctrine is firmly within the classic mold of American separation of powers philosophy. "[T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others."[215] Members of the legislative and executive branches who complain of judicial interference in their management of Alaska's resources may complain that unelected judges have no place in a republican government, but such a complaint flies in the face of history.[216]

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[212] *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 17 (1990).

[213] The need for the judicial branch to act as a "check," "balance," or "brake" on the legislative and executive branches is a recurring theme in *The Federalist Papers*. "And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Enlightened statesmen will not always be at the helm." THE FEDERALIST No. 10, at 124-25 (James Madison) (Isaac Kramnick ed., 1987).

[214] *Id.*, No. 47, at 303; *see also id.*, No. 48 (James Madison) & Nos. 49-51 (Alexander Hamilton & James Madison).

[215] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 113 (Harper & Row 1964) (1787).

[216] *See* THE FEDERALIST, *supra* note 213, No. 39, at 256 (James Madison).

America's founding fathers did not intend to create a system of government in which the three branches of government would be absolutely separate and distinct. The system of Montesquieu, which served as our founders' model, provided for each branch of government to have a partial agency in and control over the acts of the others. It is fundamental to the American system of government that there be a partial mixture of powers among the coordinate branches.[217]

> [T]he political apothegm [of separation of powers] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other . . . . [U]nless these departments be so far connected and blended as to give *each* a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.[218]

The judicial branch historically has been seen as the most effective bulwark against excess by the legislative and executive branches of government.[219] The more transient tenure of legislators and members of the executive branch naturally makes those officials subject to different interests, more focused on short-term benefits, and more easily affected by the risk of a diminution in their emoluments by way of political retaliation for failure to take a particular action. It is the duty of the courts to "declare all acts contrary to the manifest tenor of the Constitution void."[220] Our founders recognized that judges are less likely to be swayed by the winds of politics than are legislators or members of the executive.

Constitutional principles, like Alaska's public trust doctrine, should not be overridden by the legislature or the executive branch.

> [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.[221]

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[217] *See id.*, No. 47 (James Madison) & No. 51 (Alexander Hamilton & James Madison).

[218] *Id.*, No. 48, at 308 (James Madison) (emphasis added).

[219] *Id.*, No. 68 (Alexander Hamilton).

[220] *Id.* at 438.

[221] *Id.*, No. 78, at 439 (Alexander Hamilton); *see also id.*, No.81 (Alexander Hamilton).

IV
CONCLUSION

No individual and no branch of government enjoys a monopoly on wisdom or foresight. It is necessary and proper that the American system of checks and balances, in which the courts are the final arbiters, should apply to and restrain transfer of Alaska's publicly-owned wealth into private hands. In its purest essence, this is the meaning of the public trust doctrine.

The public trust doctrine is merely the name given to the rationale relied on by a republican government to limit the power of those who temporarily occupy the seats of governmental power when the governors seek to transfer the common wealth of the governed into private hands.[222] Properly understood, the public trust doctrine should act as a restraining influence on the executive and legislative branches of government. By appreciating their fiduciary duties as guardians of the long-term public interest, the legislative and executive branches should voluntarily moderate their behavior and make decisions which are procedurally and substantively proper.

It is human nature to tend to exaggerate the importance of current events and thoughts. For example, there are many people today who believe that the "owner state" philosophy is essential to the economic and spiritual development of Alaska.[223] There are perhaps an equal number who abhor the "owner state" and claim it suffers from a monomaniacal obsession with development that ignores the long-term effects on renewable resources.[224]

The purpose of this article is not to embrace either of those positions in the current political spectrum. Rather, its purpose has been to explain the legal foundation of the public trust doctrine in Alaska. In particular, the author has sought to demonstrate that the principles of the public trust doctrine in Alaska are so important that they have been enshrined in our state constitution, in our statutes, and in the decisions of our Supreme Court. These principles of conservation and wise use have been handed down to us since the Magna Carta, and should not be casually discarded in the course of popular political

[222] **The sovereignty of the state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments.**

Spooner v. McConnel, 22 F. Cas. 939, 943 (C.C.D. Ohio 1838).

[223] *See generally* WALTER HICKEL, WHO OWNS AMERICA (1971).

[224] *Id.*

debate over how to achieve the chimera of permanent material wealth.

In large measure, the judicial branch must serve as trustee of the public resources subsumed within the rubric of the public trust doctrine, because of the longer duration of the tenure of the judiciary and its relative insulation from political pressures. Since the persons who serve in the executive and legislative branches are generally present in government for fewer years, the focus of their outlook is often shorter. A short-term outlook has something to offer in a democratic system, but the leavening effect of a long-term view is just as necessary to the health and welfare of society. There is political boldness in advocating the rapid placement of Alaska's public wealth into private hands. Yet there is also an unknown opportunity cost incurred by such transfers.

Viewed in the context of the never-ending debate over the advisability of transferring publicly-owned resources into private hands, the public trust doctrine is the polestar that enables the judicial branch to keep the course of government a moderate one, and to prevent extremism.[225] "Private rights and interests are in constant danger if the judicial power does not grow more extensive and stronger to keep pace with the growing equality of conditions."[226]

The best protection which the public enjoys against improvident transfer of public resources into private hands is the power of the judicial branch to void actions that violate the public trust. Imperfect though it may be, we must rely on the collective wisdom, experience, and procedural safeguards of the judicial process to protect the vast and multifarious natural wealth constituting Alaska's patrimony from being sold or traded for short-term advantages that will leave all Alaskans poorer.

A free and adequate flow of information regarding the extent and value of public trust resources between state agencies and the public is crucial. Without this information, the state will be unable to preserve the public's trust assets. Without this information, the state will also be unable to assure that it obtains full value for any sale, lease, or exchange of trust assets. Full information is critical to enable the public, as beneficiaries, to enforce its rights and hold the state to the appropriate and highest standard of care — the duty of a fiduciary.

The public trust explicitly and implicitly limits the power of the State

[225] *See* 1 NICOLO MACHIAVELLI, THE DISCOURSES § 53 (Routledge & Kegan 1975) (1531) ("The populace, misled by the false appearance of advantage, often seeks its own ruin, and is easily moved by splendid hopes and rash promises.").

[226] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, bk. 4, at 343 (Henry Reeve ed., rev. by Francis Bowen & Phyllis Bradley 1945) (1841).

of Alaska to dispose of public lands and resources. Many of the requirements of the public trust doctrine that have been described in this article have not yet been recognized by the executive branch. It is hoped that in the future, the considerations set forth here will help state government more effectively perform its job as trustee. The state and all Alaskans will benefit from improving the quality and quantity of information exchanged regarding the extent and value of Alaska's public trust resources. The public trust doctrine will be most effective when it serves as a rule of self-restraint whereby state government checks its plans *before* acting to ensure that the mandates of the public trust are met and the state fulfills its fiduciary duties.

The public trust doctrine offers a legal framework to enhance the quality of state government by establishing management standards for various public resources. The doctrine provides the best safeguard yet known to preserve the natural resources and quality of life that make Alaska unique. All three branches of government, together with the public at large, must cooperate in good faith to ensure that the public trust doctrine is used with success for the benefit of current and future generations of Alaskans.

UPDATE: Public Trust case law in Alaska from 1992-1997

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I. INTRODUCTION

Most of the cases decided by the Alaska Supreme Court and involving a discussion of the "common use" clause (Alaska Constitution, Article VIII, §3) tend to involve disputes over the allocation of fish and wildlife among competing groups of users.

It seems reasonable to anticipate that fish and wildlife allocation disputes will continue to work their way up through the courts, and that the Public Trust doctrine will continue to work its way into the argument and resolution of those disputes.

In Alaska, it is rare that one sees the Public Trust Doctrine enter into a dispute in which one party seeks to vindicate truly public rights. Instead, the interests that are advocated in courtrooms tend to be those of a particular user group, e.g., sport, commercial, subsistence.

To the best of my knowledge, none of the Public Trust "common use" cases that have reached the Alaska Supreme Court

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have sought to obtain conservation-oriented goals with results intended to benefit the resource; courtroom advocacy has been in favor of the resource user, instead.

The cases that follow and which have been synopsized here show, at a minimum, the ongoing vitality and importance in Alaska law of the Public Trust Doctrine and the "common use" clause of our state Constitution.

II. PUBLIC TRUST CASE LAW

A. Alaska Fish Spotters v ADF&G, 838 P.2d 798 (Alaska 1992).

Alaska Fish Spotters v ADF&G, 838 P.2d 798 (Alaska 1992), involved a claim that a regulation of the Alaska Board of Fisheries prohibiting use of airplanes to spot schools of salmon in Bristol Bay was invalid. The Alaska Supreme Court UPHELD the regulation as a valid limit on methods and means of harvest.

The Court's decision included a discussion of the Alaska Constitution, Article VIII, § 3, the "common use" clause. The Court analyzed the regulation in light of the appellants' claim that the law improperly infringed on the Public Trust.

In Fish Spotters, the Alaska Supreme Court wrote that the common use clause does not obligate the State "to guarantee access to a natural resource by a person's preferred means or method." Alaska Fish Spotters v ADF&G, 838 P.2d 798, 801 (Alaska

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1992). Consequently, fishermen who would like to rely on airplanes to spot schools of salmon for them have no constitutionally-protected right to this assistance.

In other words, it is one thing to protect a legitimate Public Trust use; it is quite another thing to protect a specific method or means of harvest, or a manner of gaining access to the Public Trust resource being used.

B. Hayes v. A.J. Associates, Inc., 846 P.2d 131 (Alaska 1993).

Hayes v. A.J. Associates, Inc., 846 P.2d 131 (Alaska 1993), involved a mining claim on tidelands that had been filled near Juneau. The mining claim was on land that had been, but was no longer, subject to tidal influence.

The appellant (Hayes) argued, among other things, that mining activity was protected under the Public Trust Doctrine because mining was a form of "commerce." Hayes further argued that since mining was "commerce" and protected by the Public Trust, he could not be enjoined or ejected from utilizing the property for mining purposes.

The Alaska Supreme Court disagreed with Mr. Hayes.

The Court wrote that "commerce" in the context of the Public Trust Doctrine means "trade, traffic or transportation of goods over navigable waters, a meaning which does not include mining." Hayes v. A.J. Associates, Inc., 846 P.2d 131, 133

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(Alaska 1993).

To further clarify the spirit of the Public Trust Doctrine, the Court provided additional gloss describing the public, non-wasting nature of uses that come under the aegis of the Trust.

> Most importantly, a mining claim is not a "public use," but rather an exclusive, depleting use of a non-renewable resource for private profit. We believe that even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises. (footnote omitted)

Hayes v. A.J. Associates, Inc., 846 P.2d 131, 133 (Alaska 1993).

C. Tongass Sport Fishing Ass'n v State, 866 P.2d 1314 (Alaska, 1994).

Tongass Sport Fishing Ass'n v State, 866 P.2d 1314 (Alaska, 1994) involved a challenge to a regulation of the Alaska Board of Fisheries allocating the number of chinook (king) salmon to be harvested by commercial seiners and gillnetters, commercial trollers, and sport fishers in Southeast Alaska. The Board's allocation was made within the framework of the ceiling set by the Pacific Salmon Commission and the Pacific Salmon Treaty.

In Tongass, the Alaska Supreme Court held that the Board's

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king salmon allocation between the sport and commercial fleets did not violate the Alaska Constitution's "common use" clause because the Board's action did not place any limits on admission to the competing (commercial or sport) user groups. Tongass, 866 P.2d at 1318.

From the perspective of understanding Alaska's Public Trust Doctrine, the paramount feature of Tongass is its reiteration of the principle articulated in McDowell that the common use clause is implicated when a law seeks to limit admission to a user group, rather than when an allocation of a harvestable resource is made.[1]

Tongass is also important for its discussion of the Board of Fisheries' and Board of Game's powers to allocate fish and wildlife among diverse user groups and sub-groups. The Court wrote:

> The Board of Fisheries was created for the purposes of conservation and development of the state's fishery resources. AS 16.05.221(a). In Kenai Peninsula Fisherman's Cooperative Ass'n v. State, 628 P.2d 897, 903 (Alaska 1981), we held that concepts of "conserving" and "developing" fishery resources necessarily include the concepts of managed utilization and thus allocation of these resources. See also Alaska Fish Spotters v. State, Dep't of Fish & Game, 838 P.2d 798, 800 (Alaska 1992). In Meier v. State, Board of Fisheries, 739 P.2d 172, 174 (Alaska 1987), we stated that the Board's "duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users." We also held that the Board's authority encompasses the power to allocate a fishery resource between two competing

[1] "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group." Tongass, 866 P.2d 1320, fn 11, citing McDowell v State, 785 P.2d at 8.

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subgroups of commercial users. Id. at 174 (upholding Board allocation of salmon between setnet and driftnet fishers). Subsequently, in Gilbert v. State, Department of Fish & Game, 803 P.2d 391, 399 (Alaska 1990), we recognized that the Board possessed authority to allocate among different fisheries.

We have held that the "common use" clause of article VIII, section 3, the "no exclusive right of fishery" clause of section 15, and the "uniform application" clause of section 17 are not implicated unless limits are placed on the admission to resource user groups. McDowell v. State, 785 P.2d 1, 8 & n. 14 (Alaska 1989); see also Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492 (Alaska 1988). Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users. (FN11) In Kenai Peninsula, we said:

> 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, sports, 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 in the same area must also be allowed, would be to go far beyond the purpose of the section. 628 P.2d at 904.

Tongass, 866 P.2d at 1317-1318.

D. State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995).

State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995), involved whether the Alaska Constitution is violated by a statute which (1) requires the creation of areas in which permits for subsistence hunting and fishing may not be granted, and (2) grants priority hunting and fishing rights to a preferred class of subsistence users based on where they reside.

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The Alaska Supreme Court resolved Kenaitze primarily by reference to its decision in McDowell v State, 785 P.2d 1 (Alaska 1989) and the prohibition of Alaska's "common use" clause against granting preferences for the taking of fish or wildlife based on the location of an Alaskan's residence.[2]

The creation of "nonsubsistence areas" was upheld in Kenaitze and the importance of the "common use" clause in assuring that location of residence within Alaska be a neutral factor was emphasized.

The Alaska Constitution, Article VIII, § 3, "is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves 'to the people for common use' wild fish and game '[w]herever occurring." (Emphasis in original. State v Kenaitze, 894 P.2d 632, 640, fn 21 (Alaska 1995).

> Inconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses.

State v Kenaitze, 894 P.2d 632, 640 (Alaska 1995).

> The fact that residents of nonsubsistence areas must travel in order to utilize subsistence permits is not a limitation to their admission to a subsistence user group. (footnote omitted) Further, just as the fact that a certain species is made available for sport fishing in a given area does not mean that the same species must be made available for commercial fishing in the same area, the fact that a certain species is made available for sport or commercial use in a given area does not mean that the constitution commands that the same species be made available in the same area for priority subsistence use.

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[2] Kenaitze, 894 P.2d at 838, and fn 21.

Kenaitze, 894 P.2d at 641.

The Alaska Supreme Court has held that where entry into a user class is restricted, it will employ a "least restrictive alternative" test. Kenaitze, 894 P.2d at 641-642, citing McDowell, 755 P.2d 1 at 10, Owsichek, 763 P.2d at 498, n. 17, and Johns 758 P.2d 1266. In contrast, allocation decisions of the Boards "...are so complex and multi-faceted that they are not amenable to analysis under such a test." Id., citing Tongass, 866 P.2d at 1319, Gilbert, 803 P.2d at 399, and Meier, 739 P.2d at 175.

E. Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995).

Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995), involved a challenge to the constitutionality of AS 16.05.255(d), and regulations of the Board of Game adopted thereunder, which granted a preference to resident Alaskans over non-Alaskans in the harvest of certain species of wildlife.

The Alaska Supreme Court upheld the statute and regulations. The Court wrote that under the federal and state constitutions the state has a special interest in the fish and wildlife within its boundaries and is entitled to grant allocational preferences to state resident recreational users. Shepherd, 897 P.2d at 39.

There is no conflict with the "common use" clause when

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Alaska favors its own residents over non-residents. The state may completely exclude non-residents from harvest opportunities.

Although the Alaska Supreme Court cited many venerable authorities[3] in support of the power to prefer Alaska residents, it relied primarily on State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed, 340 U.S. 923, 71 S.Ct. 498, 95 L.Ed. 667 (1951). In Kemp, South Dakota had proved that there was a real danger that the flyways, breeding grounds, and nursery for ducks and geese would be subject to excessive hunting and possible destruction by nonresident hunters lured to the State by an abundance of pheasants.[4] 44 N.W.2d at 217.

Our Court reasoned that:

> As the trustee of those resources for the people of the state, the state [of Alaska] is required to maximize for state residents the benefits of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in

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[3] viz., Montana Outfitters Action Group v. Fish & Game Commission, 417 F.Supp. 1005 (D.Mont.1976), aff'd sub nom., Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); Geer v. Connecticut, 161 U.S. 519, 530, 16 S.Ct. 600, 604-05, 40 L.Ed. 793 (1896); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1877); Corfield v. Coryell, 6 F.Cas. 546 (C.C.E.D.Pa.1825) (No. 3,230).

[4] State v Kemp is a case that had been rarely cited until it surfaced in a footnote in Montana Outfitters Action Group v. Fish & Game Commission, 417 F.Supp. 1005 (D.Mont.1976), aff'd sub nom., Baldwin v. Fish & Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

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conflict with paramount federal interests. Shepherd, 897 P.2d at 40-41.

F. Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996).

Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996), also known as "the F.I.S.H. Initiative case," involved a challenge to an exercise of the Constitutional procedure of the Initiative in which a proposed law is submitted to a public vote by the electorate instead of the Legislature. The F.I.S.H. Initiative would have established a statutory system for allocating salmon harvests among certain user groups.

The majority opinion in Pullen held that the Initiative was void because it would have worked an unconstitutional appropriation. The majority also recognized the state's Public Trust obligation to manage fish, wildlife, and waters.

Pullen, 923 P.2d at 60.

The majority opinion in Pullen recognizes and cites the Public Trust as a powerful factor in Alaska law. The majority opinion expressly declined to address the argument that management of Alaska's salmon resources falls exclusively within the power of the state legislature as trustee of Alaska's wildlife, and therefore is not a proper subject of an initiative. (Pullen, fn 18.)

Chief Justice Allen Compton concurred in the majority holding and result of Pullen, but for entirely different

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reasons than the "improper appropriation" grounds relied on by the majority of the Alaska Supreme Court. The Chief Justice would have found the Initiative invalid as prohibited by the trust relationship between the State and its citizens.[5] In his concurring opinion, the Chief Justice reviewed several of the most important decisions of the Alaska Supreme Court that recognize, elaborate upon, and affirm the Public Trust Doctrine. Selected key passages from the majority holding are excerpted below, followed by excerpts from the Chief Justice's concurring opinion.

> In Owsichek v. State, Guide Licensing, 763 P.2d 488 (Alaska 1988), we had occasion to analyze the common use clause found in article VIII, section 3 of Alaska's Constitution. After noting that the framers of our constitution apparently intended to constitutionalize historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources, we said:
>
> > Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people. We have twice recognized this duty in our prior decisions. In Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961) aff'd 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962), we stated:
> >
> > These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.
>
> (Emphasis added.) Similarly, in Herscher v. State, Department of Commerce, 568 P.2d 996, 1003 (Alaska 1977), we noted that the state acts "as trustee of the natural resources for the benefit of its citizens."

[5] Pullen, Compton, C.J., concurring, 923 P.2d at 66.

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Id. at 495.

In a footnote to this text, we stated:

> The Court overruled Geer's state ownership doctrine in Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). That case involved facts almost identical to Geer. The Oklahoma statute at issue forbade the export of minnows taken from the waters of the state. See id. at 323, 99 S.Ct. at 1729, 60 L.Ed.2d at 254. The Court struck down the statute as violative of the commerce clause. Id. at 338, 99 S.Ct. at 1737, 60 L.Ed.2d at 263. The Court found the state ownership doctrine to be a legal fiction that created anomalies and did not conform to "practical realities." Id. at 335, 99 S.Ct. at 1735, 60 L.Ed.2d at 261. Nothing in the opinion, however, indicated any retreat from the state's public trust duty discussed in Geer. Indeed, the Court stated, "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." Id. at 335-36, 99 S.Ct. at 1735-36, 60 L.Ed.2d at 261.

. . . .

After Hughes, the statements in the Alaska Constitutional Convention regarding sovereign ownership, quoted supra, are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains.

Id. at 495 n. 12.

These important themes have been consistently reaffirmed. See Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391, 399 (Alaska 1990); Shepherd v. State, Dep't of Fish and Game, 897 P.2d 33, 40 (Alaska 1995).

Given the above, we think there is merit in Pullen's contention that the public trust responsibilities imposed on the state by the provisions of article VIII of our constitution compel the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities.

In short, we are in agreement with Pullen's position

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that

> [i]t is the authority to control naturally occurring fish which gives the state property-like interests in these resources. For that reason, naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people.
>
> We hold that the state's interest in salmon migrating in state and inland waters is sufficiently strong to warrant characterizing such salmon as assets of the state which may not be appropriated by initiative. Thus we conclude that the superior court correctly reasoned that salmon are public assets of the state which may not be appropriated by initiative.

The Public Trust Doctrine is more directly addressed at 923 P.2d 65, Chief Justice Compton concurring:

> The trust relationship derives generally from article VIII of the Alaska Constitution, and in this case specifically from article VIII, section 3, which provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." This section, generally referred to as the "common use clause," can be amended by the people of the State, for that right is guaranteed them by article XIII, section 1 of the Alaska Constitution. However, it cannot be amended by the legislature, only implemented within the narrow confines of the limitations of the common use clause, which has created the trust relationship between the State and its people.

Chief Justice Compton's concurring opinion, which rejects the majority's conclusion that fish and wildlife are state assets, relies entirely on the Public Trust Doctrine and the Alaska Constitution's exclusion of certain topics as "clearly inapplicable" to adoption by Initiative to find that the F.I.S.H. Initiative was invalid:

> The people, as beneficiaries of this trust, cannot dictate to the trustee the manner in which the trust is

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to be administered.[6]

To me, the majority opinion's reliance on Alaska constitutional law concerning what does or does not constitute an invalid "appropriation" appears just as strained as it struck Chief Justice Compton. Nevertheless, it was that view of the law that garnered a majority of votes on our Supreme Court. Consequently, one should expect practitioners in Alaska to tailor future legal arguments to fit the "improper appropriation" rubric.

Practitioners in Alaska are likely to look at this situation and conclude that both legal theories--improper appropriation and violation of the trust relationship--should be elaborated in future challenges of a similar ilk.

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[6] Pullen, 923 P.2d at 66.

III. CONCLUSION

As the Public Trust jurisprudence of Alaska's "common use" clause continues to evolve and develop, what changes may be anticipated?

Arguably, the Alaska Supreme Court lost its foremost authority on natural resource issues with the retirement of Justice Jay Rabinowitz in early 1997. Justice Rabinowitz' successor as the natural resources dean of the Alaska Supreme Court appears to be Justice Compton. Justice Compton's concurring opinion in Pullen shows, beyond any doubt, his familiarity with and concern for the Public Trust Doctrine, so we may be assured that any legal argument standing on the Public Trust Doctrine will find a certain measure of receptivity and a well of understanding.

The relatively recent elevation of Justices Fabe and Eastaugh to the Alaska Supreme Court have not yet shown their significance in natural resources jurisprudence.

My personal hope is that a good fact situation will present itself to an able barrister who is also blessed with good luck, and that this will combine to provide the vehicle for Alaska's "common use" clause and the Public Trust Doctrine to be used for straightforward resource conservation reasons. In other words, I hope to see the Public Trust Doctrine used to vindicate public rights, not merely used as a prybar in an allocation dispute.

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On the other hand, I feel confident that allocation disputes among competing groups of resource users will continue to dominate litigation that turns on, or simply includes, arguments based on Alaska's "common use" clause. Competition among competing groups of users of wildlife and fish is certain to intensify, and it is natural to see user groups turn to the "common use" clause.

Alaska's human population is almost certain to increase. The pressures for increased exploitation of Alaska's natural resources--especially oil and natural gas--are almost certain to increase, too, with collateral effects on some fish and wildlife. Together, these factors should heighten competition for scarce fish, wildlife, and water resources.

State-federal jurisdictional conflicts and confusion in Alaska will not disappear. Nor will internecine acrimony, even in the event of an amendment to the Alaska Constitution that seeks to resolve "The Subsistence Question" by allowing discrimination among Alaska residents based on where within Alaska they may live.

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2/21/98

CS FOR HOUSE BILL NO. 406(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RESOURCES COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to fish and game."**

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

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

4 (1) the ability to take fish and game for personal and family use for sustenance
5 is a fundamental right under the Constitution of the State of Alaska;

6 (2) the common use clause of the Constitution of the State of Alaska imposes
7 on the state a trust duty to manage the fish, game, and water resources of the state for the
8 benefit of all the people;

9 (3) the harvest of fish and game for personal and family use for sustenance is
10 the highest and best use of fish and game;

11 (4) the fish and game resources of Alaska have adequate biological and
12 reproductive capacity to provide an abundance of fish and game for all users;

13 (5) the harvest of fish and game for personal and family use for sustenance
14 does not constitute or affect interstate commerce and is not subject to regulation under the
15 commerce clause of the Constitution of the United States.

1 (b) It is the intent of the legislature to provide
2 (1) a preference for personal and family use of fish and game for sustenance
3 that parallels the Congressional intent underlying the subsistence preference under Title VIII
4 of the Alaska National Interest Lands Conservation Act (P.L. 96-487) but does not violate the
5 fundamental constitutional rights of Alaskans to sustenance, equal protection, and common use
6 of fish and game under the Constitution of the State of Alaska;
7 (2) a greater role for local fish and game advisory committees and regional fish
8 and game management boards in the review and approval of regulations governing the use of
9 fish and game resources;
10 (3) for a greater abundance of fish and game resources to serve as a source of
11 food for persons who are dependent on fish and game for personal and family use for
12 sustenance.
13 * **Sec. 2.** AS 16 is amended by adding a new chapter to read:
14 **Chapter 16. Use of Fish and Game for Sustenance.**
15 **Sec. 16.16.010. Preferred use of fish and game.** The harvest of fish and
16 game for personal and family use for sustenance by residents is the highest and best
17 use of fish and game. The Board of Fisheries, the Board of Game, and the department
18 shall adopt regulations, policies, and management plans to implement a preference for
19 consumptive use of fish and game for personal and family use for sustenance over
20 other uses of fish and game.
21 **Sec. 16.16.020. Dependence on fish and game for sustenance.** (a) The
22 Board of Fisheries and the Board of Game acting jointly shall identify and define areas
23 of the state where fish and game dependent uses exist. A fish and game dependent use
24 area is an area where dependence on fish and game for personal and family use for
25 sustenance is the principal characteristic of the economy and way of life of the area.
26 In determining whether dependence on fish and game for personal and family use for
27 sustenance is the principal characteristic of the economy and way of life of an area,
28 the Board of Fisheries and the Board of Game shall jointly consider the relative
29 importance of dependence on fish and game in the context of the totality of the
30 following socioeconomic characteristics of the area:
31 (1) the social and economic structure;

1 (2) the stability of the economy;
2 (3) the extent and kinds of employment for wages, including full-time,
3 part-time, temporary, and seasonal employment;
4 (4) the amount and distribution of cash income among those who live
5 in the area;
6 (5) the cost and availability of goods and services to those who live in
7 the area;
8 (6) the variety of fish and game species used by those who live in the
9 area;
10 (7) the seasonal cycle of economic activity;
11 (8) the percentage of those who live in the area participating in hunting
12 and fishing activities or using wild fish and game;
13 (9) the harvest levels of fish and game by those who live in the area;
14 (10) the historical, social, and economic values associated with the
15 taking and use of fish and game;
16 (11) the geographic locations where those who live in the area hunt and
17 fish;
18 (12) the extent of sharing and exchange of fish and game by those who
19 live in the area;
20 (13) the other sources of direct and indirect economic support available
21 in the area;
22 (14) additional similar factors the boards establish by regulation to be
23 relevant to a determination under this subsection.
24 (b) If the Board of Fisheries or the Board of Game, as appropriate, determines
25 that a shortage of fish or game resources available for harvest in a fish and game
26 dependent use area exists, the board may establish a preference for fish or game
27 dependent uses and, consistent with sustained yield, reserve a sufficient portion of the
28 resource to provide a reasonable opportunity to satisfy the need for fish and game
29 dependent uses of the resource. A board shall make its determination of whether
30 sufficient fish or game resources exist in an area to provide a reasonable opportunity
31 to satisfy fish and game dependent uses of the resource based on the recommendations

1 of the department's area management biologist for the area, the regional fish and game
2 board for the area, and the advisory committees for the area. The preference
3 established under this subsection shall be extended to a person who is determined to
4 be dependent on fish and game for personal and family use for sustenance under (c) -
5 (g) of this section. In a time of shortage of fish or game resources, the appropriate
6 board may adopt a regional preference among beneficial uses of fish and game by
7 requiring that the flesh or meat of fish and game be consumed within the region where
8 the fish or game was taken.

9 (c) A person is dependent on fish and game for personal and family use for
10 sustenance if the person

11 (1) possesses a $5 resident hunting, trapping, and sport fishing license
12 issued under AS 16.05.340(a)(6); and

13 (2) submits to the local fish and game advisory committee for the area
14 in which the person lives a signed written statement that the person

15 (A) is dependent on fish and game for personal and family use
16 for sustenance or has no alternate means of sustenance as the result of the
17 absence of a cash-based economy in the area where the person lives or as the
18 result of the person's decision to adopt a fish and game dependent life style;

19 (B) has consumed in the preceding 12 months a minimum
20 number of species or groups of species of fish and game, as determined by the
21 Board of Fisheries and the Board of Game acting jointly; the minimum number
22 of species or groups of species or the groups of species may vary among the
23 fish and game management regions of the state in accordance with the diversity
24 of fish and game species in each region; and

25 (C) has shared fish and game resources taken by the person
26 with a minimum number of households, as determined by the Board of
27 Fisheries and the Board of Game acting jointly, or received fish and game
28 resources taken by members of a minimum number of other households, as
29 determined by the Board of Fisheries and the Board of Game acting jointly.

30 (d) Each local fish and game advisory committee shall review the written
31 statements submitted by persons asserting a dependence on fish and game for personal

1 and family use for sustenance and make recommendations as to whether the person is
2 entitled to a preference under (b) of this section. An advisory committee may hold a
3 hearing to gather additional information regarding whether a person is dependent on
4 fish and game for personal and family use for sustenance. Each advisory committee
5 shall forward its recommendations regarding each person's eligibility for a preference,
6 all written statements received by the advisory committee, and all additional
7 information collected by the advisory committee to the regional fish and game board
8 for the region in which the advisory committee is located. The regional board shall
9 defer to a recommendation made by an advisory committee unless a person disputes
10 the recommendation of the advisory committee under (e) of this section.
11 (e) A person who disputes the recommendation of the advisory committee as
12 to the person's eligibility for the preference may appeal the recommendation to the
13 regional fish and game board for the region in which the person lives. The regional
14 board shall make a determination as to whether the person is dependent on fish and
15 game for personal and family use for sustenance and should be recommended to the
16 Board of Fisheries and the Board of Game to receive the preference authorized under
17 (b) of this section. Proceedings of a regional board under this subsection are subject
18 to AS 44.62.330 - 44.62.630.
19 (f) Each regional fish and game board shall forward all recommendations,
20 written statements, and additional information received from the advisory committees
21 in the region, together with recommendations made by the regional board under (e) of
22 this section and additional information collected by the regional board, to the Board
23 of Fisheries and the Board of Game. The Board of Fisheries and the Board of Game,
24 acting jointly, shall make the final determination as to who is entitled to the preference
25 authorized under (b) of this section. The boards shall defer to the recommendations
26 of the advisory committees and the regional fish and game boards unless a person
27 disputes the recommendation made by an advisory committee or a regional board. The
28 boards shall hold a hearing subject to AS 44.62.330 - 44.62.630 to make a final
29 determination of whether the person is dependent on fish and game for personal and
30 family use for sustenance.
31 (g) A person who is determined by the Board of Fisheries and the Board of

1 Game to be dependent on fish and game for personal and family use for sustenance
2 may take fish and game in any location in the state where a preference for the harvest
3 of fish or game for personal and family use for sustenance has been established under
4 (b) of this section.
5 (h) The Board of Fisheries and the Board of Game shall adopt regulations
6 governing the allowable level of noncommercial barter and sharing of fish and game
7 resources taken for personal and family use for sustenance. The boards shall set the
8 level of allowable noncommercial barter at a documented historical level that does not
9 subject barter of fish and game taken for personal and family use for sustenance to
10 federal regulation under the commerce clause of the Constitution of the United States.
11 **Sec. 16.16.095. Definitions.** In this chapter,
12 (1) "principal" means more than 50 percent;
13 (2) "reasonable opportunity" means an opportunity, as determined by
14 the Board of Fisheries or the Board of Game, as appropriate, that allows a person to
15 participate in a fishery or hunt that provides a normally diligent participant with a
16 reasonable expectation of success of taking of fish or game; "reasonable opportunity"
17 does not mean a guarantee of taking fish or game;
18 (3) "shortage" means the amount of fish or game resources available
19 for harvest is not sufficient to reasonably provide for the sustenance needs of persons
20 who are dependent upon fish and game for personal and family use for sustenance;
21 (4) "sustained yield" means a level of utilization of a fish or game
22 population for consumptive uses by humans that is capable of being maintained in
23 perpetuity.
24 * **Sec. 3.** AS 16.05.090(c) is amended to read:
25 (c) There is established in the department a section of <u>fish and game</u>
26 <u>dependent use</u> [SUBSISTENCE HUNTING AND FISHING].
27 * **Sec. 4.** AS 16.05.094 is amended to read:
28 **Sec. 16.05.094. Duties of section of <u>fish and game dependent use</u>**
29 **[SUBSISTENCE HUNTING AND FISHING].** The section of <u>fish and game</u>
30 <u>dependent use</u> [SUBSISTENCE HUNTING AND FISHING] shall
31 (1) compile existing data and conduct studies to gather information,

1 including data from <u>persons dependent upon fish and game for personal and family</u>
2 <u>use for sustenance</u> [SUBSISTENCE USERS], on all aspects of the role of
3 [SUBSISTENCE] hunting and fishing <u>for fish and game dependent use</u> in the lives
4 of the residents of the state;
5 (2) quantify the amount, nutritional value, and extent of dependence on
6 food acquired through [SUBSISTENCE] hunting and fishing <u>for fish and game</u>
7 <u>dependent use</u>;
8 (3) make information gathered available to the public, appropriate
9 agencies, and other organized bodies;
10 (4) assist the department, the Board of Fisheries, and the Board of
11 Game in determining what uses of fish and game, as well as which users and what
12 methods, should be termed <u>fish and game dependent</u> [SUBSISTENCE] uses, users,
13 and methods;
14 (5) evaluate the impact of state and federal laws and regulations on
15 [SUBSISTENCE] hunting and fishing <u>for fish and game dependent use</u> and, when
16 corrective action is indicated, make recommendations to the department;
17 (6) make recommendations to the Board of Game and the Board of
18 Fisheries regarding adoption, amendment, and repeal of regulations affecting
19 [SUBSISTENCE] hunting and fishing <u>for fish and game dependent use</u>;
20 (7) participate with other divisions in the preparation of statewide and
21 regional management plans so that those plans recognize and incorporate the needs of
22 [SUBSISTENCE] users of fish and game <u>for fish and game dependent use</u>.
23 *** Sec. 5.** AS 16.05 is amended by adding a new section to read:
24 **Sec. 16.05.245. Review of regulatory proposals.** (a) Notwithstanding
25 AS 44.62, each proposal for a regulation to be adopted by the Board of Fisheries or
26 the Board of Game shall be submitted to local fish and game advisory committees and
27 regional fish and game boards that may be affected by the proposal. Each advisory
28 committee and regional board may review the proposed regulation and submit
29 comments and recommendations regarding the proposal to the Board of Fisheries or
30 the Board of Game, as appropriate. This subsection does not apply to emergency
31 regulations considered by either the Board of Fisheries or the Board of Game.

1 (b) The Board of Fisheries and the Board of Game shall carefully review each
2 recommendation made by a regional fish and game board and shall defer to the
3 recommendation of the regional board, unless
4 (1) there is a contrary recommendation from another regional board;
5 (2) the recommendation is not consistent with the conservation of the
6 fish or game resource;
7 (3) the recommendation involves issues of statewide significance; or
8 (4) the recommendation involves conflicts between regional boards.
9 (c) If the Board of Fisheries or the Board of Game chooses not to follow the
10 recommendation of an advisory committee or a regional board, the appropriate
11 statewide board shall inform the advisory committee or regional board of the action
12 and state the reasons for not following the recommendation.
13 (d) Subject to (a) and (b) of this section, the Board of Fisheries and the Board
14 of Game may consider and adopt any proposal for a regulation that is submitted for
15 adoption, even if comments or recommendations regarding the proposal are not
16 received from an advisory committee or a regional board.
17 * Sec. 6. AS 16.05.251(a) is amended to read:
18 (a) The Board of Fisheries may adopt regulations it considers advisable in
19 accordance with AS 44.62 (Administrative Procedure Act) for
20 (1) setting apart fish reserve areas, refuges, and sanctuaries in the
21 waters of the state over which it has jurisdiction, subject to the approval of the
22 legislature;
23 (2) establishing open and closed seasons and areas for the taking of
24 fish; if consistent with resource conservation and development goals, the board may
25 adopt regulations establishing restricted seasons and areas necessary for persons 60
26 years of age and older to participate in sport **fishing**, personal use **fishing**, or
27 [SUBSISTENCE] fishing **for personal and family use for sustenance**;
28 (3) setting quotas, bag limits, harvest levels, and sex and size
29 limitations on the taking of fish;
30 (4) establishing the means and methods employed in the pursuit,
31 capture, and transport of fish;

1 (5) establishing marking and identification requirements for means used
2 in pursuit, capture, and transport of fish;
3 (6) classifying as commercial fish, sport fish, guided sport fish,
4 personal use fish, [SUBSISTENCE FISH,] or predators or other categories essential
5 for regulatory purposes;
6 (7) watershed and habitat improvement, and management, conservation,
7 protection, use, disposal, propagation, and stocking of fish;
8 (8) investigating and determining the extent and effect of disease,
9 predation, and competition among fish in the state, exercising control measures
10 considered necessary to the resources of the state;
11 (9) prohibiting and regulating the live capture, possession, transport, or
12 release of native or exotic fish or their eggs;
13 (10) establishing seasons, areas, quotas, and methods of harvest for
14 aquatic plants;
15 (11) establishing the times and dates during which the issuance of
16 fishing licenses, permits, and registrations and the transfer of permits and registrations
17 between registration areas is allowed; however, this paragraph does not apply to
18 permits issued or transferred under AS 16.43;
19 (12) regulating commercial **fishing**, sport **fishing**, guided sport **fishing**,
20 **fishing for personal and family use for sustenance** [SUBSISTENCE], and personal
21 use fishing as needed for the conservation, development, and utilization of fisheries;
22 (13) requiring, in a fishery, observers on board fishing vessels, as
23 defined in AS 16.05.475(d), that are registered under the laws of the state, as defined
24 in AS 16.05.475(c), after making a written determination that an on-board observer
25 program
26 (A) is the only practical data-gathering or enforcement
27 mechanism for that fishery;
28 (B) will not unduly disrupt the fishery;
29 (C) can be conducted at a reasonable cost; and
30 (D) can be coordinated with observer programs of other
31 agencies, including the National Marine Fisheries Service, North Pacific

1 Fishery Management Council, and the International Pacific Halibut
2 Commission;
3 (14) establishing nonexclusive, exclusive, and superexclusive
4 registration and use areas for regulating commercial fishing;
5 (15) regulating resident or nonresident sport fishermen as needed for
6 the conservation, development, and utilization of fishery resources;
7 (16) requiring unlicensed fishing vessels present in or transiting the
8 waters of the state to report to the department the quantity, species, and origin of fish
9 on board; in this paragraph, "unlicensed fishing vessel" means a fishing vessel that is
10 not licensed under AS 16.05.490 - 16.05.530.
11 * **Sec. 7.** AS 16.05.251(d) is amended to read:
12 (d) Regulations adopted under (a) of this section must, consistent with
13 sustained yield and the provisions of **AS 16.16.020** [AS 16.05.258], provide a fair and
14 reasonable opportunity for the taking of fishery resources by personal use, sport, and
15 commercial fishermen.
16 * **Sec. 8.** AS 16.05.255(a) is amended to read:
17 (a) The Board of Game may adopt regulations it considers advisable in
18 accordance with AS 44.62 (Administrative Procedure Act) for
19 (1) setting apart game reserve areas, refuges, and sanctuaries in the
20 water or on the land of the state over which it has jurisdiction, subject to the approval
21 of the legislature;
22 (2) establishing open and closed seasons and areas for the taking of
23 game;
24 (3) establishing the means and methods employed in the pursuit,
25 capture, taking, and transport of game, including regulations, consistent with resource
26 conservation and development goals, establishing means and methods that may be
27 employed by persons with physical disabilities;
28 (4) setting quotas, bag limits, harvest levels, and sex, age, and size
29 limitations on the taking of game;
30 (5) classifying game as game birds, song birds, big game animals, fur
31 bearing animals, predators, or other categories;

1 (6) methods, means, and harvest levels necessary to control predation
2 and competition among game in the state;
3 (7) watershed and habitat improvement, and management, conservation,
4 protection, use, disposal, propagation, and stocking of game;
5 (8) prohibiting the live capture, possession, transport, or release of
6 native or exotic game or their eggs;
7 (9) establishing the times and dates during which the issuance of game
8 licenses, permits, and registrations and the transfer of permits and registrations between
9 registration areas and game management units or subunits is allowed;
10 (10) regulating sport hunting and [SUBSISTENCE] hunting **for**
11 **personal and family use for sustenance** as needed for the conservation, development,
12 and utilization of game;
13 (11) taking game to ensure public safety.
14 * Sec. 9. AS 16.05.255(d) is amended to read:
15 (d) Regulations adopted under (a) of this section must provide that, consistent
16 with the provisions of **AS 16.16.020** [AS 16.05.258], the taking of moose, deer, elk,
17 and caribou by residents for personal or family consumption has preference over taking
18 by nonresidents.
19 * Sec. 10. AS 16.05.255(f) is amended to read:
20 (f) The Board of Game may not significantly reduce the taking of an identified
21 big game prey population by adopting regulations relating to restrictions on harvest or
22 access to the population, or to management of the population by customary
23 adjustments in seasons, bag limits, open and closed areas, methods and means, or by
24 other customary means authorized under (a) of this section, unless the board has
25 adopted regulations, or has scheduled for adoption at the next regularly scheduled
26 meeting of the board regulations, that provide for intensive management to increase
27 the take of the population for human harvest consistent with (e) of this section. This
28 subsection does not apply if the board
29 (1) determines that intensive management would be
30 (A) ineffective, based on scientific information;
31 (B) inappropriate due to land ownership patterns; or

1 (C) against the best interest of <u>persons who take game for</u>
2 <u>personal and family use for sustenance</u> [SUBSISTENCE USES]; or
3 (2) declares that a biological emergency exists and takes immediate
4 action to protect or maintain the big game prey population in conjunction with the
5 scheduling for adoption of those regulations that are necessary to implement (e) of this
6 section.
7 * **Sec. 11.** AS 16.05.259 is amended to read:
8 **Sec. 16.05.259. No <u>personal and family use</u> [SUBSISTENCE] defense.** In
9 a prosecution for the taking of fish or game in violation of a statute or regulation, it
10 is not a defense that the taking was done for <u>personal and family use for sustenance</u>
11 [SUBSISTENCE USES].
12 * **Sec. 12.** AS 16.05.260 is repealed and reenacted to read:
13 **Sec. 16.05.260. Local advisory committees and regional boards.** (a) The
14 Board of Fisheries and the Board of Game, acting jointly, shall establish a maximum
15 of five fish and game management regions in the state.
16 (b) The Board of Fisheries and the Board of Game, acting jointly, shall adopt
17 regulations establishing a maximum of nine fish and game areas in each fish and game
18 management region established under (a) of this section that together comprise the
19 whole of the region and shall establish a local fish and game advisory committee for
20 each area. The advisory committees shall be composed of persons well informed on
21 the fish or game resources of the area. The boards shall set the number of members
22 and the terms of each of the members of the advisory committees and shall designate
23 one member of each committee as chair.
24 (c) A local fish and game advisory committee may
25 (1) hold public hearings on fish or game matters;
26 (2) make recommendations regarding fish and game matters and fish
27 and game regulatory proposals to the regional fish and game board for the region in
28 which the committee is located and to the Board of Fisheries, the Board of Game, and
29 the department;
30 (3) advise the Board of Fisheries and the Board of Game as to the
31 appropriate criteria for determining whether a person is dependent on fish and game

1 for personal and family use for sustenance under AS 16.16.020.

2 (d) Recommendations from the local fish and game advisory committees on
3 regulatory proposals and other fish and game matters shall be forwarded to the
4 appropriate regional and statewide boards for consideration.

5 (e) For each fish and game management region established under (a) of this
6 section, there is established a regional fish and game board. Each board consists of
7 nine members appointed by the governor from a list of names submitted by the fish
8 and game advisory committees within the region of the board. The governor may
9 reject one or more names submitted by the advisory committees and may ask for
10 additional names. The governor shall appoint each member on the basis of interest in
11 public affairs, good judgment, knowledge, and ability, and with a view to providing
12 diversity of interest and points of view in the membership. The members shall be
13 residents of the state and shall be appointed without regard to political affiliation or
14 geographical location of residence. The members of the boards appointed by the
15 governor are subject to confirmation by the legislature in joint session. The members
16 of the boards serve staggered terms of three years. The terms of members of the
17 boards begin on July 1. Notwithstanding AS 39.05.080(1), by April 1 of the calendar
18 year in which the term expires, the governor shall appoint a person to fill the vacancy
19 that will arise on a board due to expiration of the term of a member of the board and
20 submit the name of the person to the legislature for confirmation. If a vacancy arises
21 on the board, the governor shall, within 30 days after the vacancy arises, appoint a
22 person to serve the balance of the unexpired term and submit the name of the person
23 to the legislature for confirmation. A person appointed to fill the balance of an
24 unexpired term shall serve on the board from the date of appointment until the earlier
25 of the expiration of the term or the failure of the legislature to confirm the person
26 under AS 39.05.080. Members of a regional fish and game board serve without
27 compensation but are entitled to per diem and travel expenses authorized for boards
28 and commissions under AS 39.20.180.

29 (f) The governor may only remove a member of a regional fish and game
30 board for inefficiency, neglect of duty, or misconduct in office, or because the
31 member, while serving on the regional board, is convicted of a misdemeanor for

1 violating a statute or regulation related to fish or game or is convicted of a felony.
2 The governor shall deliver to the member a written copy of the charges and give the
3 member an opportunity to be heard in person or through counsel at a public hearing
4 before the governor or a designee upon at least 10 days' notice by registered mail.
5 The member may confront and cross-examine adverse witnesses. Upon removal, the
6 governor or a designee shall file in the proper state office the findings and a complete
7 statement of all charges made against the member.
8 (g) A majority of the members of a regional fish and game board constitutes
9 a quorum for the transaction of business, for the performance of any duty, and for the
10 exercise of any power. A majority of the full board membership is required to carry
11 all motions, regulations, and resolutions.
12 (h) Each regional fish and game board may
13 (1) exercise authority delegated to it by the Board of Fisheries, the
14 Board of Game, or the commissioner;
15 (2) hear appeals from recommendations of a local fish and game
16 advisory committee under AS 16.16.020;
17 (3) hold public hearings on fish and game matters;
18 (4) make recommendations regarding fish and game matters and fish
19 and game regulatory proposals to the Board of Fisheries, the Board of Game, and the
20 department;
21 (5) advise the Board of Fisheries and the Board of Game as to the
22 appropriate criteria for determining whether a person is dependent on fish and game
23 for personal and family use for sustenance under AS 16.16.020.
24 (i) The regional fish and game boards shall carefully review each
25 recommendation made by a local fish and game advisory committee within its region
26 regarding regulatory proposals and other fish and game matters. The regional board
27 shall defer to the recommendation of the advisory committee, unless there is a contrary
28 recommendation from another advisory committee, the recommendation is not
29 consistent with the conservation of the fish or game resource, the recommendation
30 involves issues of regional significance, or the recommendation involves conflicts
31 between advisory committees. If the regional board does not adopt or concur in the

1 proposal of the advisory committee, the board shall inform the advisory committee of
2 its decision and state the reasons for its action.
3 (j) The commissioner shall delegate authority to a regional board for
4 emergency closures during established seasons. The appropriate statewide board shall
5 adopt the necessary regulations governing these closures. The commissioner may set
6 aside and void only opening of seasons set by a regional board under this subsection.
7 * **Sec. 13.** AS 16.05.270 is amended to read:
8 **Sec. 16.05.270. Delegation of authority to commissioner <u>or to a regional</u>
9 <u>fish and game management board</u>.** <u>(a)</u> For the purpose of administering
10 AS 16.05.251 and 16.05.255, each board may delegate authority to the commissioner
11 **<u>or to a regional fish and game board</u>** to act in its behalf.
12 <u>(b)</u> If there is a conflict between the board and the commissioner on proposed
13 regulations, public hearings shall be held concerning the issues in question. If, after
14 the public hearings, the board and the commissioner continue to disagree, the issue
15 shall be certified in writing by the board and the commissioner to the governor who
16 shall make a decision. The decision of the governor is final.
17 * **Sec. 14.** AS 16.05.403 is amended to read:
18 **Sec. 16.05.403. Special licenses and permits.** (a) A resident hunting license,
19 a resident sport fishing license, a resident [SUBSISTENCE] fishing permit **<u>for</u>**
20 **<u>personal and family use for sustenance</u>**, or a resident personal use fishing permit
21 indicating that the purchaser is blind may be obtained from the department upon
22 payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon presentation of
23 either an affidavit of the applicant stating that the applicant cannot distinguish light
24 from darkness or an affidavit signed by a licensed physician or a licensed optometrist
25 stating that the applicant's central visual acuity does not exceed 20/200 in the better
26 eye with correcting lenses or that the applicant's widest diameter of visual field
27 subtends an angle no greater than 20 degrees.
28 (b) A resident who is a person with physical disabilities may obtain from the
29 department upon payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon
30 submission of satisfactory proof of physical disabilities a resident hunting license, a
31 resident sport fishing license, a resident [SUBSISTENCE] fishing permit **<u>for personal</u>**

1 **and family use for sustenance**, or a resident personal use fishing permit indicating
2 that the purchaser is a person with physical disabilities.
3 (c) A resident who is 65 years of age or older may obtain from the department
4 upon payment of the fee prescribed in AS 16.05.330 - 16.05.430 and upon submission
5 of satisfactory proof of age a resident hunting license, a resident sport fishing license,
6 a resident [SUBSISTENCE] fishing permit **for personal and family use for**
7 **sustenance**, or a resident personal use fishing permit indicating that the purchaser is
8 a person who is 65 years of age or older. This subsection does not limit the right of
9 a resident person who is 65 years of age or older to claim an exemption from hunting
10 or sport fishing license requirements under AS 16.05.400(b).
11 * Sec. 15. A 16.05.405(c) is amended to read:
12 (c) Notwithstanding AS 16.05.420(c), a resident holding a valid noncommercial
13 fishing license may take fish on behalf of a person who is blind, a person with
14 physical disabilities, or a person who is 65 years of age or older if the resident
15 possesses on the resident's person
16 (1) a document signed by the person on whose behalf the fish is taken,
17 stating that the resident possesses the person's sport fishing license, [SUBSISTENCE]
18 fishing permit **for personal and family use for sustenance**, personal use fishing
19 permit, or permanent identification card in order to take fish on behalf of that person;
20 (2) the person's
21 (A) resident sport fishing license issued under AS 16.05.403 or
22 permanent identification card issued under AS 16.05.400(b);
23 (B) resident [SUBSISTENCE] fishing permit **for personal and**
24 **family use for sustenance** issued under AS 16.05.403; or
25 (C) resident personal use fishing permit issued under
26 AS 16.05.403; and
27 (3) all other documents issued to the person that are required by law
28 as a condition of taking the fish being pursued.
29 * Sec. 16. AS 16.05.930(e) is amended to read:
30 (e) This chapter does not prevent the **limited noncommercial**
31 [TRADITIONAL] barter of fish and game taken **for personal and family use for**

1 <u>sustenance</u> [BY SUBSISTENCE HUNTING OR FISHING], except that the
2 commissioner may prohibit the barter of [SUBSISTENCE-TAKEN] fish and game by
3 regulation, emergency or otherwise, if a determination on the record is made that the
4 barter is resulting in a waste of the resource, damage to fish stocks or game
5 populations, or circumvention of fish or game management programs.
6 * **Sec. 17.** AS 16.05.940(2) is amended to read:
7 (2) "barter" means the exchange or trade of fish or game, or their parts,
8 taken for <u>personal and family use for sustenance</u> [SUBSISTENCE USES]
9 (A) for other fish or game or their parts; or
10 (B) for other food or for nonedible items other than money if
11 the exchange is of a limited and noncommercial nature;
12 * **Sec. 18.** AS 16.05.940(5) is amended to read:
13 (5) "commercial fishing" means the taking, fishing for, or possession
14 of fish, shellfish, or other fishery resources with the intent of disposing of them for
15 profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid
16 <u>fishing</u> [SUBSISTENCE] permit <u>for personal and family use for sustenance</u> in
17 possession, if required by statute or regulation, is considered prima facie evidence of
18 commercial fishing if commercial fishing gear as specified by regulation is involved
19 in the taking, fishing for, or possession of fish, shellfish, or other fish resources;
20 * **Sec. 19.** AS 16.05.940 is amended by adding a new paragraph to read:
21 (37) "fish and game dependent uses" means the noncommercial,
22 historical uses of fish and game by a resident for direct personal or family
23 consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and
24 selling of handicraft articles out of nonedible by-products of fish and game resources
25 taken for personal or family consumption, and for the limited noncommercial barter
26 or sharing for personal or family use for sustenance; in this paragraph, "family" means
27 persons related by blood, marriage, or adoption, and a person living in the household
28 on a permanent basis.
29 * **Sec. 20.** AS 16.10.380(b) is amended to read:
30 (b) In this section "user group" includes [, BUT IS NOT LIMITED TO,] sport
31 fishermen, processors, commercial fishermen, <u>persons who fish for personal and</u>

1 family use for sustenance [SUBSISTENCE FISHERMEN], and representatives of
2 local communities.
3 * Sec. 21. AS 16.10.750(a) is amended to read:
4 (a) The legislature finds that
5 (1) the salmon fishing industry is among the state's largest industries
6 and generates hundreds of millions of dollars and thousands of jobs each year; the
7 salmon fishery is vitally important to commercial, [SUBSISTENCE,] personal use, and
8 sport fishing interests, to persons who fish for personal and family use for
9 sustenance, and to the state's developing tourist industry;
10 (2) the state is committed to maintaining and enhancing its wild stocks
11 of salmon by careful management, by initiating a 20-year rebuilding program, and by
12 investing in the fishing industry;
13 (3) millions of Alaska salmon are being caught and injured by high
14 seas fisheries that intercept salmon contrary to state, federal, or international law; the
15 high seas interception of Alaska salmon defeats the state's management and rebuilding
16 programs, deprives the state of a return on its investment in the fishing industry, and
17 detrimentally affects personal and family uses of Alaska salmon for sustenance
18 [SUBSISTENCE] and sport fishing uses of Alaska salmon;
19 (4) vessels that engage in the high seas interception of salmon can
20 move relatively freely and undetected from region to region in the North Pacific and
21 thus are able to harvest whatever species is most readily available or most valuable;
22 by moving farther westward, a greater proportion of the take is Asian salmon; moving
23 eastward results in a greater proportion of the take being Alaska salmon; although
24 there is intermixing of Asian and North American salmon stocks, scientific evidence
25 proves that even a minimal harvest of salmon within the migratory range of each
26 species will contain Alaska salmon;
27 (5) the illegal taking of salmon detrimentally affects the Alaska fishing
28 industry; the illegal taking of Alaska salmon is of primary concern because of the
29 direct and immediate effect on the state; in addition, the illegal taking of Asian salmon
30 is also of concern because depletion of those stocks will ultimately result in a shifting
31 of high seas fishing efforts, both legal and illegal, to Alaska salmon;

1 (6) high seas interception of salmon occurs beyond the exclusive
2 economic zone of the United States, or through incursion within the exclusive
3 economic zone and the state's territorial sea, by vessels that are usually not registered
4 in this state; moreover, these vessels are not based in Alaska and can thus avoid
5 detection more easily than Alaska-based vessels; as a practical matter, it is extremely
6 difficult to directly or indirectly regulate the vessels themselves; it is therefore
7 necessary to prohibit activities within the state that give aid, comfort, and financial
8 incentives to high seas interception of salmon.
9 * **Sec. 22.** AS 16.10.800(1) is amended to read:
10 (1) "high seas interception," "interception," or a similar term means the
11 unauthorized catching, taking, or harvesting of salmon for other than sport, **personal
12 and family use for sustenance** [SUBSISTENCE], or personal use purposes [,]
13 (A) throughout the migratory range of each species by a vessel
14 not registered under the laws of this state; or
15 (B) beyond the territorial sea of the state by a vessel registered
16 under the laws of the state;
17 * **Sec. 23.** AS 16.20.033(b) is amended to read:
18 (b) The Yakataga State Game Refuge is established to protect the
19 (1) fish and wildlife habitat and populations, including salmon
20 spawning and rearing habitat and critical goat and moose winter habitat;
21 (2) public uses of fish and wildlife and their habitat, particularly
22 commercial **fishing, fishing for personal and family use for sustenance, and** [,] sport
23 [, AND SUBSISTENCE] fishing, hunting, viewing, photography, and general public
24 recreation in a high quality environment; and
25 (3) the use and disposition of other resources when the activities are
26 not inconsistent with (1) and (2) of this subsection.
27 * **Sec. 24.** AS 16.20.033(f) is amended to read:
28 (f) The department shall allow commercial **fishing**, sport **fishing**, [AND
29 SUBSISTENCE] fishing **for personal and family use for sustenance**, and hunting
30 within the Yakataga State Game Refuge under regulations of the Board of Fisheries
31 and the Board of Game. The department shall also permit associated support activities

when necessary and consistent with AS 16.20.010 - 16.20.080 to support fishing and hunting permitted under this section, including fish buying operations, aircraft support including landing strips, and off-road vehicle use.

*** Sec. 25.** AS 16.20.090(a) is amended to read:

(a) 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 **personal and family use for sustenance** [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.

*** Sec. 26.** AS 16.20.615(d) is amended to read:

(d) The department shall permit existing [EXITING] cabins to remain, **personal and family use of fish and game for sustenance to continue,** [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.

*** Sec. 27.** AS 16.20.625(e) is amended to read:

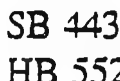
(e) The department shall permit uses of the Redoubt Bay Critical Habitat Area in a manner that is compatible with the purposes for which the critical habitat area is established. The department shall permit the following public uses to continue without further approval by the department unless the department determines that the use is not compatible with the purposes for which the Redoubt Bay Critical Habitat Area is established:

(1) hunting, including [SUBSISTENCE] hunting **for personal and**

1 family use for sustenance, trapping, fishing for personal and family use for
2 sustenance [AND SUBSISTENCE], commercial fishing, and sport fishing, including
3 the continued use of cabins for the purpose of hunting, trapping, and fishing;
4 (2) hiking, backpacking, and camping, including the use of campfires;
5 (3) cross-country skiing, snowmachining, boating, and the landing of
6 aircraft; and
7 (4) other related uses that are temporary in duration and have no
8 foreseeable adverse effects on vegetation, drainage, soil stability, or fish and game and
9 their habitat.
10 * **Sec. 28.** AS 16.40.120(c) is amended to read:
11 (c) The commissioner shall specify the expiration date of an acquisition permit
12 and may attach conditions to an acquisition permit, including conditions relating to the
13 time, place, and manner of harvest. Size, gear, place, time, licensing, and other
14 limitations applicable to sport harvest, commercial harvest, or [SUBSISTENCE]
15 harvest **for personal and family use for sustenance** of aquatic plants and shellfish do
16 not apply to a harvest with a permit issued under this section. The commissioner of
17 fish and game shall issue or deny a permit within 30 days after receiving an
18 application.
19 * **Sec. 29.** AS 16.40.120(d) is amended to read:
20 (d) The commissioner shall deny or restrict a permit under this section upon
21 finding that the proposed harvest will impair sustained yield of the species or will
22 unreasonably disrupt established uses of the resources by commercial, sport, **or**
23 personal use [, OR SUBSISTENCE] users **and by persons who use the resources for**
24 **personal and family use for sustenance**. The commissioner shall inform the Board
25 of Fisheries of any action taken on permit applications for species that support
26 commercial fisheries subject to limited entry under AS 16.43 and of any permits
27 denied because of unreasonable disruption of an established use. A denial of the permit
28 by the commissioner must contain the factual basis for the findings.
29 * **Sec. 30.** AS 16.40.120(f) is amended to read:
30 (f) Except as provided in (d) of this section or in a regulation adopted under
31 (e) of this section, the commissioner shall issue a permit if

1 (1) wild stock is necessary to meet the initial needs of farm or hatchery
2 stock;
3 (2) there are technological limitations on the propagation of culture
4 stock for the species sought;
5 (3) wild stock sought is not fully utilized by commercial fisheries,
6 sport fisheries, personal use [, OR SUBSISTENCE] fisheries, or by persons engaged
7 in personal and family use for sustenance; or
8 (4) wild stock is needed to maintain the gene pool of a hatchery or
9 aquatic farm.
10 * **Sec. 31.** AS 41.21.625(b) is amended to read:
11 (b) The governor shall appoint individuals to the Alaska Chilkat Bald Eagle
12 Preserve Advisory Council representing the following interests for a two-year term:
13 (1) a resident of the Haines Borough representing a conservation
14 organization;
15 (2) a representative of the United States Fish and Wildlife Service; and
16 (3) a member of the local [UPPER LYNN CANAL] fish and game
17 advisory committee for the area.
18 * **Sec. 32.** AS 16.05.258, 16.05.330(c), 16.05.940(8), 16.05.940(30), 16.05.940(31), and
19 16.05.940(32) are repealed.
20 * **Sec. 33.** Sections 3 and 5, ch. 1, SSSLA 1992, are repealed.
21 * **Sec. 34.** TRANSITION. (a) Notwithstanding the repeal of AS 16.05.258, by sec. 32 of
22 this Act, the areas outside of the nonsubsistence areas established by the Board of Fisheries
23 and the Board of Game shall constitute fish and game dependent use areas under
24 AS 16.16.020. added by sec. 2 of this Act, until the earlier of either the effective date of
25 regulations adopted by the Board of Fisheries and the Board of Game acting jointly to identify
26 fish and game dependent use areas under AS 16.16.020, added by sec. 2 of this Act, or two
27 years from the effective date of this Act.
28 (b) Notwithstanding the repeal and reenactment of AS 16.05.260 by sec. 12 of this
29 Act, a local fish and game advisory committee established before the effective date of this Act
30 that is active on the day before the effective date of this Act shall continue to operate under
31 the former provisions of AS 16.05.260 until the effective date of regulations adopted by the

1 Board of Fisheries and the Board of Game, acting jointly, that establish the local fish and
2 game advisory committees described in AS 16.05.260, as repealed and reenacted by sec. 12
3 of this Act. The Board of Fisheries and the Board of Game, acting jointly, shall appoint
4 persons to serve on the local fish and game advisory committees established under
5 AS 16.05.260, as repealed and reenacted by sec. 12 of this Act, immediately upon adoption
6 of regulations establishing the local fish and game advisory committees described in
7 AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.
8 * **Sec. 35.** INITIAL APPOINTMENT OF MEMBERS TO THE REGIONAL FISH AND
9 GAME BOARDS. (a) Notwithstanding AS 16.05.260, as repealed and reenacted by sec. 12
10 of this Act, immediately upon the adoption of regulations by the Board of Fisheries and the
11 Board of Game, acting jointly, to define the boundaries of fish and game management regions
12 in the state, the governor shall solicit nominations from local fish and game advisory
13 committees in existence at that time for persons to serve on each of the regional fish and game
14 boards established under AS 16.05.260, as repealed and reenacted by sec. 12 of this Act.
15 (b) Notwithstanding AS 16.05.260(e), as repealed and reenacted by sec. 12 of this Act,
16 the governor shall appoint the initial members of each of the regional fish and game boards
17 to staggered terms in accordance with AS 39.05.055(7).
18 * **Sec. 36.** REVISOR'S BILL. The revisor of statutes shall prepare a bill for consideration
19 of the resource committees of the House of Representatives and the Senate of the Alaska State
20 Legislature that amends references to subsistence uses of fish and game outside of Title 16
21 of the Alaska Statutes to conform to the provisions of this Act. The bill shall be presented
22 to the resource committees by the 20th legislative day of the First Regular Session of the
23 Twenty-First Alaska State Legislature.



SB 443
HB 552

An Act Relating to the Taking of Fish and Game for Subsistence; and Providing For an Effective Date

Prepared by:
The Governor's Subsistence Advisory Council

State of Alaska
Office of the Governor
March 3, 1992

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VI. Fiscal Notes

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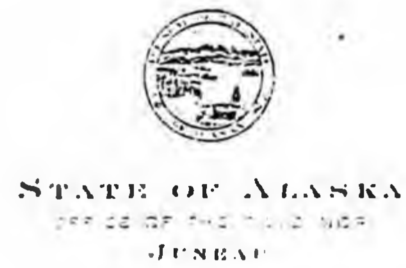
WALTER J. HICKEL



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 21, 1992

The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to subsistence.

Among the fifty states, only Alaska has a significant portion of its population who, in large part, live off the land. Subsistence is unique and special to Alaska. Because of the importance of subsistence to Alaska, both the United States Congress and past Alaska legislatures, have passed laws giving a preference to subsistence over other consumptive uses of the same resources.

Despite the general agreement that subsistence should have a preference, there has been monumental disagreement on how that preterence should be implemented. For too many years, Alaskans on different sides of the subsistence issue have talked about each other, but never to each other. The effect of conflicting court opinions, federal Alaska National Interest Lands Conservation Act mandates, and legislative gridlock have produced a crisis in the management of our fish and game. We have a current situation where everyone loses.

For the past year, an outstanding group of citizens has been meeting steadily to try to resolve this problem. There are nine members of the Governor's Subsistence Advisory Council and all of Alaska owes a debt to them. The members are:

The Honorable Jay S. Hammond, Port Alsworth
Mr. Dick Bishop, Fairbanks
Mr. John James Burns, Fairbanks
Mr. Mitch Demientieff, Nenana
Mr. Eric Forrer, Juneau
Mr. Matthew Iya, Nome
Mr. Byron Mallott, Juneau
Mr. Theo Matthews, Kenai
Mr. Gene Peltola, Bethel

These nine members represent all sides of the subsistence issue. While some members were nominated by specific groups, I asked each member to participate as an individual.

The group had a goal that is simple to define, but very difficult to achieve: it was to find the best possible subsistence solution for Alaska. Many observers thought that was an impossible dream, that the members could never agree. There were times during meetings, when that appeared to be true, but the council members did not give up. Today I am introducing subsistence legislation that the council drafted. Every part of this legislation is the result of consensus among the members.

The legislation is not what any one member, any one group, nor I, by myself, would have drafted. It is legislation that protects the resource, the interests of every group, and can pass. In designing this statute, great emphasis has been placed on how it will actually work. Extensive time has been spent with the Alaska Departments of Fish and Game (ADF&G) and Law.

The legislation is designed for species protection, to function with a minimum of disruption for users, for ease of administration by the Board of Fisheries and the Board of Game, for management by the ADF&G, enforceability by the Department of Public Safety, and defensibility in court. The legislation will reduce the constant barrage of subsistence court cases by making the state's actions more defensible, but, much more importantly, by laying out clear guidelines for the boards and reducing the problems which caused people to sue.

A packet of material describing and explaining the bill will be provided to the Senate Secretary and Chief Clerk.

I realize the legislature has a constitutional responsibility to consider and, if necessary, amend bills to make them the best possible legislation. Neither I nor the council make any claim that this legislation is perfect, but every word in it has been the subject of hours or days of debate. The two things I ask of the legislature, are to maintain the goal of the advisory council by passing the best possible piece of subsistence legislation, and to act swiftly to solve the subsistence crisis and help heal Alaska.

Sincerely,

S/S Walter J. Hickel

Walter J. Hickel
Governor

A Brief Introduction to HB 552 and SB 443 (Subsistence)

How would the new law work?
Participation would be limited to qualified subsistence users. Qualification is based on a point system applied across the state with three different levels of presumption. The new system would provide that communities and areas in the state be classified into one of three groups, and apply presumptions as follows:

Group 1 consists of areas where the population of each community in the area is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.
A person who hunts or fishes and lives in an area identified under group 1 is presumed to meet the subsistence eligibility standards. No permit or filing of a statement affirming the person's compliance with the standards is required.

Group 2 consists of communities where the population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life.
A person who hunts or fishes and lives in a community identified under group 2 is rebuttably presumed to meet the standards upon signing a statement affirming his or her compliance with the standards.

Group 3 consists of communities or urban areas where the population is 7,000 or greater or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life.
A person who lives in a community or in an area identified under group 3 may qualify by applying to the Department of Fish and Game and demonstrating that he or she meets the qualification standards.

What are the qualification standards?
Qualification will be based on a weighted point system of 7 criteria. The boards will adopt the point system by regulation. Qualification requires more points than just meeting the minimums in the first four criteria, but anyone who fails to meet each of the minimums would be disqualified. The last three criteria do not have minimums. The seven criteria are:
(1) the quantity of fish and game consumed by the person in the preceding twelve months, with a mandatory minimum of 125 pounds;
(2) the number of species and groups of species of fish and game from the subsistence use area consumed by the person in the preceding twelve months, with a mandatory minimum set by the boards by region;

(3) the number of days in the preceding twelve months that the person engaged in taking fish or game in the subsistence use area or spent processing that fish or game, with a mandatory minimum of 30 days;
(4) the number of months in the preceding twelve months in which the applicant engaged in taking fish or game in the subsistence use area, with a mandatory minimum of four months;
(5) the number of weeks, in the preceding twelve months, during which the taking or processing of fish and game was the applicant's principal work effort, to a maximum of 26 weeks;
(6) the number of households, other than the person's household, with which the person shared or received fish and game in the preceding twelve months, with a maximum of 10 households; and
(7) whether the person's taking of fish and game occurred solely in the subsistence use area for which they are qualifying.

As indicated above, in group 3 communities a person must fill out an application and score sufficient points to demonstrate his or her eligibility; in group 2 communities, signature of a statement affirming the person's qualification creates a rebuttable presumption that the person is qualified; and in group 1 areas, no paper work is required and the presumption is that all persons who hunt or fish meet the minimum standards.

Where would people be able to go for subsistence hunting and fishing?
People would normally qualify for the subsistence use area in which they live, but could qualify for another area by application. Subsistence use would be on fish stocks and animal populations that have customarily and traditionally been used for subsistence. This would allow qualified subsistence users to hunt and fish as they have in the past. Group 3 areas would be closed to subsistence hunting and fishing, but urban residents who qualify as subsistence users would be able to subsistence hunt and fish in portions of the subsistence use area in which they live that are not classified in group 3 and thus closed to subsistence taking.

What are the advantages of this approach?
It protects the resource. It does not divide villages. It protects residents of regional centers from growing out of subsistence, and it allows the small minority of urban residents who are subsistence users to participate. It complies with our constitution. Most importantly, because this legislation has been worked out with the help of all sides, it will protect subsistence and subsistence users while reducing the division and political instability that has plagued this issue.

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 6, 1992

Mr. Mitch Demientieff
P. O. Box 249
Nenana, AK 99760

Dear Mitch,

For too many years, the politics of subsistence divided our state. When the Subsistence Advisory Council first met, there were skeptics who said there was no solution. As we wrap up the proposed legislation and conclude the Council's final meeting, it is clear the skeptics were wrong.

You have served as a shining example of how Alaskans of good faith and good sense can work together and solve problems, no matter how tough. You have performed a tremendous service for Alaska.

In about a week and a half, I will introduce legislation you have helped to draft. As we conclude the Council's deliberations and begin the legislative process, I hope each of you will continue to be involved, both individually and on behalf of the interests you have so ably represented. I appreciate the Council's willingness to reassemble, if necessary, as we continue through the process and in two years to review how the law has functioned. Passage of subsistence legislation continues as a top priority for me. I want you and Kathleen to join me for a great party at the signing ceremony.

I know that there are parts of the draft that each Council member would do differently if it were left to him alone. Each of you will have to deal with friends and associates who will feel you should have prevailed on every point. I also understand that while some members were nominated by specific groups, each of you participated as individuals, and each interest group will have to make its own decision.

I asked you to draft the best possible subsistence legislation for Alaska, and I think you have done it. I sat at the table as meeting after meeting you hammered out the hard points and forged a document that works. Most important, you have proved that all users of our fish and game can work together for a common purpose.

I have previously told you I feel the Council has made the most important contribution to Alaska of any group since the Constitutional Convention, and I meant it. Thank you for your service. We are all in your debt.

With warm regards.

Sincerely,

Wally

Walter J. Hickel
Governor

GOVERNOR'S SUBSISTENCE ADVISORY COUNCIL

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Phone: 465-3500 Fax: 465-3454

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. __

Revision Date: ________________

Title: An Act relating to the taking of fish and game for subsistence

Sponsor: Rules Committee

Requestor: ________________

Department Affected: Fish and Game

BRU: Subsistence

Component: Subsistence

COMPONENT SERIAL NO. 483

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	229.9	222.4	218.4	193.8	200.3	206.8
TRAVEL	8.5	7.5	6.5	5.5	5.5	5.5
CONTRACTUAL	27.5	25.5	23.5	22.0	22.0	22.0
SUPPLIES	2.5	2.5	2.5	2.5	2.5	2.5
EQUIPMENT	17.0	3.0	3.0	2.5	2.5	2.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	285.4	260.9	253.9	226.3	232.8	239.3
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	285.4	260.9	253.9	226.3	232.3	239.3
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	285.4	260.9	253.9	226.3	232.8	239.3

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME	3.0	3.0	2.0	1.0	1.0	[illegible]
TEMPORARY						

Estimate of current year impact: No impact in FY 92

ANALYSIS: (Attach a separate page if necessary.) See attached analysis.

Prepared By: Robert Bosworth, Director

Phone: 465-4147

Division: Division of Subsistence

Date: 2/20/92

Approved by Commissioner: ________________

Agency: Department of Fish and Game

Date: ________________

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

Rev 10/7/91

FISCAL NOTE ANALYSIS: Division of Subsistence

Development of a Subsistence Permitting Program:

OVERVIEW:

The Governor's subsistence bill creates a new system by which subsistence qualification criteria are applied to individual applicants in the urbanized areas of Alaska, and in some smaller communities where the economy is not based on subsistence. This individual application system is expected to draw in excess of 10,000 applicants in the first year or two, and a lesser number of applicants thereafter. Implementation of the proposed subsistence permitting program is anticipated to have a cost of $285,378 for the first year. FY 93. By FY 98, the cost is expected to have dropped to $239,342 as the permitting system assumes a normal regulatory presence and acceptance. A subsistence application program staff, with initial support from other Division of Subsistence staff, will have responsibility for the preparation, distribution, scoring, and issuing of subsistence permits. In addition, the staff will review applications for completeness and accuracy, evaluate responses, and hold findings of fact in disagreements involving issuance of permits.

PROCESS:

The unit charged with issuing subsistence permits will consist of a core of four individuals: a hearing officer, an analyst/programmer, a data processing clerk, and a clerk typist. Duties of the staff relate to two primary functions, (1) the mechanics of issuing permits and (2) the rectification of disagreements. The issuance of permits requires the design and printing of applications, a distribution system to provide the public with ready access to the applications, a means to rapidly evaluate applications, and issue permits to qualified applicants. The rectification of disagreements over the issuance of permits requires a systematic process in which applicants have adequate recourse to resolving disputes prior to seeking judicial relief.

To provide the applicant with the greatest opportunity of receiving the benefits to which they are entitled, the permitting system provides a series of safe guards. The oversight process begins with receipt of the application and its initial review. Applications lacking vital information or incomplete responses will be returned with letters of explanation. Applicants who do not receive a permit as confirmation of meeting the subsistence criteria will receive notification of their rejection and the opportunity to provide additional support to their claim of subsistence priority. If the unsuccessful applicant provides additional support, the application will be re-evaluated and the applicant informed of the results. Should the applicant still be rejected, they may seek an appearance before the hearing officer in order to determine the facts of the case. If the hearing officer still decides against the applicant, the applicant can appeal to the Commissioner of Fish and Game. In the event the Commissioner affirms the original denial, the decision would be final for the Department and the applicant could appeal to the state Superior Court.

CORE STAFFING:

Hearing Officer: The hearing officer (HO) is a range 21 employee with responsibilities for determining findings of facts. This position will design and implement the necessary procedures to see that the intent of the legislation is met and that applicants who are denied a subsistence permit are assured of due process. The position receives clerical support from the clerk typist position and investigative support from the analyst programmer position.

Analyst Programmer III: The analyst programmer (A/P III) is a range 17 with responsibilities for the design of the application, creation of the necessary data management procedures and programs, and the

collection of administrative information relevant to the applicant. Using hunting license and permit information within the Department of Fish and Game, the programmer will provide the hearing officer with data relevant to applications in dispute. The position will also undertake a random review of successful awardee to ensure that the system is meeting its objective of providing a subsistence priority to qualified applicants. The analyst/programmer will have co-responsibility with the hearing officer for preparation of documentation on applicant cases. The position will provide immediate supervision of the data processing clerk and those functions of clerk exclusive of the hearing process.

Data Processing Clerk II: The data processing clerk II (DPC II) is a range 9 with responsibilities for the accurate review and entry of information provided by the applicant. Following data entry, the position will archive all materials in accordance with administrative procedures. As required, the data processing clerk will provide support for the distribution of applications and permits.

Clerk III: The clerk III is a range 9 with responsibilities for maintaining administrative functions of the unit, responding to public inquiries, and facilitating the activities of the hearing officer through the recording and preparation of transcripts of all hearings.

SUPPORT STAFF:
During the initial years of the program, the unit will draw upon some staff resources of the Division of Subsistence. The Division's current research director and AP IV will develop and analyze options for the subsistence application and scoring system for presentation to the Boards of Fisheries and Game, who are authorized in the bill to finalize the application and scoring system. These and other support functions will be subsumed within the Division's current budget. Subsistence Resource Specialist (SRS) IIs and clerical staff will provide regional support in facilitating the public's awareness of the process and responding to inquiries of local residents. In the first year, eight months of SRS support is provided. This drops to four months in the second year, and a single month in the third year. After the third year, the permitting process will involve only the core, four-member staff.

BUDGET--Division of Subsistence:

FY 93
The initial budget provides for three full time employees: the analyst/programmer III, the data processing clerk II, and the clerk III. This group will prepare and distribute the application forms, respond to public inquiries, and score the applications received. The hearing officer will be brought onto staff immediately prior to the receipt of applications. With the subsistence permitting unit based in Anchorage, additional regional support to respond to public inquiries will be provided by subsistence resource specialists (SRS) and clerical staff (C III) in other regions of the state. Funding in the amount of four months each is provided for each of the two employee classes. Total personnel costs are projected at $229,878.

A travel budget of $8,500 provides opportunities for program outreach in affected portions of the state, and the appearance of the hearing officer for hearings as required.

Contractual services for the printing and distribution of applications, permits, and other correspondence, and communications totals $27,500. Total contractual expenses are $27,500.

Providing for office expendibles will entail $2,500 per year. The creation of a new organization requires the acquisition of the necessary equipment and furniture to allow the staff to perform their required functions. Seventeen thousand dollars ($17,000) is designated to meet this one-time need for equipment.

The total budget for the first year of operation is $300,378.

FY 94:
Staff expenses during the second year decline to $222,416 as the additional SRS and clerical support is reduced. An additional $3,000 reduction occurs for lines 200 and 300 (travel and services) as the number of applicants declines. Equipment expenses decline to $3,000. The total cost of implementing the program in the second year is $260,916, a reduction of over 8% from the previous year.

FY 95:
Further personnel savings accrue during the third year as outside support is reduced to a single month of SRS time. Travel and services decline by an additional $3,000. Supplies and equipment expenses are unchanged from the previous year. The total cost of program implementation in the third year is $253,921, a reduction of 2.5% from the previous year.

FY 96:
The third year is projected to show a decline of nearly $25,000 in personnel costs from the previous year as outside assistance is eliminated and the hearing officer position reduced to half-time as the need for additional rectification declines. Supplies and services decline by another $2,500. The total program cost for the year is $226,315, a 10% reduction from the prior year.

FY 97 and FY 98:
No additional personnel savings are projected as the program is managed by three and a half full time employees. All other expenditures remain stable. In FY 97, the budget is $232,828, and in FY 98 it is $239,342. The modest increment is due to personnel longevity charges.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. __

Revision Date: ______

Department Affected: Fish and Game

Title: An Act relating to the taking of fish and game for subsistence

BRU: Boards

Component: Board Services

Sponsor: Rules Committee

Requestor: ______

COMPONENT SERIAL NO. 1 2 0 4

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	9.0	9.4	8.0	3.0	3.0	3.0
TRAVEL	180.0	187.5	160.0	85.0	85.0	85.0
CONTRACTUAL	90.0	93.5	90.0	37.0	37.0	37.0
SUPPLIES	1.8	1.9	1.6	.5	.5	.5
EQUIPMENT	0					
LAND & STRUCTURES	0					
GRANTS, CLAIMS	0					
MISCELLANEOUS	0					
TOTAL OPERATING	280.8 .0	292.3 .0	259.6	125.5	125.5	125.5 0.0

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	280.8	292.3	259.6	125.5	125.5	125.5
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	280.8	292.3	259.6	125.5	125.5	125.5

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Laird Jones *Laird A. Jones* Phone: 465-4110

Division: Division of Boards Date: 2/20/92

Approved by Commissioner: [signature]

Agency: Department of Fish and Game Date: 2/20/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

Rev 10/7/91

DIVISION OF BOARDS
FISCAL NOTE FOR SUBSISTENCE BILL

ANALYSIS

The Board of Fisheries and the Board of Game meeting individually and together as the Joint Board would require approximately seventy days of meetings over a three year period to implement the new subsistence bill. In future years, the new bill would add approximately ten days to the overall board schedule. This estimate is based on board consideration of rural designations and customary and traditional use during the 1980s. It is important to note that since 1989 both boards have deferred most proposals dealing with subsistence in anticipation of legislation that would allow for a defensible approach to proposals. Over this same time period there have been reductions in the Division of Boards budget that have reduced the capability of the boards to meet. With the advent of new subsistence legislation, the boards will have to deal with subsistence issues as well as maintaining a full workload in other regulatory areas.

The items in the proposed legislation requiring the greatest effort on the part of the boards, in descending order, are:

> (1) "The boards shall by regulation, jointly identify and delineate areas of the state, utilizing game management unit, portion of game management unit, or community, as follows:
>
> > (1) areas where the human population of each community is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area, and that are not part of an urban area.
> >
> > (2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy,culture, and way of life of the community, and that are not part of an urban area." 20 DAYS
>
> (2) "Upon receipt of recommendations from the commissioner, the Boards of Fish and Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally used for subsistence in the areas and communities of the state identified by the boards under (e)(1) and (e)(2) of this section." 40 DAYS
>
> (3) "Upon receipt of a recommendation from the commissioner, the boards shall, by regulation, adopt procedures by which the commissioner shall determine the qualification of subsistence users to subsistence hunt and fish in a specific subsistence use area." 10 DAYS

COSTS - FY93

Personal Services: overtime for existing staff	9.0
Travel: travel and per diem for board members, Boards staff, and advisory committee meetings	180.0
Contractual: meeting space, printing and postage for proposal books, telephone and legal notice of meetings	90.0
Supplies: office supplies	1.8
TOTAL	280.8

COSTS - FY94:

Personal Services	9.4
Travel	187.5
Contractual	93.5
Supplies	1.9
TOTAL	292.3

COSTS - FY95:

Personal Services	8.0
Travel	160.0
Contractual	90.0
Supplies	1.6
TOTAL	259.6

COSTS - FUTURE YEARS

Personal Services	3.0
Travel	85.0
Contractual	37.0
Supplies	.5
TOTAL	125.5

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. ______

Revision Date: ______
Department Affected: Public Safety
Title: "An Act relating to the taking of fish and game for subsistence. . ."
BRU: Fish & Wildlife Protection
Component: Enforcement & ISU
Sponsor: Rules
Requestor: Governor
COMPONENT SERIAL NO. | | 4 | 9 | 0 |

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0

REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: ______

ANALYSIS: (Attach a separate page if necessary.)
No fiscal impact is anticipated.

Prepared By: Captain Conrad G. Seibel
Phone: 269-5509
Division: Fish & Wildlife Protection
Date: 2/20/92
Approved by Commissioner: [signature] for Richard L. Burton
Agency: Department of Public Safety
Date: 2/20/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).
Rev 10/7/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. ______

Revision Date: ______
Department Affected: Department of Law
Title: "An Act relating to the taking of fish and game for subsistence..."
BRU: Legal Services
Component: Operations
Sponsor: Request of the Governor
Requestor: Governor's Office
COMPONENT SERIAL NO. 9 3

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	85.0	85.0	85.0	45.0	45.0	
TRAVEL	5.0	5.0	5.0	3.0	3.0	
CONTRACTUAL	17.6	17.6	17.6	12.6	12.6	
SUPPLIES	2.4	2.4	2.4	2.4	2.4	
EQUIPMENT	6.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	116.5	110.0	110.0	63.0	63.0	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
GENERAL FUND	116.5	110.0	110.0	63.0	63.0	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
FULL-TIME	1.0	1.0	1.0	-0-	-0-	-0-
PART-TIME				1.0	1.0	-0-
TEMPORARY						

Estimate of current year impact: ______

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 20, 1992

Richard I. Pegues for

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 20, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. __________

This bill provides a broad statutory framework that gives subsistence use of fish and game a preference over other consumptive uses of the state's fish and game resources. The bill establishes subsistence dependence standards, defines several terms that have been subject to litigation, and provides a rational scheme for determining those Alaskans whose reliance upon fish and game for subsistence purposes is actual and substantial. The bill also directs the Department of Fish and Game and the Boards of Fish and Game to take affirmative action in situations where a stock or population is not sufficient to provide for both subsistence and nonsubsistence uses, and to formulate plans for recovery of the resource sufficient to provide for all users, if possible.

The bill uses individual eligibility requirements to determine qualification for the subsistence preference. While the bill uses community characteristics to determine the paperwork requirements for qualification, an individual's demonstrated actual and substantial reliance on fish and game in the last twelve months is what determines ultimate qualification as a preferred subsistence user. Urban residents who meet the requirements will also be preferred users. This is an abrupt departure from the state's previous (rural versus urban) attempts to provide a subsistence preference. Furthermore, the bill represents a fair and manageable way of complying with the spirit of ANILCA, without violating special provisions in Alaska's constitution requiring equal access to fish and game and management according to the sustained yield principle.

Because of the controversies that have surrounded and continue to surround subsistence, this bill will be vigorously challenged in court if it is enacted. Although the bill will eliminate many uncertainties that currently involve subsistence, the bill will have a significant, ongoing fiscal impact on the Department of Law over the first four of five years of implementation. That is because the department must defend the bill against court challenges, assist the Boards of Fisheries and Game in drafting, and then reviewing, a substantial body of evolving regulations, and also advise and defend the Department of Fish and Game in disputes resulting from adverse preference qualification determinations. Consequently, the Department of Law will require the additional services of an attorney.

Position Title	Attorney IV
Time Status	PFT
Staff Months	12

No. of Positions	Range / Step	Barg. Unit
1	24A	PX

Location	Election District
Anchorage	7 through 15

TYPE OF EXPENDITURE	Amount
Salary	64,056
Benefits	20,969
Premium Pay	
Other	
Total Personal Services	85,025
Travel	5,000
Contractual	17,600
Commodities	2,400
Equipment	6,500
Other	
Total Cost	116,525
FUNDING SOURCE FOR TOTAL COST	
Federal Receipts 1002	
G.F. Match 1003	
General Fund 1004	116,525
I-A Receipts 1007	
CIP Receipts 1061	
Other	

Justification

Implementation of the subsistence preference law will require the full-time services of an attorney to handle: (1) court chalklenges of the law; (2) drafting and reviewing of a substantial body of regulations; and (3) representation of ADF&G and the Fish and Game Boards in disputes resulting from adverse preference qualification determinations. All of this work will require journey-level services of an Attorney IV.

Request For New Position

AGENCY Department of Law

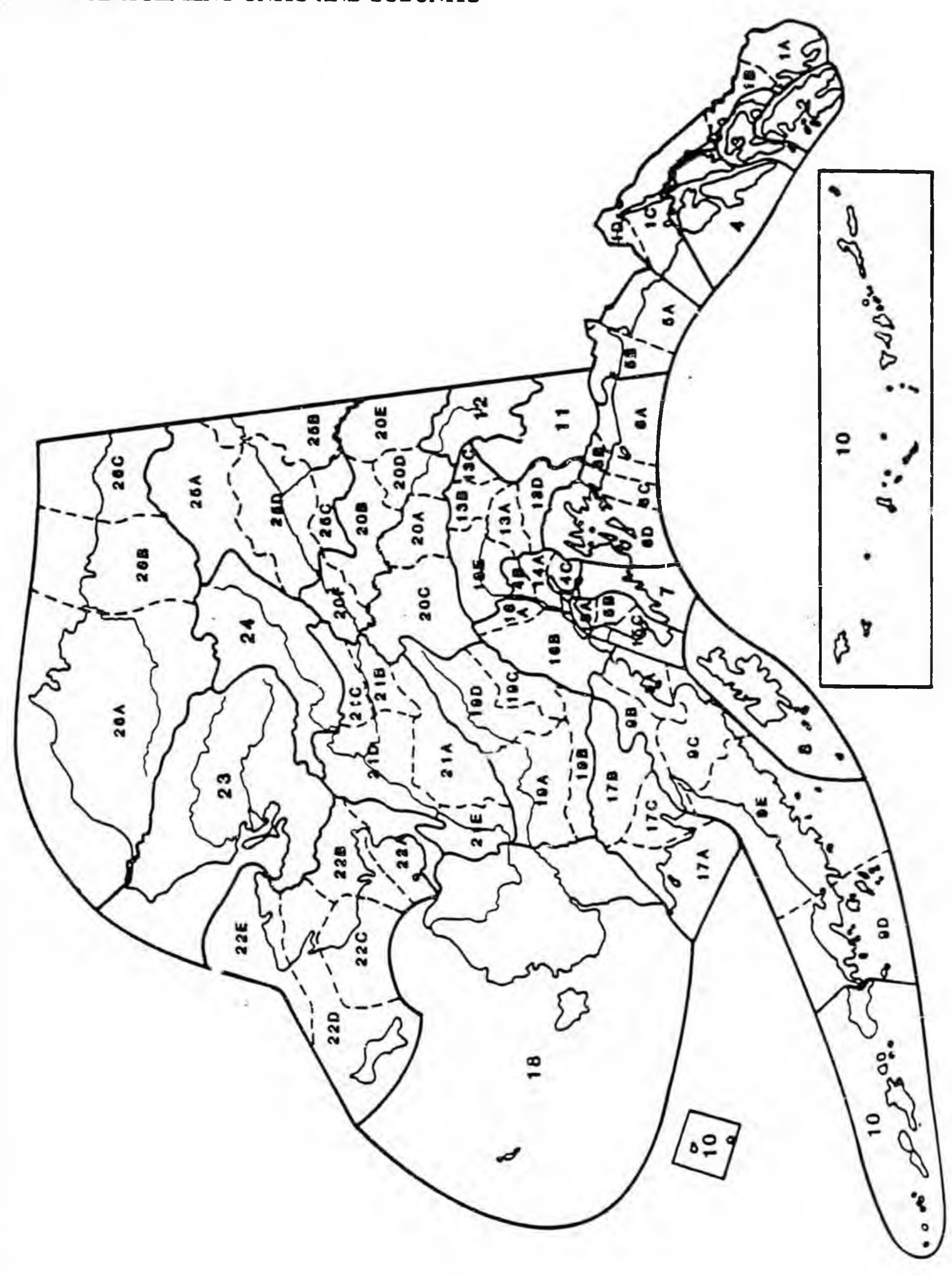
BRU Legal Services

COMPONENT Operations

FY 93

Revised Date:

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX A
GAME MANAGEMENT UNITS AND SUBUNITS



GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX B

PRELIMINARY LISTING OF ALASKA COMMUNITIES GROUPED BY TYPE OF COMMUNITY IN THE GOVERNOR'S SUBSISTENCE BILL

February 1992

This report presents a preliminary listing of Alaska communities and areas grouped into the three types of communities and areas described in the Governor's subsistence bill. The report is designed to illustrate how this part of the bill might be implemented by the Boards of Fisheries and Game.

Three Types of Communities and Areas

The Governor's subsistence bill describes three types of communities and areas:

(e)(1) areas where the human population of each community is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area, and that are not part of an urban area.

(e)(2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, and that are not part of an urban area.

(e)(3) communities or urban areas where the human population is 7,000 or greater or areas or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.

The subsistence bill states that the Boards of Fisheries and Game "shall by regulation, jointly identify and delineate areas of the state, utilizing game management unit, portion of game management unit, or community", placing them into each of the three categories.

To place areas and communities into the three categories, the Boards of Fisheries and Game will consider information about population size and "the relative importance of subsistence compared to the totality of the following socio-economic characteristics of the area:

(1) the social and economic structure;
(2) the stability of the economy;
(3) the extent of employment for wages and kinds of wage jobs including full-time, part-time, temporary and seasonal employment;
(4) the amount and distribution of cash income among residents;
(5) the cost and availability of goods and services to residents;
(6) the variety of fish and wildlife species utilized by residents;
(7) the seasonal cycle of economic activity;
(8) the percentage of residents participating in hunting and fishing activities or using wild resources;

(9) the harvest levels of fish and game by residents;
(10) the cultural, social, and economic values associated with the taking and use of fish and game;
(11) the geographic areas where residents hunt and fish;
(12) the extent of sharing and exchange of fish and game by area residents;
(13) additional similar factors the boards establish in regulation to be relevant to their determinations under this subsection."

While the exact end results of the Boards' future classifications under these procedures cannot be predicted, one can anticipate within some level of confidence which categories most Alaska communities will probably be placed by the Boards. This is because the Boards went through a similar procedure under the state's previous subsistence statute in 1986. At that time, they categorized communities and areas as to whether the use of wild resources was a principal characteristic of the economy of the community or area. Using the 1986 Board findings and making some assumptions with additional updated information, one can make an educated guess about a preliminary listing of communities within each group.

Assumptions for the Preliminary Listing

There are several assumptions that were followed to compile the following listing.

1. Group 1 communities are assumed to be those communities with 1990 populations less than 2,500 people, and in which the use of wild resources was a principal characteristic of the economy as determined by the Boards in 1986, with a few exceptions identified in Group 3 below.

2. Group 2 communities are assumed to be those communities with 1990 populations between 2,500 and 7,000 people, and in which the use of wild resources was a principal characteristic of the economy as determined by the Boards in 1986.

3. Group 3 communities are assumed to be communities or areas with 1990 populations greater than 7,000 people, or areas where wild resource use was not a principal characteristic of the economy as determined by the Boards in 1986. Some exceptions to the above are certain small places (logging camps, mining settlements, and military settlements) which the Boards may determine to be in Group 3, which the Boards classified as subsistence communities in 1986.

The 1990 federal census was used for population numbers. The populations of five areas were aggregated into single units for the purpose of the listing:

1. The road-connected area of the Kenai Peninsula (except that the Seward area was considered a separate entity).

2. The road-connected area of the Kodiak City area.

3. The Ketchikan Borough.

4. The road-connected area of the Matanuska-Susitna Borough.

5. The road-connected area of the Fairbanks North Star Borough.

The Preliminary Listing

Based on the assumptions above, the preliminary listing of communities and areas are presented in Tables 1, 2, and 3. As can be seen, of 297 communities and areas, 257 are in Group 1, 7 are in Group 2, and 33 are in Group 3. Of 550,311 state residents in 1990, 66,798 (12.1 percent) are in Group 1, 23,292 (4.2 percent) are in Group 2, and 460,221 (83.6 percent) are in Group 3 (Table 4). Of the state's 85,964 Alaska Natives, 42,313 (49.2 percent) are in Group 1, 9,948 (11.6 percent) are in Group 2, and 33,703 (39.2 percent) are in Group 3 (Table 4). Of the state's 464,347 non-Native population, 24,485 (5.3 percent) are in Group 1, 13,344 (2.9 percent) are in Group 2, and 426,518 (91.9 percent) are in Group 3 (Table 4). A few comments can be made about each group.

There are 257 communities in Group 1 with a population of 66,798 people (12.1 percent of the state's population) (Table 1). Of this population, 42,313 (66.3 percent) were Alaska Natives and 24,485 people (36.7 percent) where non-Natives (Table 4). There are three communities in Group 1 whose populations are approaching Group 2: Dillingham (2,017), the Haines area (2,117), and Wrangell (2,479).

There are seven communities in Group 2: Cordova (2,579 people), Kotzebue (2,751), Unalaska (3,089), Petersburg (3,230), Barrow (3,469), Nome (3,500), and Bethel (4,674) (Table 2). These mid-sized places had a combined population of 23,292 people in 1990 (4.2 percent of the state's population). Of this populstion, 9,948 (42.7 percent) were Alaska Natives and 13,344 (47.3 percent) were non-Natives (Table 4).

About 460,221 people were in Group 3 communities and areas (83.6 percent of the state's population) (Tables 3 and 4). Areas with populations greater than 7,000 people include the Anchorage Borough (226 338 people), the Fairbanks North Star Borough (77,720), the Matanuska-Susitna area (39,415), the Kenai Peninsula area (36,651), the Juneau Borough (26,751), the Ketchikan area (13,828), the Kodiak City area (12,230), and Sitka (8,588). There are 21 communities with populations less than 2,500 which were tentatively placed in Group 3 because it was thought that the Board might not consider subsistence to be a principal component of the economy, culture, and way of life. These places primarily are logging camps, mining settlements, and military settlements (Table 3). Of the Group 3 population, 33,703 (7.3 percent) are Alaska Natives and 426,518 (92.7 percent) are non-Natives (Table 4).

TABLE 1

PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 1 (<2,500 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPA[illegible] CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Balance of Bristol Bay Census Area	3	100.00	Southwest	Rural
Portage Creek	5	60.00	Southwest	Rural
Solomon	6	100.00	Arctic	Rural
Ugashik	7	85.70	Southwest	Rural
Council	8	62.50	Arctic	Rural
Balance of Lower Kuskokwim Census	10	40.00	Western	Rural
Telida	11	90.90	Interior	Rural
Balance of Barrow-Point Hope Census	13	7.70	Arctic	Rural
Balance of W[illegible] Hampton Census Sub	17	70.60	Western	Rural
Balance of An[illegible]n Census Sub-Area	19	0.00	Southeast	Rural
Balance of Outer Ketchikan Census Su	21	9.50	Southeast	Rural
Gakona	25	0.00	Southcentral	Rural
McCarthy	25	4.00	Southcentral	Rural
Port Clarence	26	0.00	Arctic	Rural
Paxson	30	0.00	Southcentral	Rural
Paxson-Sourdough	30	0.00	Southcentral	Rural
Alatna	31	93.60	Interior	Rural
Balance of Lake and Peninsula Borough	31	16.10	Southwest	Rural
Lake Minchumina	32	18.80	Interior	Rural
Balance of Dillingham Census Area	32	31.25	Southwest	Rural
Igiugig	33	78.80	Southwest	Rural
Evansville	33	57.60	Interior	Rural
Wiseman	33	15.20	Interior	Rural
Eagle Village	35	80.00	Interior	Rural
Nikolski	35	82.85	Southwest	Rural
Ivanof Bay	35	94.30	Southwest	Rural
Bettles	36	22.20	Interior	Rural
Meyers Chuck	37	10.80	Southeast	Rural
Mendeltna	37	5.40	Southcentral	Rural
Takotna	38	44.70	Interior	Rural
Chase	38	0.00	Southcentral	Rural
Tonsina	38	18.40	Southcentral	Rural
Point Baker	39	0.00	Southeast	Rural
Birch Creek	42	90.50	Interior	Rural
Pedro Bay	42	90.50	Southwest	Rural
Lime Village	42	95.24	Western	Rural
Annette	43	16.30	Southeast	Rural
Healy Lake	47	85.10	Interior	Rural
Chitina	49	46.90	Southcentral	Rural
Stony River	51	88.24	Western	Rural
Central	52	1.90	Interior	Rural
Red Devil	53	50.94	Western	Rural
Chignik Lagoon	53	56.60	Southwest	Rural
Pilot Point	53	84.90	Southwest	Rural
Hughes	54	92.60	Interior	Rural
Kasaan	54	53.70	Southeast	Rural
Port Alsworth	55	1.80	Southwest	Rural
Balance of McGrath-Holy Cross Census	56	10.70	Interior	Rural
Ferry	56	12.50	Interior	Rural
Elfin Cove	57	1.80	Southeast	Rural
Oscarville	57	91.22	Western	Rural
Clark's Point	60	88.30	Southwest	Rural
Chistochina	60	61.70	Southcentral	Rural
Game Creek Census Designated Place	61	0.00	Southeast	Rural
Port Protection	62	1.60	Southeast	Rural
Slana	63	6.40	Southcentral	Rural
Platinum	64	92.18	Western	Rural
Twin Hills	66	92.40	Southwest	Rural

TABLE 1
PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 1 (<2,500 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
False Pass	68	76.47	Southwest	Rural
Rampart	68	94.10	Interior	Rural
Kobuk	69	89.90	Arctic	Rural
Chiniak	69	5.80	Southwest	Rural
Bettles/Evansville	69	39.10	Interior	Rural
Dot Lake	70	54.29	Interior	Rural
Balance of Aniak Census Sub-Area	71	63.38	Western	Rural
Karluk	71	91.50	Southwest	Rural
Circle	73	86.30	Interior	Rural
Whale Pass	75	2.70	Southeast	Rural
Ekwok	77	87.00	Southwest	Rural
Akhiok	77	93.50	Southwest	Rural
Anvik	82	91.50	Interior	Rural
Nelson Lagoon	83	80.72	Southwest	Rural
Skwentna	85	1.20	Southcentral	Rural
Edna Bay	86	0.00	Southeast	Rural
Balance of Prince William Sound Censu	86	0.00	Southcentral	Rural
Tatlin	87	95.40	Interior	Rural
Balance of Wrangell Census Sub-Area	87	11.50	Southeast	Rural
Northway Junction	88	70.50	Interior	Rural
Chalkyitsik	90	92.20	Interior	Rural
Balance of Yukon Flats Census Sub-Ar	91	38.50	Interior	Rural
Balance of Nome Census Area	92	46.74	Arctic	Rural
Iliamna	94	65.90	Southwest	Rural
Chenega Bay	94	69.20	Southcentral	Rural
Tenakee Springs	94	9.60	Southeast	Rural
Arctic Village	96	93.80	Interior	Rural
Mentasta Lake	96	72.90	Southcentral	Rural
Manley Hot Springs	96	14.60	Interior	Rural
Chuathbaluk	97	89.69	Western	Rural
Atka	98	92.85	Southwest	Rural
Hyder	99	1.00	Southeast	Rural
Lignite	99	0.00	Interior	Rural
Stevens Village	102	91.20	Interior	Rural
Beaver	103	95.20	Interior	Rural
Gulkana	103	59.20	Southcentral	Rural
Levelock	105	82.90	Southwest	Rural
Sleetmute	106	86.79	Western	Rural
Crooked Creek	106	90.56	Western	Rural
Tanacross	106	94.30	Interior	Rural
Dry Creek	106	0.00	Interior	Rural
Perryville	108	94.40	Southwest	Rural
Nikolai	109	88.90	Interior	Rural
Sheldon Point	109	92.70	Western	Rural
Hollis	111	2.70	Southeast	Rural
Northway Village	113	94.70	Interior	Rural
Port Alexander	119	2.50	Southeast	Rural
Port Heiden	119	72.30	Southwest	Rural
Tatitlek	119	86.60	Southcentral	Rural
Balance of Northwest Arctic Borough	122	67.20	Arctic	Rural
Egegik	122	70.50	Southwest	Rural
Northway	123	64.20	Interior	Rural
Koyukuk	126	97.60	Interior	Rural
Golovin	127	92.90	Arctic	Rural
Klukwan	129	86.80	Southeast	Rural
Chignik Lake	133	91.80	Southwest	Rural
Pitka's Point	135	95.60	Western	Rural
South Naknek	136	79.40	Southwest	Rural

TABLE 1

PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 1 (<2,500 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Allakaket	138	94.30	Interior	Rural
Saint George	138	94.92	Southwest	Rural
Point Lay	139	81.30	Arctic	Rural
Shageluk	139	94.90	Interior	Rural
Chickaloon	145	6.20	Southcentral	Rural
Larsen Bay	147	84.40	Southwest	Rural
Cantwell	147	22.50	Interior	Rural
Cold Bay	148	5.40	Southwest	Rural
Kokhanok	152	90.10	Southwest	Rural
Nightmute	153	95.42	Western	Rural
Tyonek	154	92.20	Southcentral	Rural
Deering	157	94.30	Arctic	Rural
English Bay	158	91.10	Southcentral	Rural
Newhalen	160	94.40	Southwest	Rural
Wales	161	38.90	Arctic	Rural
Copperville	163	26.40	Southcentral	Rural
Port Graham	166	90.40	Southcentral	Rural
Eagle	168	3.00	Interior	Rural
Ruby	170	74.10	Interior	Rural
Allakaket/Alatna	170	94.10	Interior	Rural
McKinley Park Village	171	2.90	Interior	Rural
Upper Kalskag	172	84.88	Western	Rural
Mekoryuk	177	99.44	Western	Rural
Nondalton	178	89.30	Southwest	Rural
Diomede	178	93.80	Arctic	Rural
Shaktoolik	178	94.40	Arctic	Rural
White Mountain	180	87.80	Arctic	Rural
Koliganek	181	96.10	Southwest	Rural
Venetie	182	93.90	Interior	Rural
Aleknagik	185	83.20	Southwest	Rural
Coffman Cove	186	6.90	Southeast	Rural
Chignik Bay	188	45.20	Southwest	Rural
Brevig Mission	198	92.40	Arctic	Rural
Huslia	207	90.80	Interior	Rural
Newtok	207	93.24	Western	Rural
Grayling	208	93.30	Interior	Rural
Ouzinkie	209	85.20	Southwest	Rural
Atqasuk	216	93.10	Arctic	Rural
Minto	218	97.30	Interior	Rural
Port Lions	222	67.60	Southwest	Rural
Pelican	222	29.30	Southeast	Rural
Shungnak	223	94.60	Arctic	Rural
Kaktovik	224	84.40	Arctic	Rural
Balance of Petersburg Census Sub-Are	225	0.00	Southeast	Rural
Teller	230	91.30	Arctic	Rural
Koyuk	231	94.80	Arctic	Rural
Kaltag	240	92.50	Interior	Rural
Goodnews Bay	241	95.85	Western	Rural
Russian Mission	246	94.70	Western	Rural
Balance of Aleutians East Borough	247	91.09	Southwest	Rural
Tazlina	247	23.10	Southcentral	Rural
Eek	254	95.67	Western	Rural
Atmautluak	258	96.8	Western	Rural
Gustavus	258	3.90	Southeast	Rural
Anaktuvuk Pass	259	84.90	Arctic	Rural
Elim	264	91.70	Arctic	Rural
Marshall (Fortuna Ledge)	273	92.70	Western	Rural
Holy Cross	277	93.50	Interior	Rural

TABLE 1

PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 1 (<2,500 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Kwigillingok	278	94.96	Western	Rural
Old Harbor	284	88.70	Southwest	Rural
Akiak	285	97.19	Western	Rural
Lower Kalskag	291	98.28	Western	Rural
Kongiganak	294	97.28	Western	Rural
Saint Michael	295	91.20	Arctic	Rural
Tuntutuliak	300	96.66	Western	Rural
Ambler	311	89.70	Arctic	Rural
Balance of Hoonah-Yakutat Census Su	311	15.40	Southeast	Rural
Tununak	316	96.20	Western	Rural
Seldovia	316	15.20	Southcentral	Rural
Kivalina	317	97.50	Arctic	Rural
Napakiak	318	94.34	Western	Rural
Buckland	318	94.90	Arctic	Rural
Chefornak	320	97.50	Western	Rural
Napaskiak	328	94.82	Western	Rural
Noatak	333	96.70	Arctic	Rural
Scammon Bay	343	96.50	Western	Rural
Tanana	345	78.30	Interior	Rural
Nuiqsut	354	92.70	Arctic	Rural
Tuluksak	358	95.53	Western	Rural
Nulato	359	96.90	Interior	Rural
Nunapitchuk	378	97.09	Western	Rural
Hydaburg	384	89.10	Southeast	Rural
Kiana	385	93.50	Arctic	Rural
Manokotak	385	95.60	Southwest	Rural
New Stuyahok	391	95.90	Southwest	Rural
Nenana	393	47.80	Interior	Rural
Stebbins	400	94.80	Arctic	Rural
Toksook Bay	420	95.48	Western	Rural
Kenny Lake	423	9.70	Southcentral	Rural
Kasigluk	425	95.29	Western	Rural
Saint Marys (Andreafsky)	441	82.90	Western	Rural
Balance of Prince of Wales Census Sub	442	7.00	Southeast	Rural
Copper Center	449	34.50	Southcentral	Rural
Glennallen	451	6.70	Southcentral	Rural
King Cove	451	39.25	Southwest	Rural
Shishmaref	456	94.50	Arctic	Rural
Kotlik	461	96.90	Western	Rural
Pilot Station	463	95.00	Western	Rural
Kipnuk	470	97.45	Western	Rural
Akiachak	483	95.03	Western	Rural
Healy	487	1.40	Interior	Rural
Wainwright	492	94.30	Arctic	Rural
Quinhagak	501	93.81	Western	Rural
Balance of Copper River Census Sub-A	504	0.90	Southcentral	Rural
Savoonga	519	95.20	Arctic	Rural
Gambell	525	96.20	Arctic	Rural
McGrath	528	46.90	Interior	Rural
Noorvik	531	93.80	Arctic	Rural
Yakutat	534	55.10	Southeast	Rural
Aniak	540	70.74	Western	Rural
Alakanuk	544	95.80	Western	Rural
Kwethluk	558	96.42	Western	Rural
Thorne Bay	569	1.20	Southeast	Rural
Naknek	575	41.00	Southwest	Rural
Fort Yukon	580	85.00	Interior	Rural
Balance of Koyukuk-Middle Yukon Cen	589	11.60	Interior	Rural

TABLE 1
PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 1 (<2,500 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Akutan	589	13.58	Southwest	Rural
Selawik	596	95.50	Arctic	Rural
Chevak	598	92.90	Western	Rural
Togiak	613	87.30	Southwest	Rural
Anderson	628	3.70	Interior	Rural
Angoon	638	82.30	Southeast	Rural
Point Hope	639	91.90	Arctic	Rural
Emmonak	642	92.10	Western	Rural
Mountain Village	674	91.10	Western	Rural
Skagway	692	5.50	Southeast	Rural
King Salmon	696	15.50	Southwest	Rural
Kake	700	73.40	Southeast	Rural
Unalakleet	714	81.80	Arctic	Rural
Klawock	722	54.30	Southeast	Rural
Saint Paul	763	66.05	Southwest	Rural
Hoonah	795	67.20	Southeast	Rural
Galena	833	4.50	Interior	Rural
Hooper Bay	845	95.90	Western	Rural
Sand Point	878	49.31	Southwest	Rural
Tok	935	12.50	Interior	Rural
Craig	1260	22.90	Southeast	Rural
Metlakatla	1426	82.90	Southeast	Rural
Dillingham	2017	55.80	Southwest	Rural
Haines Area	2117	13.2	Southeast	Rural
Wrangell	2479	20.00	Southeast	Rural

TABLE 2

PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 2 (2,500-7,000 PEOPLE AND WHERE DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE, AND NOT PART OF AN URBAN AREA)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Cordova Area	2579	10.52	Southcentral	Rural
Kotzebue	2751	75.10	Arctic	Rural
Unalaska	3089	8.38	Southwest	Rural
Petersburg	3230	10.10	Southeast	Rural
Barrow	3469	63.90	Arctic	Rural
Nome	3500	52.10	Arctic	Rural
Bethel	4674	63.89	Western	Rural

TABLE 3
PRELIMINARY LISTING OF COMMUNITIES AND AREAS IN GROUP 3 (>7,000 PEOPLE OR WHERE DEPENDENCE UPON SUBSISTENCE IS NOT A PRINCIPAL CHARACTERISTIC OF THE ECONOMY, CULTURE, AND WAY OF LIFE)

Place Name	1990 Population	Percent Native	Region	Old Rural Status
Amchitka	25	8.00	Southwest	Rural
Deadhorse	26	11.50	Arctic	Rural
Alcan	27	0.00	Interior	Rural
Circle Hot Springs Station	29	0.00	Interior	Rural
Port Alice	30	6.70	Southeast	Rural
Balance of Aleutians West Census Are	33	20.00	Southwest	Rural
Prudhoe Bay	47	8.50	Arctic	Urban
Dora Bay	57	3.50	Southeast	Rural
Freshwater Bay	68	10.30	Southeast	Rural
Saint John's Harbor	69	1.50	Southeast	Rural
Naukati Bay	93	1.10	Southeast	Rural
Balance of Prudhoe Bay-Kaktovik Cens	101	8.90	Arctic	Rural
Rowan Bay	133	6.80	Southeast	Rural
Polk Inlet	135	13.30	Southeast	Rural
LeBouchere Bay	149	1.30	Southeast	Rural
Cube Cove	156	5.80	Southeast	Rural
Whitestone Logging Camp	164	3.70	Southeast	Rural
Hobart Bay	187	6.40	Southeast	Rural
Long Island	198	4.50	Southeast	Rural
Whittier	243	12.40	Southcentral	Urban
Shemya Station Census Designated Pla	664	0.45	Southwest	Rural
Seward Area	3357	13.89	Southcentral	Urban
Delta Area	4008	2.79	Interior	Urban
Valdez	4068	5.90	Southcentral	Urban
Adak Station	4633	1.20	Southwest	Rural
Sitka	8588	20.90	Southeast	Rural
Kodiak City Area	12230	10.45	Southwest	Rural
Ketchikan Area	13828	13.73	Southeast	Urban
Juneau	26751	12.90	Southeast	Urban
Kenai Peninsula Area	36651	7.35	Southcentral	Urban
Matsu Area	39415	4.91	Southcentral	Urban
Fairbanks North Star Borough	77720	6.80	Interior	Urban
Anchorage	226338	6.44	Southcentral	Urban

TABLE 4
CULTURAL DIVERSITY OF POPULATION
BY TYPE OF COMMUNITY
BASED ON PRELIMINARY LISTING

	NON-NATIVES		ALASKA NATIVES		STATE TOTALS	
GROUP 1	24485	5.3%	42313	49.2%	66798	12.1%
GROUP 2	13344	2.9%	9948	11.6%	23292	4.2%
GROUP 3	426518	91.9%	33703	39.2%	460221	83.6%
STATE TOTAL	464347	100.0%	85964	100.0%	550311	100.0%

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX C

The following illustrates an example of an application for a subsistence permit for applicants from Type 2 communities.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION CERTIFICATION FOR APPLICANTS FROM TYPE 2 COMMUNITIES

I certify that I am a qualified subsistence user. My pattern of taking and use of wild fish and game in a subsistence use area during the last 12 months meets enough of the criteria established in statute and regulation so that my score on the state subsistence application would exceed the qualifying point level and each of the mandatory minimums, including the following criteria:

(A) Personal consumption of a substantial quantity of wild fish and game during the past twelve months, with a mandatory minimum of 125 lbs;

(B) Use of a wide diversity of species and groups of species of fish and game in the past twelve months, with a mandatory minimum of 6 species or groups of species;

(C) Expenditure of a substantial number of days during the last twelve months engaged in taking fish or game in a subsistence use area or processing that fish and game, with a mandatory minimum of 30 days;

(D) Taking fish and game in a subsistence use area in a number of different months, with a mandatory minimum of 4 months;

(E) Expenditure of weeks in the last twelve months during which the taking or processing fish or game was the applicant's principal work effort, with no minimum required to a maximum of 26 weeks (optional criterion);

(F) Sharing or receiving fish and game in the past twelve months with a number of households other than the applicant's, with no minimum required to a maximum of ten households (optional criterion);

(G) Taking fish and game solely in the subsistence use area (optional criterion).

My taking and processing of fish and game described above was legal, noncommercial, and characterized by efficiency and economy of effort, cost, and transportation.

CERTIFICATION

Signature of Applicant________________________________

Signature of Witness________________________________

(Note: Providing false information is subject to a maximum penalty of either $1,000 fine or 6 month imprisonment, or both, per 16.05.430.)

STATE OF ALASKA, SUBSISTENCE WORKSHEET
FOR SUBSISTENCE HARVEST PERMIT APPLICATION CERTIFICATION

This worksheet can be used by you to see if you qualify as a subsistence user.
You do not have to return this worksheet with the application; it is for your use only.
To see if you qualify, answer each question and follow the instructions below.
A person must score at least 100 points to qualify as a subsistence user.
A person must also score higher than the minimums for each question.

1. How many pounds of wild fish and game did you consume during the last 12 months? (Scoring: 1 point for every 10 lb. There is a 125 lbs minimum.)
2. How many different species of wild fish and game did you use during the last 12 months? (Scoring: 3 points for every species. There is a 6 species minimum.)
3. How many days did you spend engaged in taking fish or game in your subsistence use area, or spent processing that fish and game during the last 12 months? (Scoring: 1 point for every day. There is a 30 days minimum.)
4. In how many different months did you hunt or fish during the last 12 months? (Scoring: 1 point for every month. There is a 4 months minimum.)
5. During the last 12 months, how many weeks was the taking or processing of fish or game your principal work effort? (Scoring: 1 point for each week. There is no minimum; there is a 26 weeks maximum.)
6. With how many different households outside your own did you share or receive fish and game in the past 12 months? (Score: 2 points per household. There is no minimum; there is a 10 households maximum.)
7. Did your taking of fish and game occur entirely within the subsistence use area for which you are now applying? (Score: yes = 5 points, no = 0 points. There is no minimum.)

To figure your score, fill in your answers below, do the formulas, and add up the total.

Question	Your Answer	Formula	Your Score	Minimum Score
1. Quantity of fish and game consumed		/ 10 =		125
2. Number of species used		x 3 =		6
3. Days spent taking or processing		x 1 =		30
4. Number of months when taking occurred		x 1 =		4
5. Weeks when taking/processing fish/game was main work		x 1 =		0
6. Households receiving or giving		x 2 =		0
7. Taking was in subsistence use area? y = 5, n = 0		x 1 =		0
		ADD UP YOUR TOTAL		

A person must score more than 100 points to qualify.
A person must score more than each minimum to qualify.

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX D

The following illustrates an example of an application for a subsistence permit for applicants from Type 3 communities.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION
FOR APPLICANTS FROM TYPE 3 COMMUNITIES
(PAGE 1)

Preamble

If you live in a community or urban area where the human population is 7000 people or greater, or if you live in a community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area, there is a rebuttable presumption that you do not qualify as a subsistence user. You may apply for a subsistence harvest permit using this application. However, the burden of proof is placed on the applicant to demonstrate that the applicant's personal history of wild resource use qualifies the person to be a subsistence user.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION
(PAGE 2)

A. Background Questions

A1. What is your name? Please print clearly. (First Name, MI, Last Name)

A2. What is your mailing address? (Street or Post Office Box, Community, Zip Code)

A3. Where is your permanent domicile, if different from your mailing address? (Location, Community)

A4. List the Game Management Subunit in which your permanent domicile is located. (See accompanying map and table.)

A5. List the Game Management Subunits contiguous to the Game Management Subunit in which you are domiciled. (See accompanying map and table.)

A6. Other than the Game Management Subunits listed in A4 and A5 above, list any Game Management Subunit(s) in which you believe you have established a personal history of subsistence harvesting.

A7. What is your date of birth? [This number is used for cataloging and tracking applicants.]

A8. How long have you lived in Alaska? (Applicants must be Alaska residents for at least one year.)

A9. What is your daytime or message phone?

A10. What is your social security number? [This number is used for cataloging and tracking applicants.]

A11. How many people are in your household? [This number is used in validating use levels in question C1.]

A12. If you applied for a subsistence permit in the past, did you qualify as a subsistence user the last time you applied? (yes, no, did not apply) Indicate the most recent year you applied.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION
(PAGE 3)

B. Instructions for Questions C1 through C8

While answering Questions C1 through C8 below:

a. Do not count commercial fish.

b. Do not count wild fish and game purchased from a store or commercial dealer.

c. Do not count fish or game harvested by you or household members outside the game management subunit in which you are domiciled (question A4 above), contiguous game management subunits (question A5 above), or the game management subunits identified in question A6 above.

d. Count only fish or game harvested with means characterized by efficiency and economy of effort, cost, and transportation, as conditioned by local circumstances. For example: (1) in most instances, traveling to Game Management Subunits or harvest areas with aircraft does not qualify as efficient or economical; (2) in most instances, rod and reel fishing in open water does not qualify as efficient or economical; (3) in most instances, guided hunting and fishing does not qualify as efficient and economical. The burden of proof is on the applicant to demonstrate that harvests by means such as these may be counted.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION QUESTIONS
(PAGE 4)

C. Qualifying Questions

C1. Over the last 12 months, how many pounds of wild fish and game did you consume?

Pounds ___

(Note: Please show the amounts of wild meat and fish used by you in Worksheet D, questions D1, D2, and D3 to support your answer.)

C2. Over the last 12 months, how many different types (species) of wild fish and game were eaten by you?

Number of types of fish and game: ____types

(Note: Please show how you calculated this number on Worksheet D, question D4.)

C3. Were the methods of harvesting the fish and game reported in questions C1 and C2 characterized by efficiency and economy of effort, cost, and transportation?

Yes ___
No ___

(Note: Please show methods on Worksheet D, question D1. In general, use of airplanes, rod and reel, or paid guides are not considered efficient and economical means.)

C4. During the past 12 months, how many days did you spend engaged in taking fish or game in your subsistence use area, or spent processing that fish or game?

Days ___

(Note: Please show dates on Worksheet D, questions D1 and D5 in support of your answer.)

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION
(PAGE 5)

C5. In how many different months did you hunt or fish in your subsistence use area during the last 12 months?

Months ____

(Note: Partial months may be counted as one month. Please indicate the months on Worksheet D, questions D1 and D6 in support of your answer.)

C6. During the last 12 months, how many weeks was the taking or processing of fish or game your principal work effort?

Weeks _____

(Note: Please indicate the weeks on Worksheet D, questions D1 and D7 in support of your answer.)

C7. With how many different households outside your own did you share or receive fish and game in the past 12 months?

Number of households ____

(Note: Please indicate the households on Worksheet D, questions D2 and D8 in support of your answer.)

C8. Did your taking of fish and game in the last 12 months occur entirely within the subsistence use area for which you are now applying?

Yes ____
No ____

(Note: Please indicate areas on Worksheet D, question D1 in support of your answer.)

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION QUESTIONS
(PAGE 7)

D2. In this table, list the types of wild, non-commercial fish and game your household received or gave during the last 12 months. In column A, indicate the types (species) of fish and game received or given. In column B, for species received, indicate the pounds consumed by you. In column C indicate the name of one person in the household from whom you received the fish or game, or the name of one person in the household to whom you gave the fish or game. In column D indicate the communities of the households.

	A. Species Given or Received	B. Pounds Eaten by You	C. Name of Person in Household	D. Household's Community
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				
19.				
20.				
21.				
22.				
23.				
24.				
25.				

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION
(PAGE 6)

D. Worksheets: Supporting Documentation
You must complete questions D1 through D8 as support for your answers on questions C1 through C8.

D1. In this table, list the kinds of wild, non-commercial fish and game harvested by members of your household during the last 12 months. In column A list the type (species) of fish and game harvested. In column B indicate the numbers taken of each species. In column C indicate the pounds (usable weight) of the harvest consumed by you. In column D indicate the Game Management Subunit(s) where the harvest occurred. In column E indicate the harvest methods used for taking fish (see list below). In column F indicate whether aircraft was used to travel from your permanent domicile to or within the Game Management Subunit where the harvest occurred. In column G, indicate the dates you were engaged in taking or processing fish and game (for instance, if the dates were February 5 through February 8, February 20, and March 3 through March 4, you would enter "2/5-2/8, 2/20, and 3/3-3/4").

	A. Species	B. Number Taken	C. Lbs Eaten by You	D. Sub-unit(s) of the Harvest	E. Method Used for Fish*	F. Was Air-craft Used? (yes, no)	G. Dates You Spent in Taking or Processing (Enter all Months/Days)
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							
11.							
12.							
13.							
14.							
15.							
16.							
17.							
18.							
19.							
20.							

* Types of fishing methods: gill net, dip net, seine net, fishwheel, set line, jigging (through the ice), fish trap, gaff, rod and reel, etc.

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION QUESTIONS

D3. To calculate how much wild fish and game you consumed in the last twelve months, add the lbs in column C of question D1 with the lbs in column B in question D2, and enter the number below:

_____ Number of lbs of fish and game you consumed

(Note: This is the answer to question C1.)

D4. To calculate how many different types (species) of wild, non-commercial fish and game were eaten by you, count the number of different types of wild fish and game listed in D1 and D2 which you ate and enter the number below:

_____ Types of fish and game

(Note: This number is the answer to question C2)

D5. To calculate the number of days you were engaged in taking or processing fish and game, count the number of different dates listed in column G in question D1 and enter the number below:

______ Number of different dates

(Note: Partial days count as one day. Do not count days outside of the subsistence use area. This number is the answer to question C4.)

D6. To calculate the number of different months during which you were engaged in taking fish and game, count the number of different months listed in column G in question D1 and enter the number below:

_____ Number of different months

(Note: Any time spent in a month counts as one month. Do not count months outside of the subsistence use area. This number is the answer to question C5.)

STATE OF ALASKA
SUBSISTENCE HARVEST PERMIT APPLICATION QUESTIONS
(PAGE 9)

D7. If you claimed any time in question C6, list the weeks in which the taking of fish or game was your principal work effort below, and describe your employment situa ion during those times:

____

____

D8. To calculate the number of households with which you shared or received fish and game, count the number of different households listed in column C, question D2 and enter it below:

______ Number of different households

(Note: This is the answer to question C7.)

NOTIFICATION OF POSSIBLE ADDITIONAL MATERIALS
The State of Alaska may use additional materials at some later date to verify your answers. Verification materials you may be asked to provide at some later date include the following:

1. Names, addresses, and phone numbers of persons who can corroborate your sharing and receiving information, and
2. Names, addresses, and phone numbers of persons who can corroborate your hunting and fishing days.

In addition, the state may check the following additional sources to verify your answers:

1. Game harvest records in ADF&G data files to validate your big game harvests; and
2. Fishing permit records or salmon harvest calendar records in ADF&G data files to verify you salmon harvests.

CERTIFICATION
I hereby certify that all of the above information is true and correct and that I understand this information is subject to public disclosure. (Note: Providing false information is subject to a maximum penalty of either $1,000 fine or 6 month imprisonment, or both, per 16.05.430.)

Signature of Applicant______________________________

Signature of Witness______________________________

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX E

APPLICANT CASE EXAMPLES
SUBSISTENCE PERMIT APPLICATIONS AND SCORES

The following eight case examples illustrate how an applicant for a subsistence permit might be scored using the example permit application. The cases were real households documented in the early 1980s through research of the Division of Subsistence, Alaska Department of Fish and Game in Sitka, the Kenai City area, Homer, and Nome. The original cases were published in a scientific report which contains a number of other cases for comparison (Robert J. Wolfe and Linda J. Ellanna (compilers), Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities, Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau, 1983). Although these cases are a decade old, they are examples of types of fishing and hunting patterns that still exist in Alaska communities.

Because the cases were documented in the early 1980s, certain information was not gathered that is necessary to complete the subsistence permit application. For this exercise, assumptions were made to fill in the missing information consistent with the content of the cases and how one might expect the applicants to represent themselves. Therefore, the cases cannot be taken to be exact representations of actual applicants, but only case illustrations of types of applicants that might be expected to apply for subsistence permits.

It is also important to state that the application form and scoring systems are preliminary examples illustrating the general type of application form and scoring system that may be created to implement the state subsistence statute. Ultimately, the Boards of Fisheries and Game are mandated to create the application and scoring system. Should a different set of questions or weighting system be adopted by the Boards, then there may be some differences in the outcomes for particular case applicants.

In this analysis, a person needs a minimum of 100 points on the application, covering seven criteria.
(A) Quantity of fish and game consumed. One point for every 10 lbs consumed. A minimum of 125 pounds is required, or an applicant is not a subsistence user.
(B) Number of species used. Three points for each species or species group. Under the terms of the Governor's bill, a minimum qualification threshold will be set by the Boards of Fisheries and Game for this criteria. This analysis assumes a minimum of 6 species or species groups is required. The species groups used for the purpose of this analysis are consistent with Appendix G, Table 1. For example, all varieties of crab are counted as one species group.
(C) Days spent taking or processing. One point for each day spent hunting, fishing, gathering, or processing. A minimum of 30 days is required.
(D) Number of months in which the taking or processing occurred. Two points for each month.
(E) Number of weeks during which the taking or processing of fish and game was the applicant's principal work effort. One point per week. Maximum of 26 weeks.
(F) Households with which the applicant gave or received fish or game. Two points per household. Maximum of ten households.
(G) Whether the taking was in the subsistence use area. Five points if the taking was in the subsistence use area for which the applicant is applying for a permit.

Each case follows a similar format. First, a narrative for each case's pattern of fish and game use is presented (these narratives originally appeared in Wolfe and Ellanna (1983: 116-117, 144-148, 243-244, 166). Second, the person's assumed scores on the subsistence application questions are presented, with each applicant's final score and status. A brief listing of assumptions used for scoring follows each case study.

A summary of the final status of each case is as follows, a "yes" indicating a "subsistence user" and a "no" indicating "not a subsistence user":

Case 1. Sitka. Yes. Case 3. Soldatna No. Case 5. Kenai. No. Case 7. Nome. No.
Case 2. Sitka. Yes. Case 4. N. Kenai. No. Case 6. Homer. No. Case 8. Nome. Yes.

Case 1. This Sitka household consists of a couple and their four-year-old daughter. The husband was born in Alaska 52 years ago and the family has been living in Sitka for the past 22 years. Both adults are employed full time: he as a planner and she as an accounts clerk. Their joint household income is more than $50,000 per year. The household's level of involvement in use of local food resources has remained constant over the last five years.

> "Cost savings is probably the most important reason for hunting, fishing and gathering, although our lifestyle places us where there is a good supply of subsistence foods and wood. By using subsistence foods, they have become important in our diet and are not available any other way or elsewhere."

An estimated 60 percent of the household's meat, 100 percent of the fish, and 5 percent of the fowl used in the past year came from hunting and fishing. They reported obtaining eight deer and twelve ducks, a good return for the 6-10 times they went out hunting. They fished about 25 times in the past year and obtained 70 salmon (10 kings, 35 silvers, and 25 sockeye); 10 snapper; 10 halibut; 10 ling cod; 10 Dolly Varden; 10 king crab and 30 dungeness crab; 10 pounds of shrimp; 50 pounds of herring roe, and 10 pounds of smelt. From the intertidal zone they gathered clams, scallops, abalone, cockles, two types of seaweed and kelp. They also gathered salmonberries, huckleberries, and cranberries. To preserve their food, the household uses a freezer, smokehouse and methods of pickling and canning. They also exchange harvested foods with relatives and friends.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	350	/ 10 =	35	21%
B. Number of species used	6	16	x 3 =	48	29%
C. Days spent taking or processing	30	45	/ 1 =	45	27%
D. No. of months when taking occurred	4	6	x 2 =	12	[illegible]%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	10	x 2 =	20	12%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	3%
TOTAL				**165**	100%

This case qualifies as a subsistence user, scoring a total of 165 points (exceeding the 100 points threshold), and meeting minimum thresholds for each criteria.

Case 1 Assumptions

To score this case, the following assumptions were made:

(1) the applicant's household used 16 resource categories with the following weights: deer (640), ducks (1[illegible]), king salmon (153), silver salmon (270), sockeye salmon (108), snapper (20), halibut (150), Dolly Varden (2[illegible] crab (145), shrimp (10), herring roe (50), smelt (10), clams (?), cockles (?), scallops (?), and abalone (?) (categories not counted included: seaweed, kelp, salmonberries, huckleberries, and cranberries because they are not fish and game)

(2) the applicant consumed about 350 lbs personally, as the total household harvest weighed about 1,600 lbs, or about 533 lbs per member, and the household gave foods to relatives and friends

(3) 45 days were spent taking or processing (25 days fishing, 10 days hunting, 10 days gathering)

(4) the harvest occurred in 6 different months

(5) there were no weeks where taking fish and game was the main activity
(6) the applicant shared with the maximum of 10 households
(7) all taking occurred locally

Case 2. This Sitka household includes a couple with their three children, school aged and below. The parents have lived in the Sitka area all their lives. The household reported an annual income of between $20,000 and $25,000. The father is employed as a foreman. The household reported that hunting, fishing, and gathering are fundamental to their way of life and essential for the continuation of Tlingit culture. They saw those things as fundamental Native rights. They reported that all of the fish and fowl, and much of the meat they eat comes from hunting and fishing. They exchange these foods with other community members. They have become more involved in the use of local food resources than they were five years ago. In the past year they hunted and obtained three deer, six hair seal, and one sea lion. In addition to utilizing the meat and pelt, seal oil was rendered from the seal fat. The family fished about 15 times in the past year and harvested salmon with a net (25 pinks, 8 kings, 10 silvers, 25 chum, and 25 sockeye); three halibut and five red snapper. The family also gathered a small quantity of herring and herring roe. They gathered a small quantity of clams, sea urchins, and abalone, black and red seaweed, salmonberries, blueberries, huckleberries, and edible plants. They put their food up by canning, pickling, salting, fermenting, freezing, and smoking. They have their own freezer, smokehouse, and maintain an off-road vehicle used for hunting.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	300	/ 10 =	30	22%
B. Number of species used	6	14	x 3 =	42	30%
C. Days spent taking or processing	30	30	/ 1 =	30	22%
D. No. of months when taking occurred	4	6	x 2 =	12	9%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	10	x 2 =	20	14%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	4%
TOTAL				139	100%

This case qualifies as a subsistence user, scoring a total of 136 points (exceeding the 100 point threshold), and meeting minimum thresholds for each criteria.

Case 2 Assumptions
To score this case, the following assumptions were made:
(1) the applicant's household used 14 resource categories with the following weights: deer (210), seal (540), sea lion (150), pink salmon (55), king salmon (122), silver salmon (77), chum salmon (155), sockeye salmon (108), halibut (45), red snapper (10), herring-herring roe (?), clams (?), sea urchins (?), abalone (?) (categories not counted included: red and black seaweed, salmonberries, blueberries, huckleberries, and edible plants because they are not fish and game)
(2) the applicant consumed about 300 lbs personally, as the total household harvest weighed about 1,472 lbs, or about 294 lbs per member
(3) 30 days were spent taking or processing (15 days fishing, 10 days hunting, 5 days gathering)
(4) the harvest occurred in 6 different months
(5) there were no weeks where taking fish and game was the main activity
(6) the applicant shared with the maximum of 10 households
(7) all taking occurred locally

Case 3 is a Kenai household. This household consists of a Native woman, age 64, who is a lifelong resident of the community. She formerly fished a commercial set net, but is now retired. Her daughter and son-in-law, both in their 40s, live on an adjacent lot. The older woman shares many of the following resources with her daughter and son-in-law.

The woman ideally could use 30 king salmon each year which she smokes, cans, pickles, and freezes. Kings, however, are difficult to get because she is no longer engaged in commercial fishing, does not have a boat for trolling in Cook Inlet, and has never learned to fish in rivers with a rod and reel. In addition, she considers salmon in the rivers to be too decomposed to eat. As a result, the woman has had to purchase most of her kings from commercial fishermen during the last three or four years. This year, kings sold for $1.25 a pound; the household purchased $400 worth. She prefers the early kings that arrive in May, because these have traditionally been used by Kenai residents, are the first fresh salmon available, and run when the weather is cool and dry enough for smoking. However, there is no commercial or non-commercial season on these early kings and, hence, salt water kings are not available. The household also has started using other salmon species, including 18 silvers this year from her son-in-law's commercial gillnetter and 10 reds, which she obtained in five days of fishing with three other people in the new Kasilof River "personal use" gillnet fishery. The woman gets some of her salmon by smoking other people's fish for a one-half share. She distributes fish widely to her many relatives in the community and to old and sick people who cannot get their own. She said salmon is very important to her because she has eaten and preserved it this way all her life.

The woman and her daughter use about four cases of clams each year which they usually harvest from Clam Gulch or Ninilchik. This year, however, they did not go clam digging because they had some remaining from last year. The older woman puts out a hooligan (eulachon) net on Salamatof Beach in April and May, eating what she wants fresh. She also lets friends and neighbors use her net to get hooligan.

The two households usually use a moose every year. The older woman and her now deceased husband formerly hunted moose, but now she relies on her daughter and son-in-law for moose. However, this year the daughter and her husband had only a week to hunt, because the husband was working on the North Slope, and for the first time they were not successful harvesting a moose. Frequently it takes them 10 to 20 days to harvest a moose, and they usually hunt in the Swanson River area. She rarely buys meat in the store. She said she seldom receives fish or game, even though she frequently shares fish with others. "People don't share like they used to, not even relatives," she said.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	90	/ 10 =	9	9%
B. Number of species used	6	6	x 3 =	18	17%
C. Days spent taking or processing	30	40	/ 1 =	40	38%
D. No. of months when taking occurred	4	5	x 2 =	10	10%
E. Weeks when taking fish/game was main work	0	2	x 1 =	2	2%
F. Households receiving or giving	0	10	x 2 =	20	19%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	5%
TOTAL				**104**	100%

This case does not qualify as a subsistence user, failing to meet the 125 pounds minimum consumption threshold of criteria (A).

Case 3 Assumptions

To score this case, the following assumptions were made:

(1) the households of the applicant and her daughter used at least the minimum of 6 resource categories with the following weights: silver salmon (86), red salmon (40), clams (80), hooligan (20), and two others from sharing (king salmon was not counted because it was purchased from commercial fishermen)

(2) the applicant consumed about 90 lbs personally, as the total harvests of the two cooperating households weighed about 226 lbs, or about 75 lbs per member, and the households gave and received some foods (on other years, a moose was reported taken; however, during the application year, no moose was reported taken or used)

(3) 40 days were spent taking or processing (35 days fishing or processing fish, 0 days hunting, 5 days gathering)

(4) the harvest occurred in 5 different months

(5) there were 2 weeks where taking fish and game was the main activity

(6) the applicant shared with the maximum of 10 households

(7) all taking occurred locally

Case 4 is a North Kenai household that takes salmon with their commercial set net. The household includes a husband and wife, both in their 40s, and four daughters. The entire family works a commercial set net in summer in North Kenai. The husband also fishes the commercial herring season, but neither he nor his wife works at other remunerative employment in winter. The household has lived in North Kenai since 1966.

The household annually uses 50 to 60 red salmon which they retain from their commercial set net harvests; these are first frozen, then canned or smoked when the family has time after commercial season closes. The household also fishes for silvers with a rod and reel in the Swanson River in late August and September, mainly, they say, for recreation. Before they had a set net, the household harvested all the salmon they used with a rod and reel. They generally do not give away much fish, except the silvers taken with a rod and reel if the household already has enough for the winter. These are given to friends and neighbors who do not have time to fish for themselves. The household also has fished in the local August subsistence or non-commercial gillnet fishery when it was open in previous years. The household said they eat fish two or three times weekly year-round; they prefer it to other kinds of meat because it tastes better and is healthier.

The household uses 150 to 200 pounds of halibut each year. The husband previously fished the commercial halibut season, keeping part of his catch for the household. This year the family fished for halibut with a rod and reel in late August from a friend's boat off Deep Creek. In total, they harvested 280 pounds of halibut, half of which their friend kept.

The household occasionally sets crab and shrimp pots in Kachemak Bay, about 90 miles distant. The household says that the cost of gasoline and a boat makes this activity more recreational than economical because depletion of resources in the Bay means that it is no longer possible to harvest enough crab and shrimp to compensate for the costs. The household occasionally digs clams at Clam Gulch for pleasure but generally gives them away because they do not like to eat clams. In winter, the household fishes for pleasure through the ice on local lakes for land-locked silvers.

The husband tried to get a moose each year but does not consider himself an "aggressive" hunter. He hunts very near his house, considering it is dangerous to be in the woods with all the inexperienced hunters. The husband has not harvested a moose in three years. He hunts spruce grouse locally in fall, using as many as he gets. In the fall, the family also gathers low- and high-bush cranberries, raspberries, currants, and blueberries, making about three to four cases of jam which they use each year. The household harvests wild resources, they say, because they enjoy the activities and value the self-sufficiency resulting from wild food harvests. Because the household works seasonally, they have time to take these resources.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	98	/ 10 =	9.8	12%
B. Number of species used	6	4	x 3 =	12	14%
C. Days spent taking or processing	30	40	x 1 =	40	47%
D. No. of months when taking occurred	4	6	x 2 =	12	14%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	3	x 2 =	6	[illegible]
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	6%
TOTAL				84.8	100%

This case does not qualify as a subsistence user, failing to meet the minimum threshold of criteria (A) and (B), and having a point total less that 100 points.

Case 4 Assumptions

To score this case, the following assumptions were made:

(1) the applicant's household used 4 resource categories with the following weights: red salmon (240), halibut (140), grouse (10), and clams (?) (categories not counted included: silver salmon because it was taken with inefficient rod and reel; crab and shrimp because they were taken on inefficient recreational boat trips; and cranberries, raspberries, currents, and blueberries because they are not fish and game)

(2) the applicant consumed about 98 lbs personally, as the total household harvest weighed about 390 lbs, or about 98 lbs per member

(3) 40 days were spent taking or processing (20 days fishing, 10 days hunting, 10 days gathering)

(4) the harvest occurred in 6 different months

(5) there were no weeks where taking fish and game was the main activity

(6) the applicant shared with 3 other households

(7) all taking occurred locally (Kachemak Bay was considered "local")

Case 5 is a Kenai city household that heavily uses wild resources but does most of their harvesting in non-local areas. The husband, a Native, is a lifelong Kenai resident; the wife moved to Kenai from Oregon in 1967. The husband is a Cook Inlet gillnetter and fishes the commercial herring, halibut, and salmon seasons. Depending on his income from fishing and the availability of jobs, the husband frequently works as a millwright in winter, often locally but occasionally on the North Slope or in Valdez. The wife has no wage occupation. The income of this household is probably fairly high, though not always dependable due to the variability of commercial fishing income.

Each year this household uses three to four cases of salmon (about 5-15 fish total), which they smoke, can, or freeze. Although they prefer kings because the husband has eaten them all his life, the household also will use silvers. They seldom use other salmon species because they consider these to be of inferior quality. The household gets their fish from the husband's commercial catch. This year, however, he caught only two kings, so the household smoked chum salmon for the first time. The husband does nearly all the salmon harvesting and preserving; salmon are very important to him, he reported. However, the wife has not eaten salmon all her life, does not consider it so important, and does not know how to harvest or process fish.

The household uses halibut which they get from the husband's catch, usually eating it twice monthly, year-round. The husband gets clams about twice yearly across Cook Inlet at Polly Creek, which he reaches in his floatplane. He said he prefers to dig clams there because the clams are bigger and taste better. The household does not like to clean clams, however, so they keep enough for a meal and give the rest away to friends and relatives. The household occasionally uses crab or shrimp which the husband harvests while commercial fishing for other species. The household likes hooligan, but the husband is commercial fishing during the run and has no time for harvest activities. The household occasionally receives hooligan from friends or relatives because it is easy to get and people tend to harvest more than they can use, but the household would use more if it were available. As with salmon, the wife has no interest in or knowledge of harvesting and processing hooligan. In winter the husband occasionally fishes through the ice for rainbow trout on local lakes, mainly, he says, for pleasure.

The husband hunts elk in the fall on Afognak Island which he reaches in his floatplane. He considers elk to be easier to get and more tender than moose. If the husband cannot get elk, he hunts either moose in Stony River area or caribou across Cook Inlet. The household rarely buys meat in the store; only once in the last 15 years have they not have enough wild game. If wild game were not available, however, they would buy a side of beef. Although it is expensive to fly to hunt, the husband says it is almost impossible to get a moose locally because there is too much competition, so he has given up trying. The household does not think it is more expensive to fly to hunt than to buy beef in the store. In addition, wild game is important to the husband, he says, because he has eaten it all his life. He does not consider himself a "recreational" hunter. The family also gathers cranberries, blueberries, and raspberries in the fall.

Because the wife has little interest in or knowledge of wild food harvesting, the husband does nearly all the harvesting and preservation. Because of the limited knowledge of and interest in wild resources on the part of the wife, the amount of wild resources the household uses depends on how much time the husband has. Although the husband has many relatives in the area, the household does not receive much fish or game. With a relatively high income, the household can afford equipment such as a floatplane, which gives the husband access to harvest areas not available to most local residents and facilitates his resource harvesting activities.

Criterion	Minimum	Applicant Answer	Formula	Applicant Score	Percent
A. Quantity of fish and game consumed	125	65	/ 10 =	6.5	9%
B. Number of species used	6	6	x 3 =	18	25%
C. Days spent taking or processing	30	30	/ 1 =	30	41%
D. No. of months when taking occurred	4	7	x 2 =	14	19%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	2	x 2 =	4	6%
G. Taking was in subsistence use area? y=5, n=0	0	0	x 1 =	0	0%
TOTAL				**72.5**	100%

This case does not qualify as a subsistence user, failing to meet the 125 lb. minimum consumption threshold, and scoring less than the 100 points threshold.

Case 5 Assumptions

To score this case, the following assumptions were made:

(1) the applicant's household used the minimum of 6 resource categories with the following weights: king salmon (32), chum salmon (74), halibut (24), crab (?), shrimp (?), and hooligan (?) (categories not counted included: clams, elk, moose, and caribou because they were taken with inefficient air transportation; trout because it was taken with inefficient rod and reel; and cranberries, blueberries, and raspberries because they are not fish and game)

(2) the applicant consumed 65 lbs personally, as the total household harvest weighed about 129 lbs, or about 65 lbs per member (only harvests taken with efficient gear were counted)

(3) the minimum of 30 days were spent taking or processing (30 days fishing)

(4) the harvest occurred in 7 different months

(5) there were no weeks where taking fish and game was the main activity

(6) the applicant shared with 2 households

(7) some of the taking occurred non-locally

Case 6. This Homer household consists of a single female and her teenage daughter. The family moved to the city of Homer five years ago, after living elsewhere in Alaska, because of a business opportunity and an environment they found appealing. The mother is the owner of a local business, and is able to take time off whenever she desires to fish or gather resources. Having no family members locally, they participate with friends in the August subsistence fishery on Kachemak Bay, fishing for silver salmon on the beach below their bluff home at Miller's Landing. They put up 10 to 15 fish by freezing and canning. They gather mussels on the same beach throughout the year and eat them fresh. They fish for halibut by skiff off the same beach, catching and freezing about 50 to 150 pounds per year. With the skiff they also fish in saltwater with hook and line for trout, catching a dozen through the summer. They often give these to friends who bring them gifts of shrimp and crab. During the spring and summer they dig clams on the Homer spit, as the clams and cockles there are considered better than the redneck clams at Miller's landing. They also gather greens for immediate consumption including nettles, goose tongue, and wild parsley. The family conducts extensive berry picking in late summer and fall, and these are frozen as well as used fresh. This household does not hunt moose or other wild game, stating they have neither the equipment nor the knowledge of how to go about it. They say they enjoy resource harvesting because it brings them closer to the country, as well as helping them financially.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	110	/ 10 =	11	14%
B. Number of species used	6	7	x 3 =	21	27%
C. Days spent taking or processing	30	20	/ 1 =	20	28%
D. No. of months when taking occurred	4	6	x 2 =	12	16%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	4	x 2 =	8	10%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	6%
TOTAL				77	100%

This case does not qualify as a subsistence user, failing to meet the minimum threshold for criteria A and B., and scoring less than the 100 point threshold.

Case 6 Assumptions

To score this case, the following assumptions were made:
(1) the applicant's household used 7 resource categories with the following weights: silver salmon (72), halibut (150), clams (?), cockles (?), mussels (?), crab (?), shrimp (?) (categories not counted included: trout because it was taken with inefficient rod and reel gear; greens and berries because they are not fish and game)
(2) the applicant consumed about 110 lbs personally, as the total household harvest weighed about 220 lbs, or about 110 lbs per member
(3) 20 days were spent taking or processing (10 days fishing, 10 days gathering)
(4) the harvest occurred in 6 different months
(5) there were no weeks where taking fish and game was the main activity
(6) the applicant shared with 4 households
(7) all taking occurred locally

Case 7. This case represents a Nome household which harvests five to ten categories of resources. The household is composed of a 48-year-old retired military officer and his 48-year-old wife. Their only child, a son in his 20s, now lives in a separate household in Anchorage. Husband and wife work for city and state government agencies respectively, and together they earn in excess of $70,000 net annually. They have lived in Alaska for nine years, eight of which have been in Nome.

Their primary resource harvest activity is fishing. "I love fishing," the wife said. "I'm down at the mouth of that river [the Nome River] at 5:00 every morning when the silver salmon are running." She fishes more than her husband, and recalls she had her first fishing pole at the age of five, whereas her husband did not begin fishing or hunting until ten or fifteen year ago, and then did so only sporadically. This year the household members harvested approximately 100 pink salmon, 50 to 60 silver salmon, 50 to 60 Dolly Varden, four to five grayling, a portion of a shared moose, and an undetermined quantity of blueberries and cranberries. Most of their hunting, fishing, and gathering activities take place along the road system, especially at the Nome, Sinuk, and Snake rivers and occasionally inland on the Pilgrim River. They have a boat but have not used it for three years. They also have a snowmobile but usually use their four-wheel-drive vehicle for resource harvest related transportation.

Interestingly, neither eats much fish except for Dolly Varden. Most salmon are smoked and given away to two or three older people in town or to other friends. Salmon are also preserved by freezing. In the winter, friends give them crab, which are taken with handlines or pots through the ice in winter. "It's too spooky out there on the sea ice for me," the wife states. This year they were unsuccessful in harvesting a moose, but their son in Anchorage did and shared it with them. If they had been successful and their son had not, they would have reciprocated. Moose is preserved by freezing. Summer is their busiest resource harvesting period, primarily because of resource availability, road access, and time not committed to work (longer days, vacation time). To this household the ability to use and harvest local resources is an important part of living in northwest Alaska.

		Applicant		Applicant	
Criterion	Minimum	Answer	Formula	Score	Percent
A. Quantity of fish and game consumed	125	130	/ 10 =	13	21%
B. Number of species used	6	2	x 3 =	6	11%
C. Days spent taking or processing	30	10	/ 1 =	10	18%
D. No. of months when taking occurred	4	1	x 2 =	2	4%
E. Weeks when taking fish/game was main work	0	0	x 1 =	0	0%
F. Households receiving or giving	0	10	x 2 =	20	36%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	9%
TOTAL				56	100%

This case does not qualify as a subsistence user, failing to meet the minimum thresholds for criteria (B), (C), and (D), and scoring less than 100 points total.

Case 7 Assumptions

To score this case, the following assumptions were made:

(1) the applicant's household used 2 resource categories with the following weights: moose (250 lbs, received from son in Anchorage) and crab (10) (categories not counted included: pink salmon, silver salmon, Dolly Varden, and grayling because they were harvested with inefficient rod and reel; blueberries and cranberries because they are not fish and game)

(2) the applicant consumed about 130 lbs personally, as the household's moose and crab were assumed to weigh about 260 lbs, or about 130 lbs per member
(3) 10 days were spent taking or processing (10 days hunting; 0 days fishing were counted because it was recreational in nature)
(4) the moose hunting occurred during 1 month
(5) there were no weeks where taking fish and game was the main activity
(6) the applicant shared with the maximum of 10 households
(7) all taking occurred locally

Case 8. This Nome household is composed of a husband in his late 30s, his wife in her early 40s, an adult son, and a six-year-old son. The husband is Eskimo and has lived in Nome all his life. The wife is not Native, but she has lived in Alaska for 22 years, 9 of which have been in Nome. Both husband and wife are professional educators, although the husband was unemployed at the time of the survey. The older son is employed as a laborer for the city and carves part-time. The combined household annual net income varies depending on whether or not their contracts extend into the summer months, but averages between $40,000 and $50,000.

This household estimates that during most years 75 percent of their protein foods are derived from locally harvested fish and game. This summer, however, the husband had to attend school in Fairbanks for three months and their four-wheel-drive vehicle was broken down, so only about 50 percent of this winter's protein is composed of locally harvested resources. The household has two camps, one at Cape Nome (18 miles east of town). This summer (June 15 to the end of August), they seined for salmon at Fort Davis with a non-related fishing partner, together harvesting 200 pinks, 150 chums, 25 silvers, and one king. Their half of the fish was dried, requiring the occasional help of a married son and his wife and an average of 2-3 hours' labor a day to care for the drying fish. Much of the salmon was distributed to XYZ (an organization which provides meals to elderly Native people) and to individual older households without adequate resource support. Some dried fish and moose meat are traded for marine mammal products such as walrus meat and belukha <u>muktuk</u>.

Other fish taken by this household include arctic cod ("tomcod") which are taken through the sea ice in winter, dried, and shared with others (75 were harvested this last winter); whitefish, harvested by the older son in nearby rivers; or capelin ("cigar fish") taken on the beach in late July; and arctic char, taken from rivers with a seine or rod and reel and smoked (an activity often undertaken simultaneously with moose hunting). This household uses both a seine and rod and reel for fishing, but reports that the outcome of both techniques is the same, a means for obtaining food. The wife states, "I wouldn't catch a fish I wasn't going to eat; it would be a silly waste of time." They would like to fish through the river ice in winter, but lack adequate knowledge about where the holes are located.

Moose are very important to this household, and they are successful in harvesting at least one every year. Moose meat is also shared with XYZ and with people they "owe things to."

Although marine mammals are used for food and raw materials by household members, the husband does not own a boat and so can hunt only when there is room for him on a friend's boat. He was unable to participate this spring, but, as previously mentioned, obtained some food through trade of other resources.

Waterfowl are not as accessible as the household would like because they have no boat, but someone in the household will harvest various species if they have a chance to hunt with someone else while visiting a village. Husband and wife normally eat ptarmigan, but this year they were scarce and only five were taken. All household members will participate in crabbing for king crab through the ice, but the last couple of years crab have not been abundantly available in nearshore waters; and, according to this household, many people in town are both discouraged and think it is too risky to go out on the necessary three or so miles of ice to harvest this resource. Blueberries, salmonberries, mossberries, greens, and roots are also harvested in summer, primarily by the wife.

Not only does this household provide resources to other households both within and without Nome, but they participate as recipients in a resource distribution network that spans hundreds of miles. The husband's mother and sister reside in Homer and share halibut, clams, and occasionally seal with this Nome household. Cousins in Kotzebue send two to three sacks of sheefish and caribou (as much as they can after they have met their own family's needs) each year.

Although this household states they could physically "survive" without local resources, to do so, in their view, would dramatically reduce the quality of every aspect of their lives: nutritional, economic, social and cultural. The wife learned to harvest and depend on resources in Washington state with her family, and came to live and work in rural Alaska to continue that life. Her husband grew up in an Eskimo family and values the harvest and use of local resources above almost all other things in his life. As his wife states, "I don't know any

Eskimo male who would be happy if he couldn't participate in resource harvest. It is not simply a matter of choice but rather a reason to exist."

Criterion	Minimum	Applicant Answer	Formula	Applicant Score	Percent
A. Quantity of fish and game consumed	125	300	/ 10 =	30	17%
B. Number of species used	6	17	x 3 =	51	29%
C. Days spent taking or processing	30	50	/ 1 =	50	28%
D. No. of months when taking occurred	4	9	x 2 =	18	10%
E. Weeks when taking fish/game was main work	0	2	x 1 =	2	1%
F. Households receiving or giving	0	10	x 2 =	20	11%
G. Taking was in subsistence use area? y=5, n=0	0	5	x 1 =	5	3%
TOTAL				176	100%

This case qualifies as a subsistence user, scoring more than the 100 point threshold and meeting minimum thresholds for each criteria.

Case 8 Assumptions

To score this case, the following assumptions were made:

(1) the applicant's household used 17 resource categories with the following weights: pink salmon (460), chum salmon (675), silver salmon (115), king salmon (12), tom cod (16) moose (540), ptarmigan (4) walrus (?), beluga (?), whitefish (?), capelin (?), arctic char (?), waterfowl (?), crab (?), halibut (?), sheefish (?), caribou (?) (berries, greens, and roots were not counted because they are not fish and game)

(2) the applicant consumed a minimum of about 300 lbs personally, as the total household harvest which was used weighed about 1,191 lbs (an additional 631 lbs of salmon was assumed to be given away), or about [illegible] lbs per member, and the household received additional foods from relatives and friends

(3) 50 days were spent taking or processing (40 days fishing, 10 days hunting)

(4) the harvest occurred in 9 different months

(5) there were 2 weeks where taking fish and game was the main activity

(6) the applicant shared with the maximum of 10 households

(7) all taking occurred locally

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX F

COMMUNITY SIZE, ECONOMY, AND NUMBER OF SUBSISTENCE USERS

February 1992

The Governor's subsistence bill states that there are relationships between patterns of wild resource use and types of communities in Alaska. This paper discusses some of the evidence in support of these relationships.

The "Findings, Purpose, and Intent" section of the Governor's subsistence bill states:

> (6) among persons who hunt and fish, a large majority of those living in areas described in AS 16.05.268(e)(1); a majority of those living in communities described in AS 16.05.268(e)(2); and a small minority of those living in communities or areas described in AS 16.05.268(e)(3), depend upon the subsistence taking of fish and game.

The subsistence bill describes the three types of areas referenced above:

> (e)(1) areas where the human population of each community is less than 2,500 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the areas, and that are not part of an urban area.
>
> (e)(2) communities where the human population is 2,500 to 7,000 and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community, and that are not part of an urban area.
>
> (e)(3) communities or urban areas where the human population is 7,000 or greater or areas or communities where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.

For subsistence permits, residents of the three types of communities are accorded different procedures by the subsistence bill. A person who hunts or fishes living in Type 1 communities (e)(1) "is presumed to meet" subsistence user criteria, rebuttable only by "clear and convincing evidence", so no permit or paperwork is required (g)(1). A person who hunts or fishes living in Type 2 communities (e)(2) "is rebuttably presumed to meet" subsistence user criteria, upon signing a statement affirming the person's compliance, rebuttable by a preponderance of evidence (g)(2). A person who hunts or fishes living in Type 3 communities (e)(3) is presumed not to meet subsistence user criteria, and is qualified only upon certification that the person meets the subsistence user criteria (g)(3).

In general, studies by the Division of Subsistence show that there are strong relationships between community size, economy, and percent of subsistence users in Alaskan communities. These relationships are outlined in this paper, with references to research which provide more detailed data on these issues.

Communities <2,500 people with Mixed, Subsistence-Cash Economies

Most small, rural communities in Alaska are supported by mixed, subsistence-cash economies (cf, Wolfe and Ellanna 1983; Wolfe and Walker 1987; Wolfe and Bosworth 1990; Schroeder et al 1987). In these communities, a large majority of residents are subsistence users. Mixed, subsistence-cash economies have several characteristics:

1. domestic mode of production of wild foods (family-based groups produce wild foods)
2. extensive non-market distribution and exchange of wild food products among consuming households
3. high participation rates in consumption of wild foods
4. a traditional seasonal cycle of harvesting and processing wild foods
5. a wide diversity of wild resources produced and consumed
6. moderate to high volumes of wild foods produced and consumed
7. household specialization in production ("the super-household phenomenon," the "30-70 rule")(Wolfe 1987)
8. small-scale, efficient technologies for harvesting and processing
9. integration of subsistence production with cash
    a. use of income to invest in equipment to harvest and process wild foods
    b. insecure sources of monetary incomes for some families over the long term is common
    c. low income levels for a substantial proportion of families is common
    d. limited private sector employment is common
    e. high costs of imported goods and limited retail stores are common
10. traditional subsistence territories and rules of access to common property resources ("customary law")
11. traditional knowledge and value systems

Of the approximately 278 Alaska communities with a population less than 2,500 in 1990, about 251 had mixed, subsistence-cash economies with these types of characteristics in 1986, as determined by the Alaska Boards of Fisheries and Game.

In general, research by the Division of Subsistence has found that a large majority of residents participate as consumers of subsistence products in small communities with mixed, subsistence-cash economies (cf, Wolfe and Ellanna 1983; Wolfe and Walker 1987; Wolfe and Bosworth 1990; Fall, Foster, and Stanek 1984; Schichnes and Chythlook 1988; Sumida and Andersen 1990; Leghorn and Kookesh 1986; Schroeder et al 1987). Most wild foods are produced by a subset of very productive households in the community (it is common that about 30 percent of the households produce about 70 percent or more of the wild foods). Wild foods are typically shared by highly productive households with less productive households, most commonly along kinship lines and also through other traditional distribution means. Because of extensive kinship ties connecting households in most small communities, almost all persons in the community become consumers of subsistence products. Exceptions include relatively new residents who may be in the process of integrating into the local system, temporary residents primarily living in the community for employment reasons (such as school teachers or construction workers), and the occasional non-conforming resident household.

A case example of a small community with a mixed, subsistence-cash economy is Kaktovik, an arctic slope community with 224 people in 1990, of which 84.4 percent were Alaska Native, primarily from Inupiat cultural traditions. In 1986, the Division of Subsistence interviewed 42 of 53 households in Kaktovik to document the past 12-month's subsistence patterns. Based on that survey, 90.5 percent of Kaktovik households reported harvesting some wild foods in 1985-86. In terms of use, 100 percent of households used subsistence fish, 100 percent used big game, 88.1 percent used marine mammals, and 88.1 percent used wild birds. Most subsistence foods were harvested by a subset of the community's households: 30 percent of Kaktovik's households produced 70 percent of the harvest by weight. Wild foods were widely shared among households, so that use of major species was reported by a large majority of households. For instance, all households (100 percent) reported using char, 95.2 percent used caribou, 69.0 percent used ringed seal, and 61.9 percent used spotted seal. The community landed no bowhead whales that year, yet 83.3 percent of households used bowhead whale which were shared from other communities on the north slope. While 7.2 percent of Kaktovik households harvested moose, 45.2 percent of households used moose. While 2.4 percent of households harvested muskox, 42.9 percent used muskox. While no one reported harvesting broad whitefish, 47.6 percent used whitefish, received from other communities. Kaktovik residents harvested an average of about 328 lbs of wild foods per person in 1985-86, which contained 213 percent of an individual's recommended daily allowance of protein and 31 percent of the daily allowance of calories. The survey did not ask for estimates of individual or household consumption levels. However, because of the wide-spread sharing of wild foods, the mean per capita harvest estimate is probably a reasonable estimate of per capita consumption as well. Kaktovik's cash sector was relatively strong during the 1980s compared with most other small Alaska communities, due to employment generated from North Slope Borough oil revenues. The mean taxable income per income tax return in Kaktovik from 1981-85 was $25,591, compared to $6,629 for Venetie, a neighboring village to the south, and compared to $24,677 for Fairbanks, an urbanized area to the south. The cost of food in Kaktovik is estimated to be 228 percent of prices in Anchorage. The Alaska Boards of Fisheries and Game determined that Kaktovik had a mixed, subsistence-cash economy during deliberations in 1986. State regulations provide for subsistence hunting and fishing in the Kaktovik area.

Kaktovik is just one example of the approximately 278 small communities with mixed, subsistence-cash economies in the state. Other communities show differences in terms of types of species used, harvest quantities, and the integration of subsistence activities with the pattern of local employment (Wolfe and Ellanna 1983; Wolfe and Walker 1987). However, most small communities are similar to Kaktovik in regards to the general characteristics of the mixed, subsistence-cash economy listed above. The Division has conducted studies in over 200 small communities, reported in the Division's technical paper series. Examples of other case communities for comparison with Kaktovik include Tyonek in the southcentral region (Fall, Foster, and Stanek 1984), Manokotak in the southwest region (Schichnes and Chythlook 1988), Fort Yukon in the interior region (Sumida and Andersen 1990), and Tenakee Springs in the southeast region (Leghorn and Kookesh 1986).

Communities with 2,500-7,000 people and Mixed, Subsistence-Cash Economies

There were seven mid-sized communities in Alaska with populations of 2,500-7,000 people in 1990: Cordova (2,579), Kotzebue (2,751), Unalaska (3,089), Petersburg (3,230), Barrow (3,469), Nome (3,500), and Bethel (4,674). Dillingham, with a growing population of 2,017 people, was approaching the 2,500 level. In 1986,

the Alaska Boards of Fisheries and Game determined each of these communities to have mixed, subsistence-cash economies. Studies have been done in most of these communities (cf, Ellanna 1983; Fall, Schichnes, Chythlook, and Walker 1986; Stratton 1989; Smythe 1988; Wolfe 1986). These studies have shown that, in general, in these communities, a majority of residents who hunt and fish probably meet the criteria of a subsistence user; however, some residents who hunt and fish in these communities probably do not. In general, the mixed, subsistence-cash economies of these communities share the characteristics of smaller communities, listed above, with a few important additions:

1. more employment opportunities commonly exist in the community in comparison with smaller communities, especially in government services, transportation, and/or commercial fishing;
2. greater between-household diversity exists in resource use patterns, due to greater cultural diversity in the population and more economic options;
3. other cultural traditions are found within segments of the population that affect a household's resource use patterns, such as the recreational-sport outdoors tradition and commercial fishing traditions of industrial-capitalism.

In general, research by the Division of Subsistence has found that most residents participate as consumers of wild resource products in mid-sized communities (2,500-7,000 people) with mixed, subsistence-cash economies. For instance, in Cordova in 1985, 73.3 percent of households used non-commercial salmon, 69.9 percent used halibut, 79.6 percent used big game, and 80.1 percent used marine invertebrates. In Petersburg in 1987, 96.9 percent used salmon, 81.4 percent used halibut, 76.1 percent used big game, and 80.3 percent used marine invertebrates. As in small villages, most wild foods are produced by a subset of very productive households in the community. Wild foods are commonly shared by highly productive households with less productive households, most frequently along kinship lines.

However, in general, the populations of mid-size communities are more culturally mixed in comparison with small communities, due to in-migrations of new residents during the past decades. Because of this, some households in the community fall outside of the extensive kinship networks used for sharing that characterize subsistence-cash systems. Some portion of households in mid-sized communities do not consume subsistence foods for this reason. In addition, some portion of households do not participate in the community's resource use pattern because they choose to participate solely in the cash sector of the community's economy. This choice appears to be due to the personal cultural background and economic situation of the household. Some segment of the population of mid-size communities engage in wild resource harvests from cultural traditions which are different from subsistence customs and traditions. In particular, some households hunt and fish primarily from a Euro-American recreational-sports outdoors tradition. Some households harvest fish primarily as part of the commercial fishing tradition of industrial-capitalism. Some households in these segments of the population may express ideologies in opposition to subsistence traditions, and disagree with laws providing special subsistence preferences. Therefore, although research supports the conclusion that a majority of residents in mid-size communities who fish and hunt are participants in a subsistence-type pattern of wild resource use, a portion of the residents in mid-sized communities who hunt and fish do not.

A case example of a mid-size community with a mixed, subsistence-cash economy is Kotzebue, a community in northwest Alaska with 2,751 people in 1990, of which 75.1 percent were Alaska Native, primarily from Inupiat cultural traditions.

Kotzebue served as a regional center to 11 villages of the northwest arctic. It provided a center for services, government, commerce, transportation, and administration of a developing regional minerals industry. Wage-paying jobs linked to these government-financed services and administrative functions are more numerous in Kotzebue in comparison with surrounding villages, and mean incomes were correspondingly larger. The mean taxable income per income tax return in Kotzebue from 1981-85 was $20,444, compared to $9,858 for Selawik, a neighboring village, and compared to $24,457 for Anchorage, an urbanized area to the southeast. The cost of food in Kotzebue is estimated to be 155 percent of prices in Anchorage.

In 1986, the Division of Subsistence interviewed a random sample of 90 of 765 households in Kotzebue to document the past 12-month's subsistence patterns. Based on that survey, 78.5 percent of Kotzebue households reported harvesting some wild foods in 1986. In terms of use, 95.1 percent of households used subsistence fish, 88.1 percent used big game, 64.3 percent used marine mammals, and 64.0 percent used wild birds. Most subsistence foods were harvested by a subset of the community's households: 30 percent of Kotzebue's households produced 70 percent of the harvest by weight. Wild foods were widely shared among households, so that use of major species was reported by a large majority of households. For instance, 95.4 percent of households reported using salmon, 76.0 percent used sheefish, and 88.1 percent used caribou. Bearded seal was used by 47.2 percent. The community landed no bowhead whales (some Kotzebue residents helped Point Hope hunt), yet 41.1 percent of Kotzebue households used bowhead whale which was shared from Point Hope. While 8.4 percent of Kotzebue households harvested moose, 42.0 percent of households used moose. While 45.2 percent of households harvested caribou, 88.1 percent used caribou. Kotzebue residents harvested an average of about 398 lbs of wild foods per person in 1986, which contained 258 percent of an individual's recommended daily allowance of protein and 37 percent of the daily allowance of calories. The survey did not ask for estimates of individual or household consumption levels. However, because of the wide-spread sharing of wild foods, the mean per capita harvest estimate is probably a reasonable estimate of per capita consumption as well. The Alaska Boards of Fisheries and Game determined that Kotzebue had a mixed, subsistence-cash economy during deliberations in 1986. State regulations provide for subsistence hunting and fishing in the Kotzebue area.

There are substantial differences between the seven communities in this mid-size class in terms of how wild resources are integrated into each community's culture, economy, and way of life. These use patterns are influenced by the community's history and cultural composition. But underlying these differences in detail appear to be the characteristics common to mixed, subsistence-cash economies, listed above. Other mid-size communities where the Division of Subsistence has conducted studies which can be compared with Kotzebue include Nome (Ellanna 1983), Cordova (Stratton 1989), Petersburg (1988), and Bethel (Wolfe 1986). Dillingham, a community almost within this category, can also be compared (Fall, Schichnes, Chythlook, and Walker 1986).

Communities > 7,000 People

In 1990, about 441,521 people lived in Alaskan communities larger than 7,000 people, which was about 80.2 percent of the state's population. Areas with populations greater than 7,000 people include the Anchorage Borough (226,338), the Fairbanks North Star Borough (77,720), the Matanuska-Susitna area (39,415), the Kenai Peninsula area (36,651), and the Juneau Borough (26,751). In 1986, the Boards of

Fisheries and Game found that the use of non-commercial fish and game did not comprise a principal part of the economies of these areas. In general, these areas are supported by industrial-capital economies (cf, Wolfe and Ellanna 1983; Wolfe and Walker 1987; Schroeder et al 1987). Other large Alaska communities include the Ketchikan area (13,828), the Kodiak City area (12,230), and Sitka (8,588). In 1986, the Alaska Boards of Fisheries and Game determined that Ketchikan did not have a subsistence-cash economy, while Sitka and Kodiak City did.

In large urbanized areas with industrial-capital economies, the great majority of residents who hunt and fish are probably not subsistence users. In general, the pattern of resource uses of most residents in large urbanized areas with industrial-capital economies show certain characteristics:

1. fishing and hunting are primarily for commercial uses, recreational-sport uses, and personal uses (limited fishing for food)
2. small volumes of wild foods are produced and consumed by most fishers and hunters, with most meat and fish purchased from stores
3. distribution and exchange of wild foods products between households are relatively limited
4. hunting and fishing are typically intermittent breaks from regular wage employment work schedules, rather than a traditional seasonal cycle of harvesting and processing activities
5. a relatively narrow diversity of wild resources is produced and consumed by most households
6. fishing and hunting methods are commonly geared for "fair chase" recreational values, rather than efficient food production
7. both local and relatively wide-ranging land use patterns are common, especially using the public highway systems and aircraft for transportation
8. fishing and hunting values commonly derive from a Euro-American "sports-outdoors" tradition
9. wage employment in an industrial-capital economy provides the primary mode of food production for residents
    a. strong cash sectors commonly provide wage employment opportunities to most households
    b. there are relatively lower costs of imported goods and well-stocked retail stores
    c. commonly there are secure sources of monetary incomes for families over the long term
    d. commonly there are moderate to high income levels for a substantial proportion of families

In general, many residents of large Alaskan communities with industrial-capital economies fish and hunt. For instance, in 1989 there were an estimated 124,257 resident sport anglers in the Anchorage-Matsu area (West Cook Inlet-Lower Susitna Drainage) and an estimated 24,211 resident sport anglers in the Kenai Peninsula area (Mills 1990). While the numbers participating in fishing and hunting are substantial, estimates of mean per capita harvests in large, urbanized areas are relatively low compared with small communities (Anchorage -- 10 lbs per capita; Fairbanks -- 22 lbs per capita; Kenai -- 37 lbs per capita) (Wolfe and Walker 1987). Mean per capita harvest levels were significantly higher in communities like Sitka (146 lbs) and Kodiak City (147 lbs) for a number of economic, ecological, and cultural reasons (Division of Subsistence, Community Profile Database).

In general, most of the populations of urbanized communities fish and hunt as part of a Euro-American "sport-outdoors" tradition. However, there exists cultural and economic diversity between households in many large communities. In some large communities, there are households who are part of minority enclaves or social groups whose members continue to practice a distinct cultural tradition, such as using traditional wild foods in the home and in ceremonial occasions (Schroeder 1983). Some members of Alaska Native groups with subsistence traditions are examples of these residents. In some communities, there are households who choose to practice an Alaskan "homestead" tradition (or "frontiers tradition"), which includes harvesting for one's household to achieve cultural values of "self-sufficiency" and "healthful foods" from wild resources (Caulfield 1983; Schroeder 1983; Georgette 1983; Reed 1983, 1985). These kinds of households may desire to continue these traditions although it is more difficult in large, populated areas than small communities. Finally, there are some households in certain urbanized areas whose individual household economies resemble the "mixed, subsistence-cash economic systems" of rural communities, but at the domestic household level (Schroeder 1983). These households fish and hunt because it provides a more secure economic base than if they did not.

Thus, there are at least three cultural traditions that explain how subsistence users may exist in urbanized areas: "Alaska Native cultural traditions", an Alaskan "homestead (or frontier) tradition", and the "mixed subsistence-cash economic tradition" at the household level. Although the large majority of residents of large urbanized communities who fish and hunt do so as part of a sports-outdoors tradition, a minority of residents who hunt and fish may do so from these three other types of cultural and economic traditions.

There are differences among the communities in this third category in how fish and game uses are integrated into each community's economic and cultural patterns. Unfortunately, detailed household surveys have not been conducted in the largest urbanized areas (Anchorage, Fairbanks, and Matanuska-Susitna Borough) which are comparable to the surveys conducted in small Alaska communities (but see Caulfield 1983; Schroeder et al 1987). Comparative studies are available for Kodiak City (Kodiak Area Native Association 1983), the Kenai Peninsula area (Georgette 1983; Reed 1983, 1985), and Sitka (Gmelch, Gmelch, and Nelson 1984; Schroeder 1983).

References

General

Schroeder, Robert F., David B. Andersen, Rob Bosworth, Judith M. Morris, and John M. Wright
1987 Subsistence in Alaska: Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries. Technical Paper No. 150, Division of Subsistence Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J.
1987 The Super-household: Specialization in Subsistence Economies. Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Robert G. Bosworth
1990 Subsistence in Alaska: A Summary. Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Linda J. Ellanna (comp.)
1983 Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Robert J. Walker
1987 Subsistence Economies in Alaska: Productivity, Geography, and Development Impacts. Arctic Anthropology 24(2):56-81.

Small Communities

____ Subsistence Harvests for Kaktovik. Community Profile Database, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Fall, James A., Dan J. Foster, and Ronald T. Stanek
1984 The Use of Fish and Wildlife Resources in Tyonek, Alaska. Technical Paper No. 105, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Leghorn, Ken and Matt Kookesh
1986 Timber Management and Fish and Wildlife Utilization in Tenakee Springs, Alaska. Technical Paper No. 138, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Schichnes, Janet C. and Molly B. Chythlook
1988 Wild Resource Uses in Manokotak, Southwest Alaska. Technical Paper No. 152, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Sumida, Valerie A. and David B. Andersen
1990 Patterns of Fish and Wildlife Use for Subsistence in Fort Yukon, Alaska. Technical Paper No. 179, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Mid-Sized Communities

____ 1986 Subsistence Harvests for Kotzebue. Community Profile Database, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Ellanna, Linda J.
1983 Nome: Resource Uses in a Middle-Size Regional Center of Northwestern Alaska. p. 85-123 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Fall, James A., Janet Schichnes, Molly Chythlook, and Robert J. Walker
1986 Patterns of Wild Resource Use in Dillingham: Hunting and Fishing in an Alaskan Regional Center. Technical Paper No. 135, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Stratton, Lee
1989 Resource Uses in Cordova, A Coastal Community of Southcentral Alaska. Technical Paper No. 153, Division of Subsistence, Alaska Department of Fish and

Game, Juneau.

Smythe, Charles E.
1988 Harvest and Use of Fish and Wildlife by Residents of Petersburg, Alaska. Technical Paper No. 164, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. et al.
1986 The Role of Fish and Wildlife in the Economies of Barrow, Bethel, Dillingham, Kotzebue, and Nome. Technical Paper No. 154, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Communities >7 000 people

______
1982 Subsistence Harvests of Kodiak City. Community Profile Database, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Caulfield, Richard
1983 Tanana River Fishery: Resource Use Near a Large Interior City, pp. 10-28 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Georgette, Susan
1983 Kenai: Resource Uses in a Middle-Sized, Industrial-Based, Road Connected Community of the Kenai Peninsula Borough, p. 135-153 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Gmelch, George, Sharon Bohn Gmelch, and Richard Nelson
1984 Sitka: Resource Use in a Small Alaska City. Technical Paper No. 90, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Kodiak Island Native Association
1983 Kodiak Island Area Local Fish and Game Resource Guide. Kodiak, Alaska.

Mills, Michael J.
1990 Harvest and Participation in Alaska Sport Fisheries During 1989. Fishery Data Series No. 90-44. Division of Sport Fish, Alaska Department of Fish and Game. Anchorage.

Reed, Carolyn E.
1983 "Homer: Resource Uses in a Middle-Size, Road-Connected Community of the Kenai Peninsula Borough", p. 154-169 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence. Alaska Department of Fish and Game, Juneau.

Reed, Carolyn E.
1985 The Role of Wild Resource Use in Communities of the Central Kenai Peninsula and Kachemak Bay, Alaska. Technical Paper No. 106, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Schroeder, Robert F.
1983 "Sitka: Resource Uses in a Large, Non-Road Connected Community of Southeast Alaska", p. 219-247 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Schroeder, Robert F., David B. Andersen, Rob Bosworth, Judith M. Morris, and John M. Wright
1987 "Subsistence and Other Local Uses of Resources in the Upper Cook Inlet/Susitna Basin Subregion" and "Subsistence and Other Local Uses of Resources in the Lower Cook Inlet/Kenai Peninsula Subregion", p. 528-585 in Subsistence in Alaska: Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries. Technical Paper No. 150, Division of Subsistence Alaska Department of Fish and Game, Juneau.

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX G

THRESHOLD LEVELS AND BASIC RESOURCE LISTS FOR MEASURING RESOURCE DIVERSITY OF SUBSISTENCE USERS

February 1992

Resource Diversity

"Resource diversity" is the number of different kinds of wild resources used by families for food, raw materials, and other subsistence uses during the year. A relatively wide resource diversity can be used as one defining characteristic of a subsistence use pattern. Resource diversity can be measured by counting the number of different resource categories used by a person during the past year (a list of resource categories are shown in Table 1, discussed below).

Threshold Levels

The Governor's subsistence bill recommends that the Boards of Fisheries and Game establish threshold levels of resource diversity for subsistence users. This means that applicants for a subsistence permit with resource diversity counts below a certain number would not qualify as subsistence users. The threshold level would be set to meet certain standards: a large majority of residents in communities with populations of less than 2,500 people should be above the threshold; a majority of residents in communities with populations of 2,500 to 7,000 people should be above the threshold; and a small minority of residents in communities with greater than 7,000 people should be above the threshold. The threshold levels also could be specific to particular regions, to deal with variability in species availability between regions.

Measures of resource diversity by the Division of Subsistence, Alaska Department of Fish and Game are summarized in another report (**Resource Diversity As A Characteristic of Subsistence Uses**, by Robert J. Wolfe, Division of Subsistence, Alaska Department of Fish and Game, Juneau, 1992). Tables 2 and 3 derive from that report.

Table 2 presents a measure of resource diversity at the community level. It counts the resource categories used by 50 percent or more of sampled households in particular communities where the Division has conducted research. It illustrates that at the community level, the diversity of resources varies substantially by place and area. For instance, there were six resources used by 50 percent or more of sampled households in Kotzebue in 1987 (1990 population, 2,751 people). By comparison, there were 13 resources used by 50 percent or more of sampled households in Point Lay, and only 2 resources used by 50 percent or more of sampled households in Anderson. In general, this community-level data supports the assertion that resource diversity increases in smaller communities with subsistence-cash economies. As shown in Table 2, most small communities with subsistence-cash economies have community-level counts greater than 6 resources. However, a few are near or below that level, such as Haines (4), Tok (4), Copper Center (6), Gulkana (7), Chignik Bay (7), Galena (9), and Tanana (9) (see Table 2 for the complete list).

Table 3 presents a measure of resource diversity at the household level. It counts the percent of households using a certain number of resources for 15 selected communities where data are available. Resource categories are counted in two different ways in Table 3. The first list is full species list, while the second removes "plants" and "berries" and combines all salmon

species into a single category (the issue of counting resource categories is discussed below). As shown in Table 3, resource diversity at the household level (as measured by the first list) differs substantially between households within a community. For example, in Tanana. 7.8 percent of households used 5 or fewer resources, 51.6 percent of households used 10 or fewer resources, and 81.6 percent used 15 or fewer resources. By comparison, in Kotzebue, 20.6 percent of households used 5 or fewer resources, 45.9 percent used 10 or fewer resources, and 77.0 percent used 15 or fewer resources. As a third comparison, in Copper Center, 31.9 percent of households used 5 or fewer resources, 70.7 percent of households used 10 or fewer resources, and 93.1 percent used 15 or fewer resources.

The data in Tables 2 and 3 are similar to the types of information that the Boards of Fisheries and Game would be provided as they established minimum thresholds and scoring systems for this subsistence user criterion. For instance, if the Boards established a minimum threshold level of 6 for households in the northwest arctic region, then about 79 percent of Kotzebue households look like they exceed that level, according to Table 3 (that is, about 21 percent of Kotzebue households reported using 5 or fewer resources). The data in Tables 2 and 3 suggest that the Boards may want to consider establishing region-specific threshold levels. Region-specific thresholds may provide more sensitive measures of resource diversity than a statewide standard, because they would factor in differences in the availability of resources between areas of the state.

Basic Resource Lists

Measuring resource diversity is affected by the way resources are counted, as shown by comparing household frequencies in the first list with the second list in Table 3. To measure the resource diversity of a subsistence applicant, the Alaska Boards of Fisheries and Game must develop a systematic method for counting resource categories used by an applicant. As part of this method, the Boards must identify a standard list of resource categories for counting.

Table 1 is an example of a list of basic resource categories that might be considered by the Boards. The basic list contains about 90 different categories of wild resources which are commonly reported used within particular Alaska communities, according to Division of Subsistence surveys. Table 1 also lists about 115 other subsistence resource categories which are not included in the basic list, either because they are subsumed under a more general resource category or because the Boards may not choose to count the category for the purpose of measuring resource diversity.

As shown in Table 1, over two dozen species of migratory birds have been grouped into the general categories of "ducks" and "geese" in the basic list. Several varieties of shellfish have been grouped into the general categories of "clams", "cockles", and "crabs" in the basic list. A number of freshwater and saltwater fish species which are less commonly used are grouped into "other non-salmon fish" (including fish such as sturgeon, sea perch, shark, and needlefish). Trout are not included in the basic list because the Boards do not recognize them as subsistence species for most areas of the state.

TABLE 1

SUBSISTENCE RESOURCE CATEGORIES USED BY ALASKAN COMMUNITIES

BASIC LIST FOR COUNTING RESOURCE DIVERSITY,
AND OTHER RESOURCES SUBSUMED BY OR NOT ON BASIC LIST

BASIC LIST	OTHERS
Chum Salmon	
Coho Salmon	
Chinook Salmon	
Pink Salmon	
Sockeye Salmon	
Salmon Roe	
Blackfish	
Burbot	
Cisco	
Grayling	
Pike	
Sheefish	
Sucker	
Whitefish, Broad	
Whitefish, Alaska-Humpback-Lake	
Whitefish, Round	
Black Cod-Sablefish	
Lingcod	
Tom Cod	
Pacific Cod-Grey Cod	
Halibut	
Herring	
Herring Roe on Kelp, Hemlock, Eelgrass	
Rockfish	
Red Snapper (Yelloweye Rockfish)	
Sculpin	
Smelt	
Eulachon (Hooligan)	
Arctic Char	
Dolly Varden	
Other Non-salmon Fish	
	Capelin
	Green Sturgeon
	White Sturgeon
	Whiting
	Flounder
	Sole
	Herring Sack Roe
	Blue Rockfish
	Sea Bass
	Sea Perch
	Surf Smelt
	Rainbow Smelt
	Greenling
	Wolf Eel
	Blenny Eel
	Lamprey Eel
	Dogfish
	Shark
	Pollock
	Skates
	Silver Hake
	Black Bass
	Blue Fin
	Tuna/Mackerel
	Needlefish
	Cutthroat Trout
	Lake Trout
	Rainbow Trout
	Steelhead

TABLE 1

SUBSISTENCE RESOURCE CATEGORIES USED BY ALASKAN COMMUNITIES

BASIC LIST FOR COUNTING RESOURCE DIVERSITY, AND OTHER RESOURCES SUBSUMED BY OR NOT ON BASIC LIST

BASIC LIST	OTHERS
Black Bear	
Brown Bear	
Caribou	
Deer	
Goat	
Moose	
Muskox	
Sheep	
Arctic Fox	
Red or Cross Fox	
Beaver	
Coyote	
Arctic Hare	
Snowshoe Hare	
Land Otter	
Lynx	
Marmot	
Marten	
Mink	
Muskrat	
Porcupine	
Weasel	
Wolf	
Wolverine	
Tree Squirrel	
Parka Squirrel (ground)	
Ermine	
Belukha	
Bowhead	
Bearded Seal	
Fur Seal	
Harbor Seal	
Ringed Seal	
Spotted Seal	
Seal Oil	
Walrus	
Polar Bear	
Sea Lion	
Sea Otter	
	Gray Whale
	Black Fin Whale
	Ribbon Seal
	Porpoise/Dolphin
Grouse	
Ptarmigan	
Ducks	
Geese	
Swan	
Crane	
Bird Eggs	
	Snowy Owl
	Eider
	Scoter
	Harlequin
	Goldeneye
	Bufflehead
	Merganser
	Scaup
	Mallard
	Pintail

TABLE 1
SUBSISTENCE RESOURCE CATEGORIES USED BY ALASKAN COMMUNITIES
BASIC LIST FOR COUNTING RESOURCE DIVERSITY,
AND OTHER RESOURCES SUBSUMED BY OR NOT ON BASIC LIST

BASIC LIST	OTHERS
	Wigeon
	Teal
	Gadwall
	Oldsquaw
	Shoveler
	Canvasback
	Redhead
	Ringneck
	Brant
	Emperor Geese
	Snow Geese
	Whitefronted Geese
	Taverners
	Cacklers
	Lessers
	Vancouvers
	Dusky Geese
	Aleutian Geese
	Whistling (Tundra) Swan
	Trumpeter Swan
	Whooper Swan
	Snipe
	Plover
	Cormorants
	Loons
	Puffins
	Gulls
	Kittiwakes
	Murre
	Tern
	Grebe
	Great Blue Heron
	Murre Eggs
	Gull Eggs
	Cormorant Eggs
	Puffin Eggs
	Tern Eggs
	Plover Eggs
	Snipe Eggs
	Crane Eggs
	Duck Eggs
	Geese Eggs
	Swan Eggs
Abalone	
Clams	
Crabs	
Cockles	
Scallops	
Mussels	
Chiton	
Octopus	
Sea Cucumber	
Sea Urchin	
Shrimp	
Other Marine Invertebrates	
	Butter Clams
	Razor Clams
	Steamer Clams
	Little Neck Clams
	Softshell Clams

TABLE 1

SUBSISTENCE RESOURCE CATEGORIES USED BY ALASKAN COMMUNITIES

BASIC LIST FOR COUNTING RESOURCE DIVERSITY,
AND OTHER RESOURCES SUBSUMED BY OR NOT ON BASIC LIST

BASIC LIST	OTHERS
	Pinkneck Clams
	Horse Clams (Gaper)
	Dungeness Crab
	King Crab
	Tanner Crab
	Opis Crabs
	Hair Crab
	Box Crab
	Basket Cockles
	Heart Cockles
	Geoducks
	Blue Mussels
	Snails
	Limpets
	Squid
	Oyster
	Whelk
	Berries
	Plants/Greens/Mushrooms
	Black Seaweed
	Sea Ribbons
	Bull Kelp

Table 2

Count of the Resources Used by 50 Percent or More of Sampled Households By Community, Region and Resource Class, for Selected Communities

Source: Community Profile Database, Division of Subsistence ADFG

Community	Region	Big Game	Birds & Eggs	Marine Inverte-brates	Marine Mammals	Non-Salmon Fish	Plants & Berries	Salmon	Small Game/ Furbearers	Total Count	Total Count, No Plants/Berries	Total Count Salmon One Category, No Plants/Berries
Kotzebue	Arctic	1	0	0	0	3	1	1	0	6	5	5
Nuiqsut	Arctic	1	2	0	2	5	1	1	0	12	11	11
Kaktovik	Arctic	3	5	0	3	2	0	0	0	13	13	13
Point Lay	Arctic	1	5	0	4	2	1	0	0	13	12	12
Shishmaref	Arctic	1	5	1	2	4	2	0	0	15	13	13
Brevig Mission	Arctic	1	4	0	3	4	2	2	0	16	14	13
Golovin	Arctic	2	6	1	3	5	2	1	1	21	19	19
Anderson	Interior	1	0			1	0	0	0	2	2	2
Healy	Interior	1	0			1	1	0	0	3	2	2
Tok	Interior	2	1			1	0	0	0	4	2	2
McKinley Park Villag	Interior	2	0			1	2	0	0	4	4	4
Galena	Interior	1	3			0	1	3	1	5	3	3
Tanana	Interior	1	3			1	1	2	1	9	8	5
Chisana	Interior	1	0			3	3	2	1	9	8	6
Fort Yukon	Interior	2	2			2	1	2	1	10	7	6
Northway	Interior	2	2			3	2	0	1	10	9	8
Tanacross	Interior	2	1			3	2	1	1	10	8	7
Tetlin	Interior	1	1			3	3	0	2	10	8	8
Dot Lake	Interior	2	1			4	3	1	1	10	7	7
Parks Highway Sout	Southcentral	0	0	0	0	0	1	1	0	12	9	9
Glennallen	Southcentral	1	0	0	0	0	1	1	0	2	1	1
Talkeetna	Southcentral	0	0	0	0	0	1	2	0	3	2	2
Tazlina	Southcentral	0	0	0	0	0	1	2	0	3	2	1
East Glenn Highway	Southcentral	1	0	0	0	0	2	1	0	3	2	1
Chistochina	Southcentral	2	0	0	0	0	2	1	0	4	2	2
Kenny Lake	Southcentral	0	0	0	0	1	2	2	0	5	3	3
Chitina	Southcentral	0	0	0	0	1	3	2	0	5	3	2
Copper Center	Southcentral	2	0	0	0	1	1	2	0	6	3	2
Petersville Road	Southcentral	1	1	0	0	1	2	1	0	6	5	4
Slana	Southcentral	2	0	0	0	1	2	1	0	6	4	4
Slana Homestead S	Southcentral	1	1	0	0	1	2	1	0	6	4	4
Tonsina	Southcentral	2	0	0	0	1	2	1	0	6	4	4

Table 2

Count of the Resources Used by 50 Percent or More of Sampled Households By Community, Region and Resource Class, for Selected Communities

Source: Community Profile Database, Division of Subsistence ADFG

Community	Region	Big Game	Birds & Eggs	Marine Invertebrates	Marine Mammals	Non-Salmon Fish	Plants & Berries	Salmon	Small Game/ Furbearers	Total Count	Total Count, No Plants/Berries	Total Count Salmon One Category, No Plants/Berries
Trapper Creek	Southcentral	1	0	0	0	2	1	2	0	6	5	4
Gulkana	Southcentral	2	0	0	0	1	2	2	0	7	5	4
Lake Louise	Southcentral	1	0	0	0	4	2	0	0	7	5	5
Slana Homestead N	Southcentral	1	1	0	0	1	2	2	0	7	5	4
West Glenn Highwa	Southcentral	2	0	0	0	2	2	1	0	7	5	5
Hurricane-Broad Pas	Southcentral	1	0	0	0	2	3	2	0	8	5	4
Mentasta Pass	Southcentral	2	1	0	0	1	3	1	0	8	5	5
Chase	Southcentral	1	1	0	0	3	3	1	0	9	6	6
Gakona	Southcentral	2	1	0	0	2	2	2	0	9	7	6
McCarthy Road	Southcentral	2	1	0	0	1	3	1	1	9	6	6
Mentasta	Southcentral	2	1	0	0	2	3	1	0	9	6	6
Paxson	Southcentral	2	2	0	0	3	1	1	0	9	8	8
Sourdough	Southcentral	2	1	0	0	2	2	2	0	9	7	6
South Wrangell Mou	Southcentral	2	1	0	0	2	3	[illegible]	0	9	6	6
Gold Creek	Southcentral	1	2	0	0	3	3	1	0	10	7	7
Nabesna Road	Southcentral	3	1	0	0	3	2	1	1	11	9	9
Chenega Bay	Southcentral	2	1	5	2	3	2	0	0	15	13	13
San Juan Bay	Southcentral	2	1	2	1	4	1	4		15	14	11
Port Graham	Southcentral	1	0	5	1	3	3	5	0	18	15	11
Tatitlek	Southcentral	2	1	2	3	4	2	5	0	19	17	13
English Bay	Southcentral	2	1	5	1	6	4	5	0	24	20	16
Sitka	Southeast	0	0	0	0	0	1	0		1	0	0
Skagway	Southeast	0	0	2	0	1	0	0		3	3	3
Haines	Southeast	0	0	0	0	2	1	1		4	3	3
Coffman Cove	Southeast	1	0	2	0	2	1	1		7	6	6
Tenakee Springs	Southeast	1	0	2	0	2	1	1		7	6	6
Wrangell	Southeast	1	0	3	0	1	1	1		7	6	6
Craig	Southeast	1	0	2	0	3	1	1		8	7	7
Hyder	Southeast	0	0	1	0	2	2	1		8	6	6
Metlakatla	Southeast	1	0	1	0	1	1	2		8	7	6
[illegible]	Southeast	1	0	1	0	2	2	2		8	6	5
[illegible]	Southeast	1	0	2	0	2	2	2		9	7	6

Table 2

Count of the Resources Used by 50 Percent or More of Sampled Households By Community, Region and Resource Class, for Selected Communities

Source: Community Profile Database, Division of Subsistence ADFG

Community	Region	Big Game	Birds & Eggs	Marine Inverte-brates	Marine Mammals	Non-Salmon Fish	Plants & Berries	Salmon	Small Game/ Furbearers	Total Count	Total Count, No Plants/Berries	Total Count Salmon One Category, No Plants/Berries
Klawock	Southeast	1	0	2	0	2	2	2		9	7	6
Thorne Bay	Southeast	1	0	2	0	3	2	1		9	7	7
Petersburg	Southeast	1	0	4	0	1	2	2		10	8	7
Point Baker	Southeast	1	0	3	0	3	2	1		10	8	8
Whale Pass	Southeast	1	0	4	0	2	2	1		10	8	8
Hollis	Southeast	1	0	4	0	2	2	2		11	9	8
Klukwan	Southeast	0	0	0	0	5	2	4		11	9	6
Angoon	Southeast	1	0	4	0	2	2	3		12	10	8
Port Alexander	Southeast	1	0	2	0	3	4	2		12	8	7
Meyers Chuck	Southeast	1	0	4	0	3	2	3		13	11	9
Elfin Cove	Southeast	1	0	6	0	3	2	2		14	12	11
Kake	Southeast	1	0	4	1	2	3	3		14	11	9
Pelican	Southeast	1	0	5	0	4	2	2		14	12	11
Hoonah	Southeast	1	0	3	1	5	2	3		15	13	11
Kasaan	Southeast	1	0	5	0	4	3	2		15	12	11
Port Protection	Southeast	1	0	3	0	3	4	4		15	11	8
Yakutat	Southeast	1	0	4	1	3	3	3		15	12	10
Hydaburg	Southeast	1	0	5	0	5	3	3		17	14	12
Beecher Pass	Southeast	1	1	5	0	4	3	4		18	15	12
Edna Bay	Southeast	1	0	7	0	4	3	3		18	15	13
Dillingham	Southwest	2	0	0	0	0	1	3	0	6	5	3
Chignik Bay	Southwest	1	0	2	0	1	1	2	0	7	6	5
Egegik	Southwest	1	2	0	0	0	1	3	0	7	6	4
Kodiak City	Southwest	1	0	5	0	1	0	2	0	9	9	8
Chiniak	Southwest	1	0	3	0	3	0	3	0	10	10	8
Nelson Lagoon	Southwest	1	3	2	0	1	1	2	0	10	9	8
Port Heiden	Southwest	1	3	1	0	1	1	3	0	10	9	7
Port Lions	Southwest	1	1	4	0	2	0	3	0	11	11	9
Levelock	Southwest	2	5	0	1	3	2	0	0	13	11	11
Akhiok	Southwest	1	3	5	2	1	0	3	0	15	15	13
Chignik Lagoon	Southwest	2	3	2	0	2	2	4	0	15	13	10
Ekwok	Southwest	2	0	0	0	6	1	4	2	15	14	11

Table 2
Count of the Resources Used by 50 Percent or More of Sampled Households
By Community, Region and Resource Class, for Selected Communities

Source: Community Profile Database, Division of Subsistence ADFG

Community	Region	Big Game	Birds & Eggs	Marine Inverte-brates	Marine Mammals	Non-Salmon Fish	Plants & Berries	Salmon	Small Game/ Furbearers	Total Count	Total Count, No Plants/Berries	Total Count Salmon One Category, No Plants/Berries
New Stuyahok	Southwest	2	1	0	1	4	1	4	2	15	14	11
Old Harbor	Southwest	1	2	5	2	1	0	4	0	15	15	12
Chignik Lake	Southwest	3	3	2	1	1	3	3	0	16	13	11
Pilot Point	Southwest	1	7	0	0	1	1	4	2	16	15	12
Koliganek	Southwest	2	3	0	1	4	1	4	2	17	16	13
Larsen Bay	Southwest	1	1	6	1	5	0	4	0	18	18	15
Ugashik	Southwest	2	8	0	0	2	0	3	4	19	19	17
Ouzinkie	Southwest	1	2	6	1	5	0	4	1	20	20	17
False Pass	Southwest	1	6	5	1	3	2	4	0	22	20	17
Perryville	Southwest	3	2	5	1	4	3	4	0	22	19	16
Karluk	Southwest	1	4	5	2	7	0	4	0	23	23	20
Manokotak	Southwest	2	3	1	2	11	2	4	2	27	25	22
Ivanof Bay	Southwest	2	5	8	1	5	3	7	1	32	29	23

TABLE 3. COUNT OF RESOURCES USED BY CUMULATIVE PERCENT OF HOUSEHOLDS FOR SELECTED SURVEYED ALASKAN COMMUNITIES, RESOURCE CATEGORIES COUNTED IN TWO DIFFERENT WAYS

LIST 1. FULL SPECIES LIST AS COLLECTED BY SURVEY (CATEGORIES DIFFER SOMEWHAT BETWEEN COMMUNITIES)

LIST 2. SALMON COMBINED INTO A SINGLE SPECIES, PLANTS REMOVED FROM COUNT

COUNT	KOTZEBUE LIST 1	KOTZEBUE LIST 2	KODIAK CITY LIST 1	KODIAK CITY LIST 2	SITKA LIST 1	SITKA LIST 2	GALENA LIST 1	GALENA LIST 2	TANANA LIST 1	TANANA LIST 2
0	0.0	0.0	0.0	0.0	11.5	22.6	0.0	0.0	0.0	0.0
1	7.1	7.1	0.0	0.6	25.3	34.8	0.0	1.4	6.8	6.8
2	11.6	13.9	1.9	1.9	32.1	46.3	2.7	8.1	6.8	6.8
3	13.9	18.4	1.9	5.2	41.6	58.1	8.1	14.9	6.8	7.8
4	20.6	20.0	3.9	8.4	53.4	64.2	13.5	21.6	6.8	7.8
5	20.6	21.3	7.7	12.9	59.8	71.3	20.3	29.7	7.8	16.5
6	21.3	22.0	11.0	21.3	64.5	78.4	25.7	40.5	22.4	35.1
7	24.3	26.5	15.5	29.0	72.3	81.4	35.1	50.0	29.2	49.7
8	26.5	[illegible]3.9	20.0	36.1	75.0	86.5	43.2	59.5	42.8	58.4
9	33.9	48.1	25.8	46.5	79.7	89.2	51.4	64.9	43.8	65.2
10	45.9	49.9	33.5	53.5	82.4	91.9	60.8	73.0	51.6	70.4
11	50.3	58.3	38.7	65.8	84.8	93.2	68.9	83.8	62.7	79.2
12	60.6	70.4	48.4	74.8	87.2	96.6	71.6	94.6	66.1	80.1
13	67.5	74.4	54.2	81.9	89.9	98.0	85.1	95.9	69.5	84.4
14	71.5	[illegible]9.7	65.8	87.7	90.9	98.6	93.2	95.9	78.2	85.4
15	77.0	84.1	71.6	91.0	94.3	98.6	94.6	97.3	81.6	88.2
16	84.1	86.0	79.4	95.5	95.6	99.3	97.3	98.6	84.4	89.1
17	84.9	88.6	83.2	96.8	97.6	99.3	97.3	98.6	87.2	91.9
18	88.2	91.4	87.7	97.4	98.0	99.3	97.3	100.0	89.1	91.9
19	90.3	92.7	92.3	98.1	99.0	99.3	98.6	100.0	89.1	91.9
20	91.4	94.4	94.2	98.1	99.0	99.3	100.0	100.0	91.9	93.8
>20	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

TABLE 3 (CONTINUED). COUNT OF RESOURCES USED BY CUMULATIVE PERCENT OF HOUSEHOLDS FOR SELECTED SURVEYED ALASKAN COMMUNITIES, RESOURCE CATEGORIES COUNTED IN TWO DIFFERENT WAYS

LIST 1. FULL SPECIES LIST AS COLLECTED BY SURVEY (CATEGORIES DIFFER SOMEWHAT BETWEEN COMMUNITIES)

LIST 2. SALMON COMBINED INTO A SINGLE SPECIES, PLANTS REMOVED FROM COUNT

COUNT	TOK LIST 1	TOK LIST 2	DOT LAKE LIST 1	DOT LAKE LIST 2	NORTHWAY LIST 1	NORTHWAY LIST 2	TANACROSS LIST 1	TANACROSS LIST 2	TETLIN LIST 1	TETLIN LIST 2
0	5.9	5.9	0.0	0.0	0.0	0.0	3.7	3.7	0.0	0.0
1	14.9	14.9	0.0	0.0	2.2	2.2	3.7	3.7	0.0	0.0
2	20.8	20.8	0.0	13.3	2.2	2.2	3.7	3.7	0.0	0.0
3	22.2	29.0	6.7	20.0	4.4	6.7	3.7	7.4	0.0	0.0
4	29.0	32.4	13.3	20.0	4.4	6.7	3.7	18.5	0.0	10.3
5	32.4	44.3	20.0	20.0	4.4	13.3	11.1	22.2	0.0	10.3
6	38.4	48.7	20.0	33.3	13.3	20.0	14.8	29.6	10.3	25.5
7	42.3	51.4	20.0	33.3	22.2	[illegible]	22.2	29.6	10.3	60.7
8	50.9	65.7	20.0	40.0	24.4	35.6	29.6	44.4	10.3	60.7
9	56.2	70.5	20.0	46.7	26.7	42.2	33.3	55.6	30.3	70.3
10	60.9	78.2	40.0	66.7	37.8	53.3	40.7	63.0	60.7	75.2
11	65.3	86.6	40.0	80.0	46.7	57.8	44.4	74.4	60.7	85.5
12	72.3	87.5	60.0	93.3	51.1	62.2	55.6	77.8	80.7	85.5
13	78.0	89.4	60.0	93.3	55.6	73.3	66.7	88.9	85.5	90.3
14	78.9	89.8	73.3	100.0	62.2	80.0	74.1	92.6	85.5	95.2
15	82.8	91.6	86.7	100.0	68.9	86.7	85.2	96.3	85.5	95.2
16	89.4	96.4	93.3	100.0	82.2	93.3	88.9	100.0	90.3	100.0
17	89.8	96.4	93.3	100.0	88.9	93.3	88.9	100.0	95.2	100.0
18	90.7	97.3	100.0	100.0	88.9	100.0	92.6	100.0	95.2	100.0
19	91.2	98.6	100.0	100.0	93.3	100.0	100.0	100.0	95.2	[illegible]
20	93.0	98.6	100.0	100.0	95.6	100.0	100.0	100.0	95.2	100.0
>20	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

TABLE 3 (CONTINUED). COUNT OF RESOURCES USED BY CUMULATIVE PERCENT OF HOUSEHOLDS FOR SELECTED SURVEYED ALASKAN COMMUNITIES, RESOURCE CATEGORIES COUNTED IN TWO DIFFERENT WAYS

LIST 1. FULL SPECIES LIST AS COLLECTED BY SURVEY (CATEGORIES DIFFER SOMEWHAT BETWEEN COMMUNITIES)

LIST 2. SALMON COMBINED INTO A SINGLE SPECIES, PLANTS REMOVED FROM COUNT

	GLENALLEN	GLENALLEN	GULKANA	GULKANA	COPPER CENTER	COPPER CENTER	CHISTOCHINA	CHISTOCHINA	CHITINA	CHITINA
COUNT	LIST 1	LIST 2	LIST 1	LIST 2	LIST 1	LIST 2	LIST 1	LIST 2	LIST 1	LIST 2
0	0.0	4.1	5.0	5.0	0.0	4.7	0.0	3.6	5.6	5.6
1	4.1	20.6	10.0	15.0	9.4	9.4	3.6	10.7	5.6	16.7
2	24.7	39.1	20.0	25.0	10.0	24.1	14.3	21.4	5.6	27.8
3	39.9	50.4	25.0	45.0	14.7	28.8	21.4	39.3	22.2	44.4
4	48.4	66.9	35.0	55.0	30.3	40.3	28.6	50.0	38.9	77.8
5	58.7	73.1	40.0	60.0	31.9	49.7	42.9	53.6	44.4	77.8
6	61.8	86.5	55.0	70.0	37.3	55.9	46.4	71.4	50.0	83.3
7	67.9	90.6	65.0	80.0	39.6	79.3	50.0	79.6	61.1	88.9
8	82.4	91.6	70.0	90.0	43.4	83.2	57.1	82.1	72.2	94.4
9	88.5	93.8	75.0	95.0	54.4	90.8	60.7	82.1	83.3	94.4
10	91.6	95.9	80.0	95.0	70.7	92.4	67.9	85.7	88.9	94.4
11	93.2	99.0	80.0	95.0	78.3	92.4	75.0	85.7	88.9	94.4
12	93.2	100.0	85.0	95.0	81.4	97.7	78.6	85.7	88.9	94.4
13	95.9	100.0	90.0	95.0	86.1	98.4	82.1	89.3	88.9	100.0
14	97.9	100.0	90.0	95.0	93.1	100.0	85.7	89.3	94.4	100.0
15	97.9	100.0	95.0	95.0	93.1	100.0	85.7	89.3	94.4	100.0
16	97.9	100.0	95.0	95.0	98.4	100.0	85.7	100.0	94.4	100.0
17	99.0	100.0	95.0	95.0	98.4	100.0	89.3	100.0	94.4	100.0
18	100.0	100.0	95.0	95.0	100.0	100.0	96.4	100.0	94.4	100.0
19	100.0	100.0	95.0	95.0	100.0	100.0	96.4	100.0	100.0	100.0
20	100.0	100.0	95.0	95.0	100.0	100.0	96.4	100.0	100.0	100.0
> 20	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

GOVERNOR'S SUBSISTENCE BILL SECTIONAL ANALYSIS APPENDIX H

BIBLIOGRAPHY OF SOME SUBSISTENCE STUDIES RELATED TO COMMUNITY SIZE, ECONOMY, AND AND CULTURE

February 1992

The Governor's subsistence bill states that there are relationships between patterns of wild resource use, types of communities, types of economy, and cultures in Alaska. This bibligraphy lists some subsistence studies done by the Division of Subsistence, Alaska Department of Fish and Game, which serve as basic references on subsistence use patterns within Alaska communities. A complete listing of subsistence studies published by the Division of Subsistence is contained in the abtracts of their Technical Paper Series, cited below. All technical papers are available on request from the Division of Subsistence headquarters office in Juneau (Division of Subsistence, ADF&G, Box 25526, Juneau, AK 99802-5526; 465-4147.

Basic Listing of Subsistence Studies

1991 Division of Subsistence, Alaska Department of Fish and Game, Abstracts, Technical Paper Series. Division of Subsistence, Alaska Department of Fish and Game, Juneau, Alaska, November 1991.

General

Schroeder, Robert F., David B. Andersen, Rob Bosworth, Judith M. Morris, and John M. Wright
1987 Subsistence in Alaska: Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries. Technical Paper No. 150, Division of Subsistence Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J.
1987 The Super-household: Specialization in Subsistence Economies. Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Robert G. Bosworth
1990 Subsistence in Alaska: A Summary. Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Linda J. Ellanna (comp.)
1983 Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. and Robert J. Walker
1987 Subsistence Economies in Alaska: Productivity, Geography, and Development Impacts. Arctic Anthropology 24(2):56-81.

Studies of Small Communities

Fall, James A., Dan J. Foster, and Ronald T. Stanek
1984 The Use of Fish and Wildlife Resources in Tyonek, Alaska. Technical Paper No. 105, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Leghorn, Ken and Matt Kookesh
1986 Timber Management and Fish and Wildlife Utilization in Tenakee Springs, Alaska. Technical Paper No. 138, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Schichnes, Janet C. and Molly B. Chythlook
1988 Wild Resource Uses in Manokotak, Southwest Alaska. Technical Paper No. 152, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Sumida, Valerie A. and David B. Andersen
1990 Patterns of Fish and Wildlife Use for Subsistence in Fort Yukon, Alaska. Technical Paper No. 179, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Studies of Mid-Sized Communities

1986 Subsistence Harvests for Kotzebue. Community Profile Database, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Ellanna, Linda J.
1983 Nome: Resource Uses in a Middle-Size Regional Center of Northwestern Alaska, p. 85-123 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game. Juneau.

Fall, James A., Janet Schichnes, Molly Chythlook, and Robert J. Walker
1986 Patterns of Wild Resource Use in Dillingham: Hunting and Fishing in an Alaskan Regional Center. Technical Paper No. 135, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Stratton, Lee
1989 Resource Uses in Cordova, A Coastal Community of Southcentral Alaska. Technical Paper No. 153, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Smythe, Charles E.
1988 Harvest and Use of Fish and Wildlife by Residents of Petersburg, Alaska. Technical Paper No. 164, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Wolfe, Robert J. et al.
1986 The Role of Fish and Wildlife in the Economies of Barrow, Bethel, Dillingham, Kotzebue, and Nome. Technical Paper No. 154, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Studies of Large Communities > 7,000 People

1982 Subsistence Harvests of Kodiak City. Community Profile Database, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Caulfield, Richard
1983 Tanana River Fishery: Resource Use Near a Large Interior City, pp. 10-28 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Georgette, Susan
1983 Kenai: Resource Uses in a Middle-Sized, Industrial-Based, Road Connected Community of the Kenai Peninsula Borough, p. 135-153 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Gmelch, George, Sharon Bohn Gmelch, and Richard Nelson
1984 Sitka: Resource Use in a Small Alaska City. Technical Paper No. 90, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Kodiak Island Native Association
1983 Kodiak Island Area Local Fish and Game Resource Guide. Kodiak, Alaska.

Mills, Michael J.
1990 Harvest and Participation in Alaska Sport Fisheries During 1989. Fishery Data Series No. 90-44. Division of Sport Fish, Alaska Department of Fish and Game. Anchorage.

Reed, Carolyn E.
1983 "Homer: Resource Uses in a Middle-Size, Road-Connected Community of the Kenai Peninsula Borough", p. 154-169 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence. Alaska Department of Fish and Game, Juneau.

Reed, Carolyn E.
1985 The Role of Wild Resource Use in Communities of the Central Kenai Peninsula and Kachemak Bay, Alaska. Technical Paper No. 106, Division of Subsistence. Alaska Department of Fish and Game, Juneau.

Schroeder, Robert F.
1983 "Sitka: Resource Uses in a Large, Non-Road Connected Community of Southeast Alaska", p. 219-247 in Wolfe, Robert J. and Linda J. Ellanna (comp.) Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities. Technical Paper No. 61, Division of Subsistence, Alaska Department of Fish and Game, Juneau.

Schroeder, Robert F., David B. Andersen, Rob Bosworth, Judith M. Morris, and John M. Wright
1987 "Subsistence and Other Local Uses of Resources in the Upper Cook Inlet/Susitna Basin Subregion" and "Subsistence and Other Local Uses of Resources in the Lower Cook Inlet/Kenai Peninsula Subregion", p. 528-585 in Subsistence in Alaska: Arctic, Interior, Southcentral, Southwest, and Western Regional Summaries. Technical Paper No. 150, Division of Subsistence Alaska Department of Fish and Game, Juneau.

MEMORANDUM

TO: Territorial Sportsmen, Inc.

FROM: Gregory F. Cook

RE: DRAFT ANILCA & Alaska State law amendments

DATE: December 7, 1997

G. Cook

This memo responds to your request for counsel on the following three questions:

1) Does the proposed amendment to ANILCA § 807 insulate the State of Alaska from federal court oversight of State fish and wildlife management regulatory actions?

Answering this question involves a two-part legal analysis. First, we look at the meaning of the "arbitrary and capricious" standard of review specified in the amendment. This is a matter of federal common law. Federal law is quite distinct from State common law in Alaska that interprets the same words. Second, we look at the measure of deference accorded decisions of a federal agency to determine the effect of granting a state agency "the same deference" as a "comparable federal agency."

2) Can the chances of federal court intervention in State management within the framework of ANILCA and ongoing federal oversight be reduced?

3) What is the import of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h), (i)?

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THE PROPOSED AMENDMENT TO ANILCA § 807 AND THE ISSUE OF CONTINUING FEDERAL OVERSIGHT

QUESTION PRESENTED: Does the proposed amendment to ANILCA § 807 insulate the State of Alaska from federal court oversight of State fish and wildlife regulatory actions?

SHORT ANSWER: The proposed amendment to ANILCA § 807 provides no more than a thin sheet of protection from the cold reality of Federal Court oversight of State fish and wildlife management and penetrating Federal judicial scrutiny.

I. INTRODUCTION

The Governor's Task Force on Subsistence (1997) has recommended amending ANILCA § 807 to add two new sentences:

> "Agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion.[1] When reviewing any action of a State agency, the District Court shall give the decision of the State agency the same deference it would give the same decisions of a comparable federal agency."[2]

These two sentences shall be analyzed separately. First, we focus on the standard for judicial review, i.e., the meaning of "arbitrary, capricious, or an abuse of discretion." Next, we examine the likely effect of the proposed amendment's second sentence according parity of deference to the decisions of State and federal agencies.

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[1] The "arbitrary and capricious" standard of review is extremely common; it is prescribed by the federal APA, 5 U.S.C. § 706(2)(a).

[2] Implicit in this provision is the hypothesis that without this clause, a federal court would automatically grant greater deference to a federal agency than to a State agency.

1. The "arbitrary and capricious" standard of review

Analysis of the "arbitrary and capricious" standard of review in the context of ANILCA is a matter of federal common law. As with any matter of common law, the meaning of "arbitrary and capricious" is constantly evolving. There are few, if any, "bright line" distinctions or definitions. Interpretation of this standard is always subject to the discretion of an individual judge, albeit subject to appellate review.

The standards used to guide federal judicial review of agency decisions at the trial court level occupy a spectrum[3]. At one end of the spectrum is total unreviewability. At the other end of the spectrum is **de novo** review, where the court independently performs the fact-finding task, much like an agency's regulatory hearing[4].

The most common type of judicial review, including "arbitrary and capricious" review, is in the middle of the spectrum.

The middle ground of judicial review of agency actions has been variously stated by legislative bodies. Examples include: "clearly erroneous," "clear error of judgment," "substantial evidence," "arbitrary and capricious," and "abuse of discretion." Each of these different statutory formulations of the standard for judicial review of agency action has been laboriously explicated by judges in many thousands of cases.

There is considerable cynicism among many legal commentators about judicial sophistry in interpreting and applying the different middle ground standards of judicial review. It is nonetheless useful to be familiar with some of the judicial definitions of the "arbitrary and capricious" standard of review.

The following statement by the U.S. Supreme Court is currently the preeminent explanation of "arbitrary and capricious" review.

> ...an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile

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[3] In the federal system, trial level is the District Court.

[4] The Supreme Court first drew the distinction between reviewable and unreviewable agency actions in the famous case of Marbury v Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 2866-2867 (1983); see also Arkansas v Oklahoma, 503 U.S. 91, 113 (1992).

In seeking to understand the "arbitrary and capricious" standard of review, it would be a mistake to fail to consider the huge importance of how an agency formally justifies its regulatory decisions when the agency produces written findings. The statement below, is illustrative:

> A federal agency's rule is arbitrary and capricious and may be set aside by a court if the agency relies on improper facts, ignores important arguments or evidence, fails to articulate a reasoned basis for the rule, or produces an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Natural Resources Defense Council, Inc., v E.P.A., 822 F.2d 104 (D.C. Cir. 1987).[5]

These judicial descriptions of the "arbitrary and capricious" standard should provide a good, general understanding of the term.

As a practical matter, under the "arbitrary and capricious" test, it is a relatively simple matter for a reviewing court, if it is so inclined, to overturn agency action.

Likewise, if a court wants to uphold an agency's action, it is just as simple for the court to review the agency's decision, summarize the administrative record, perhaps note that the court would not necessarily have reached the same conclusion as the agency, then pontifically opine that the court must nonetheless refrain from substituting its judgment for that of the agency.

Each of these two approaches is common in judicial review of agency actions under the "arbitrary and capricious" standard.

In a nutshell, Federal District Court judges have tremendous discretion when they review the decisions of administrative agencies under the "arbitrary and capricious" standard.

The foremost commentator in the field of federal administrative law (K.C. Davis) has written a summary of the law of this middle ground of judicial review that may be more reliable than the many complexities that are constantly repeated in federal judicial

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[5] In the 9th Circuit, it has been held that a Court of Appeals must uphold the findings of fact of an administrative agency if the agency's findings are supported by "substantial evidence" (a low threshold). As to questions of law, appellate review is plenary. SEE: Potato Sales Co., Inc., v Dept. of Agriculture, 92 F.3d 800 (9th Cir. 1996).

opinions that try to explicate "arbitrary and capricious" review:

> Courts usually substitute judgment on the kind of questions of law that are within their special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction.

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 332.

In other words, according to Professor Davis, under the "arbitrary and capricious" standard of review, what a federal District Court judge is really deciding is whether or not the agency has convinced the judge that its rule is "reasonable," as well as whether or not the agency properly followed the statute the agency was seeking to implement. It is hard to imagine a more flexible standard of judicial review. SEE: Id., § 29:7 p. 359.

According to Professor Davis, all the judicial and statutory verbiage purporting to refine the foregoing summary of the middle ground of judicial review is useless embroidery, tantamount to what Shakespeare wrote in King John, IV, ii:

> To be possess'd with double pomp,
> To guard a title that was rich before,
> To gild refined gold, to paint the lily,
> To throw a perfume on the violet,
> To smooth the ice, or add another hue
> Unto the rainbow, or with taper light
> To seek the beauteous eye of heaven to garnish,
> Is wasteful and ridiculous excess.

Professor Davis adds that:

> The most prominent example of such useless embroidery is the confused law about the comparison of the "arbitrary and capricious" standard with the "substantial evidence" standard...

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 334; SEE ALSO Id., § 29:7.

a. The "substantial evidence" standard compared to the "arbitrary and capricious" standard

What is "substantial evidence?"

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

N.L.R.B. v Columbian E. & S. Co., 306 U.S. 292, 300 (1939).

Addressing the distinction between the "arbitrary and capricious" and "substantial evidence" standards, Professor Davis has asked, rhetorically:

> What, then, is the difference between the two standards, or are they the same? The surprising answer: The courts do not know!
> The scope of review may vary from one case to another and it may vary with the mood of the writer of the opinion.[6]

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:1, p. 335.

Does the "arbitrary and capricious" standard differ from the "substantial evidence? standard? Professor Davis advises us that:

> The best response to this question might be that quibbling about it should be avoided because, whatever the technical answer, courts will go on substituting judgment on the kind of questions of law that are within their special competence and using a reasonableness test on other questions.

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[6] SEE, for example: Office of Communication of the United Church of Christ v F.C.C., 707 F.2d 1413, 1422-1426 (D.C.Cir. 1983):

> Over the years, these phrases "arbitrary," "capricious," and "abuse of discretion," as well as the judicial precedent interpreting them have develcped a deceptively talismanic quality--the mere mechanistic incantation of the terms is presumed to evoke the appropriate judicial mind-set.

Or Pacific Legal Foundation v Dept. Transportation, 593 F.2d 1338, 1343, n 35 (D.C.Cir. 1971), cert. denied, 444 U.S. 830(1971):

> ...we agree with the emerging consensus of the Courts of Appeals that the distinction between the arbitrary and capricious standard and substantial evidence review is largely semantic...

Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:7 p. 356.[7]

For this reason, we will not examine any of the other expressions used to describe the middle ground of judicial review--"clearly erroneous," "clear error of judgment," or "abuse of discretion."

Instead, we emphasize that in the context of federal common law, the mind-set of the judge before whom a case is heard is probably of far more importance than the particular verbal formula recited in a statute purporting to prescribe the standard of judicial review of agency action, unless the statute specifies the extreme of **"de novo"** review. Whether a statute specifies "arbitrary and capricious," "substantial evidence," "clearly erroneous," etc., is probably of far more importance to legislators than to judges.

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[7] "The law is, then, all at one time, that the one test requires more than the other, that the other requires more than the one, and that the difference tween the two tests is largely semantic! If lawmakers had a malevolent purpose of preventing clarity (as they surely do not), could they accomplish that purpose more effectively?

The answer is yes, for they have made the difficulties still greater. ...

If differences in the three standards exist, the least exacting review is "arbitrary or capricious," the middle one is "substantial evidence," and the most exacting is "clear error of judgment."
Davis, Administrative Law Treatise, (2d ed. 1984) Vol. 5, § 29:7 p. 359.

b. The "arbitrary and capricious" standard of review allows courts to exercise a tremendous level of discretion in reviewing agency action.

The federal APA embodies the basic presumption that agency action is subject to judicial review. SEE: Abbott Laboratories v Gardner, 387 U.S. 136, 140 (1967); Citizens to Preserve Overton Park v Volpe, 401 U.S. 402 (1971).[8]

The proposal of the Governor's Task Force on Subsistence (1997) to amend ANILCA § 807 ensures that the State's decisions implementing the ANILCA subsistence priority will be reviewable. Existing ANILCA § 807 guarantees the right of "aggrieved persons" to challenge any failure to adequately provide for the subsistence priority. (16 U.S.C. § 3117.) (This includes agency inaction.)

Despite all the different verbal formulae that have been brought to bear on the problem, it is generally accepted that judicial review under the "arbitrary and capricious" standard can be just about as searching, or as deferential, as the judge who hears the case wishes the standard to be. There is enough slack in the "arbitrary and capricious" yardstick to accommodate whatever level of rigor a particular judge wishes to bring to the process of review.

Federal judges often write that it is only in the fields of statutory construction, or analysis of legislative history, that courts enjoy "special competence." Consequently, when judicial review is in either of those fields of unique judicial expertise, a court need give no deference to an agency's decision.

In Alaska, however, perhaps one should modify the standard analysis of judicial review by noting that most "true Alaskans" consider themselves to be experts in the fields of wildlife and fisheries management. It is possible that federal judges in Alaska share this common public feeling of special skill. As a consequence, searching judicial inquiries in cases involving Alaskan fish and wildlife should not be presumed to be outside the "special competence" of federal judges in Alaska.

In Alaska, it seems reasonable to predict that where fisheries or wildlife management disputes are concerned, substitution of a court's judgment (federal or state) for that of an agency should

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[8] Under federal administrative law principles, agency inaction, on the other hand, is presumptively unreviewable, but the presumption may be rebutted. Heckler v Chaney, 470 U.S. 821, 833 (1985). BUT COMPARE Sierra Club v Hodel, 848 F.2d 1068 (10th Cir. 1988), and Adams v Richardson, 480 F.2d 1159 (D.C. Cir. en banc 1973).

never come as a surprise.

A judicious approach to the jurisprudence of administrative law will recognize that the scope of judicial review of agency decisions occupies a continuum.

At one end of the continuum lies the field of statutory interpretation, which courts consistently declare to be within their "special competence" and wherein courts consequently do not defer to agency decisions.

Courts are most prone to substitute their judgment for that of an agency when the question in front of the court is one of analyzing a statute or legislative history. SEE, e.g., Watt v Alaska, 101 S.Ct. 1673 (1983); Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 313 (9th Cir. 1988), **cert denied**, 491 U.S. 905 (1989).[9]

At the other end of the continuum of the scope of judicial review, yet not separated from the first end by a "bright line," lies judicial review of agency findings of fact and policy. It is fair to say that courts are generally less willing to substitute their judgment for that of an agency in these domains, especially where the question involves agency expertise or basic policy.

In conclusion, one could say that in general, statutory standards like "arbitrary and capricious" that purport to limit judicial review of agency decisions are like the outfield fences at the minor league Milwaukee Brewers' ballpark when the team was owned by Bill Veeck: the fences can move in and out from day to day.

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[9] Chevron v N.R.D.C., 467 U.S. 837 (1984), indicated a doctrinal shift by the U.S. Supreme Court in the field of federal administrative common law, and held that reviewing courts must affirm any reasonable interpretation of ambiguous language in an agency-administered statute. Nonetheless, tremendous judicial discretion continues, due in part to the malleability of administrative law doctrines, the large and ideologically diverse federal judiciary, and the inherent limits of appellate review for ensuring consistency.

c. Senator Stevens' version of amended § 807

Senator Stevens has made several changes to Governor Knowles' Subsistence Task Force's (1997) proposals. The following section of this memo discusses Senator Stevens' addition to the Task Force's proposed amendment to ANILCA § 807, adding the clause "or otherwise not in accordance with law" to the formula of "arbitrary and capricious."[10]

Mr. Bill Horn has written that Senator Stevens' modification "substantially weakens decisionmaking authority of State agencies." I respectfully disagree for the following reasons.

There is enormous judicial discretion in the application of the "arbitrary and capricious" standard of review under federal administrative common law. It is my opinion that the marginal change caused by the additional language inserted by Senator Stevens would be of minimal effect, not "substantial."

The federal APA specifically allows a reviewing court to declare agency action invalid if it is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

As a hypothetical, let us consider how a reviewing court would be likely to act in the absence of Senator Stevens' "otherwise not in accordance with law" language. Would a Federal District Judge be likely to refuse to void agency action that was in excess of the agency's statutory jurisdiction, without substantial observance of procedures required by law, or contrary to constitutional rights? I doubt it very much.[11]

Can any of us reasonably conceive of a statute that forbids a court to void agency action that is "not in accordance with law?"

It is nonetheless true that Senator Stevens' modification of proposed ANILCA § 807 specifically widens the enumerated grounds on which a court could void fish and wildlife regulations adopted by the State under authority of ANILCA. However, for the foregoing

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[10] These clauses, recited seriatim by judges and lawyers ever since the federal APA was adopted in 1946, have acquired a mantra-like, incantatory effect by virtue of their long-standing linkage in § 706 of the federal APA. It is possible that they have grown intellectually inseparable for federal judges whose entire career experience with administrative law has involved using these clauses almost interchangeably.

[11] SEE ALSO: U.S. v Alexander, 938 F.2d 942, 947 n. 9 (9th Cir. 1991): "Where Congress has meant to preclude us from passing upon the validity of a statute, it has said so explicitly." (citations and quotations omitted.)

reasons, I believe that Senator Stevens' addition is more of a cosmetic change than a substantive one.

d. Current 9th Circuit law on the scope of review

We next look briefly at current practice in the 9th Circuit Court of Appeals interpreting and applying the "arbitrary and capricious" standard.

It is the current judicial cant to write that the function of a reviewing court is merely to determine whether an agency has considered all the relevant factors and articulated a rational connection between the facts found and the choice made. e.g., Washington Crab Producers, Inc., v Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990).

In the context of fact-finding, courts typically state that they cannot substitute their judgment for that of the agency. e.g., Alliance Against IFQ's v Brown, 84 F.3d 343, 345, 350 (9th Cir. 1996); **cert denied** 117 S.Ct. 1467; Alaska Factory Trawler Assn. v Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987).

Nonetheless, courts **can** substitute their judgment for that of an agency in the context of fact-finding via the rubric of stating that the agency has failed to articulate a rational connection between the facts and the agency's decision.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445 (9th Cir. 1996), ("BTCM") is an instructive case to study for purposes of seeking to understand the current state of judicial review of agency actions in the 9th Circuit. The facts involved National Park Service regulations governing the use of bicycles around the Golden Gate Bridge Recreation Area.

The portions of the decision in BTCM excerpted below deal first with judicial review of an agency's interpretation of its own statute, then with judicial review of the agency's findings of facts.[12]

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[12] Federal courts recognize a distinction between "interpretive" rules and "substantive" rules.

1) "An interpretive rule expresses the agency's view of what another rule, regulation, or statute means...the scope of judicial review is broad because the interpretation of statutory language does not involve the agency's discretion." Pacific Gas & Electric Co. v FPC, 506 F.2d 33, 37, n. 14 (D.C. Cir. 1974).

2) A "substantive" rule (also known as a "legislative" rule) has been defined as one which "establishes a standard of conduct which has the force of law...A general statement of policy, on the other hand, does not establish a 'b nding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what (continued...)

In BTCM, the 9th Circuit[13] wrote that the United States Supreme Court has established a two-step process for reviewing an agency's construction of the statute it administers.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Chevron U.S.A. v N.R.D.C., 467 U.S. 837, 842-843 (1984).

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1452 (9th Cir. 1996).

Step one in this analysis requires a court to use traditional tools of statutory construction. If Congress had an intention on the precise question at issue, that intent is the law and it must be given effect. Id., citing Chevron at 843, n. 9.

If an agency decision represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, then, at least in theory, courts should not disturb the agency's choice "unless it appears from the statute or its legislative history that the accommodation is not one that Congress

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[12](...continued)
the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future." Pacific Gas & Electric Co. v FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).
The scope of review for "substantive" or "legislative" rules is narrower and more deferential than for "interpretive" rules. (SEE generally: Batterton v Francis, 432 U.S. 416, 425 (1977).)

[13] A recent case from the District of Alaska dealing with an agency's statutory interpretation is Oregon Portland Cement Co. v U.S. Dept. Interior, 590 F. Supp. 52 (D. Alaska 1984). There, the court wrote that a court is obliged to accept the administrative construction of a statute only insofar as it is reasonable...and consistent with the intent of Congress in adopting the statute. Where a statutory mandate is detailed and specific, the amount of deference due an agency decision is "tempered," and deference is less appropriate. Id. at 56.

would have sanctioned." Chevron, 467 U.S. at 845.[14]

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996).

> At Step two, the court need not conclude that the agency construction of the statute was the only one it permissibly could have adopted to uphold the agency's construction, or even the reading of the statute that the court would have chosen if the question had come up first in a judicial proceeding. Id. at 843 n 10.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996).

Taken literally, this method translates to judicial deference to an experienced agency's interpretation of the statute it is charged with administering.

Regarding the application of the "arbitrary and capricious" standard to agency findings of fact and policy decisions, the 9th Circuit relied on the current U.S. Supreme Court guideline (Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)), and its own precedents.

An agency decision can be found "arbitrary and capricious" where the agency "entirely failed to consider an important aspect of the problem." Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1460 (9th Cir. 1996), citing Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

> In order for an agency decision to be upheld under the arbitrary and capricious standard, a court must find that evidence before the agency provided a rational basis for its decision. Northwest Motorcycle Assn., 18 F.3d 1468, 1471 (9th Cir. 1994), cited in Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1462 (9th Cir. 1996). After considering the relevant data, the [agency] must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Id.

Bicycle Trails Council of Marin v Babbitt, 82 F.3d 1445, 1462 (9th Cir. 1996).

Translated into plainer English, this method of judicial review of

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[14] SEE ALSO: Wilderness Public Rights Fund v Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979), cert denied, 446 U.S. 982 (1980), noting that allocation of a limited use between competing user groups is well within the area of administrative discretion granted to the NPS.

fact-finding and policy-making gives courts broad discretion to determine whether or not the agency's explanation of its action is "satisfactory."

The NPS decision-making process in BTCM was upheld, but why? The court noted, in **dictum**, that its decision to uphold the NPS regulation was partly because the regulation adoption process took years to complete, it was exceedingly detailed and documented, it included public participation and comments from the major user groups, workshops were held, a detailed, written staff analysis and summary of all public comments was created, the court was able to review the agency's responses in writing to the public comments, and the underlying authorizing statute granted NPS authority to allocate between user groups, rather than mandating a priority.[15]

Articulating "a satisfactory explanation" is perhaps the area in which the State of Alaska's Boards of Fisheries and Game will find it the most difficult to comply with the demands of federal administrative law. The Board of Game and Board of Fisheries, along with their support staff within ADF&G, have little experience crafting the kind of detailed, post-decisional documents commonly required by federal courts.

An agency's explanation of its action must be sufficient to permit effective judicial review. S.E.C. v Chenery Corp., 332 U.S. 194, 196-197 (1947). Although Alaska's Board of Game and Board of Fisheries have developed real expertise at the level of notice and comment public hearings, the Boards and their staff are much less adept when it comes to tailoring a post-decisional document that will satisfy federal judicial review.

Several common law maxims typically guide federal courts when they look at an agency's post-decisional document and judge whether or not it offers a "satisfactory explanation" for the agency's action.

The reviewing court should not attempt to make up for deficiencies in the agency's decision. Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Id. However, a court can uphold an agency decision "of less than ideal clarity if the agency's path may reasonably be discerned." Id., **cited** in Northwest Motorcycle Assn., 18 F.3d 1468, 1478 (9th Cir. 1994).

When acting under ANILCA, the Boards will need to create an

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[15] Such a ponderous process of agency decision-making may not always be appropriate to the time-driven exigencies of fisheries and wildlife management in Alaska. It is, at a minimum, the polar opposite of management by Emergency Order. (AS 16.05.060.)

adequate administrative record prior to their decisions. The Boards will also need to create post-decisional documents, articulating their findings in a way sufficient to justify to a reviewing court the Boards' decisions.[16]

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[16] It is beyond the scope of this memo to address the increased paperwork or bureaucracy needed to meet these demands.

2. What is the likely effect of amending ANILCA § 807 to require that federal courts give the State the "same deference" they would accord a comparable federal agency?

What is "deference?" It is a judicial term of art that is so vague and amorphous it does not even appear in Black's Law Dictionary.[17] This memo will not attempt to define "deference" comprehensively or for multiple purposes. For the limited purposes of this memo, we interpret "deference" this way:

> When a reviewing court accords some level of acceptance to a decision (or interpretation) offered by an agency that is greater than the intrinsic merits of the agency's decision (or interpretation) itself.

To answer the original question regarding the proposed amendment to ANILCA § 807, it is first necessary to try to understand the purpose of the proposed amendment to ANILCA.[18]

My research indicates that it is likely that the impetus for this provision derives from two federal court cases: Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988), **cert. denied**, 491 U.S. 905 (1989), and U.S. v Alexander, 938 F.2d 942 (9th Cir. 1991).

These two cases are discussed separately, below. Concluding thoughts on this issue are presented immediately afterwards.

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[17] Webster defines "deference" as: respect and esteem due a superior or elder. Webster's Ninth New Collegiate Dictionary. (1984).

[18] To the best of my knowledge, there is not yet anything that would qualify as legislative history for this proposed amendment. Whatever legislative history is eventually created may be of pivotal importance in the interpretation of this provision.

a. Kenaitze

Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988), **cert. denied**, 491 U.S. 905 (1989) involved a suit by an Indian tribe seeking to compel the State of Alaska to promulgate regulations defining the term "rural."

Kenaitze is important to this memo insofar as the decision concerns the measure of deference which a reviewing court must pay to a federal agency interpretation of a statute the agency is charged with administering. By outlining that quantum of deference, it should be possible to better understand what advantage--if any--this proposed amendment to ANILCA § 807 may be likely to confer on decisions by the State of Alaska implementing ANILCA.

In Kenaitze, neither the State's definition of "rural," nor the federal agency's definition of "rural", was given any deference by the 9th Circuit Court of Appeals.

In Kenaitze, the State claimed that it "stood in the shoes" of the federal government, by virtue of which the State's interpretation of ANILCA was entitled to the same measure of deference as if the Alaska Board of Game or Board of Fisheries was a comparable federal agency.

The 9th Circuit roundly rejected this argument and wrote:

> Deference to a federal agency's interpretation of a statute is based in part on the expertise it possesses in implementing federal policy in the general subject area. (citation omitted) While Alaska has a long history of managing wilderness areas, it lacks the expertise in implementing federal laws and policies and the nationwide perspective characteristic of a federal agency. Federal agencies are also entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress' powers of advice and consent, appropriation, and oversight. Such direct and continuous congressional supervision is absent when state authorities are doing the regulating.
>
> Most fundamentally, unlike a federal agency, the state is delegated no authority under ANILCA. ...As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. ...Deference is not appropriate.

Kenaitze, 860 F.2d 312, 316 (9th Cir. 1988).

To recapitulate, the State definition of "rural" received no deference from the Kenaitze court because the State suffered from four handicaps. The federal court wrote that 1) the State had no expertise in implementing federal laws and policies, 2) the State lacked the nationwide perspective of a federal agency, 3) the State

was not subject to continuing Congressional supervision, and 4) the State is delegated no authority under ANILCA; the State's role is to supplant the federal regulatory scheme rather than to implement it. Id.

The action of the Assistant Secretary of the Interior, purporting to certify the State's compliance with ANILCA, had no legal effect because it was not an exercise of the Secretary of Interior's statutory authority. Kenaitze, at 315.

The federal statutory interpretation fared no better than the State's. Once a state regulatory scheme is in place, the Secretary merely monitors State implementation. (ANILCA § 806.) The court, after considering the Secretary's views, announced that it had given them "due consideration." Kenaitze, n. 6, p. 315. In effect, the federal view received no deference.

Consequently, the court interpreted the meaning of the statutory term "rural" independently (de novo review), paying no heed to either the State of Alaska definition or the federal agency's imprecations that the state definition met the federal law.

b. U.S. v Alexander

U.S. v Alexander, 938 F.2d 942 (9th Cir. 1991) involved two Alaska Natives (Haida Indians) who harvested and attempted to sell herring roe on kelp that had been taken in violation of Alaska State laws. The case was in federal court since it was a federal criminal prosecution under the Lacey Act. (16 U.S.C. § 3372(a)(2)(A).) To sustain a conviction under the Lacey Act, it was necessary to prove the validity of the two, underlying state regulations.

Alexander is important to this memo because it involves the measure of deference which a reviewing court paid to a state agency interpretation of a statute in circumstances where the U.S. Attorney had brought a major criminal prosecution based on a state regulatory interpretation of a federal statute.

In Alexander, the 9th Circuit wrote that in interpreting the meaning of a phrase that appears in a federal statute, a federal court owes no deference to an interpretation by a state regulatory agency. U.S. v Alexander, 938 F.2d 942, 946 n. 6 (9th Cir. 1991), **citing** Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 315-316 (9th Cir. 1988).[19]

c. Conclusion

At least two, distinct situations exist in which the State might claim it is entitled to deference under proposed ANILCA § 807. Those situations are 1) interpretation of ANILCA, and 2) applying federal law to specific facts. Each situation is discussed separately.

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[19] The court concluded that to the extent Alaska law may prohibit cash sales of subsistence-caught fish or wildlife, and the case sales are a part of "customary trade" (which the court defined with sweeping latitude), Alaska's regulations conflicted with ANILCA. Alexander at 946.

U.S. v Skinna, 931 F.2d 530 (9th Cir. 1990), involved a Tlingit who took $274,000.00 worth of herring roe on kelp in violation of Alaska law and sought to avoid criminal penalties under the guise of the subsistence protections of ANILCA's "customary trade" exemption. Because Skinna failed to raise his defense at trial, and failed to introduce any evidence to show trade of that magnitude was "customary," and waited until his appeal to test his theory of defense, he failed.

i. State Interpretation of Federal Law

It is one, plausible construction of the proposed amendment to ANILCA § 807 that it would strip away the four handicaps to judicial deference to state interpretations of federal laws.

I believe it is equally plausible to foresee that the 9th Circuit may yet find new reasons not to defer to Alaska's ANILCA management decisions. I do not believe courts will be quick to embrace the proposed amendment's principle of vicarious deference.

Deference to a federal agency's interpretation of a statute is based in part on the expertise an agency possesses in implementing federal policy in the general subject area. Aluminum Co. of America v Central Lincoln People's Util. Dist., 467 U.S. 380, 389-90 (1984).[20]

The Alaska Board of Game and Board of Fisheries patently lack experience implementing federal laws and policies. It is within a court's discretion to decide if USFWS--the comparable federal agency--has created a sufficient track record of ANILCA implementation to be worthy of vicarious judicial deference.

It is important to note that in Kenaitze, the 9th Circuit wrote that deference to an administrative agency's construction of a statute is appropriate only where the agency is entrusted with the administration of the statute. Kenaitze Indian Tribe v Alaska, 860 F.2d 312, 313, (9th Cir. 1988), cert denied, 491 U.S. 905 (1989); citing Chevron U.S.A. v NRDC 467 U.S. 837, 844 (1984); Blum v Bacon, 457 U.S. 132, 141 (1982), and 860 F.2d at 315-316.

Under the 9th Circuit's reasoning announced in Kenaitze, Alaska will at no time be entrusted with the administration of ANILCA. Despite the proposed amendment to ANILCA § 807's directive of vicarious judicial deference, the State will still lack the attributes of an agency that merits federal judicial deference. Alaska will remain "a separate sovereign." Kenaitze, at p. 316.

Nor would USFWS, the "comparable federal agency," likely be entitled to deference, either. In Kenaitze, the federal agency's definition of "rural" was given no deference by the reviewing court. This was because the federal agency was not "charged with administering" ANILCA; it was merely charged with overseeing the State's implementation of the program. (ANILCA § 806.)

ii. State Application of Federal Law to Facts

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[20] Even where "agency expertise" is involved, the standard for judicial review still involves an immense amount of discretion on behalf of the reviewing court.

In reviewing an agency's application of law to facts, where the question to be decided involves matters within the particular expertise of the agency, the agency's conclusions are supposedly reviewed under the reasonableness or reasonable basis standard. Monex International, Ltd. v Commodity Futures Trading Commn., 83 F.3d 1130, 1133 (9th Cir, 1996), citing Morris v Commodity Futures Trading Commn., 980 F.2d 1289, 1293 (9th Cir. 1992).

Nonetheless, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." Morris v Commodity Futures Trading Commn., 980 F.2d 1289, 1293 (9th Cir. 1992) (noting that deference is not required in reviewing common law or constitutional law).

The term "deference" is so imprecise that it does not tie the hands of a Judge. No specific measure of deference to the State of Alaska is specified by proposed ANILCA § 807.

As a practical matter, unless a judge expressly states he is giving "no deference" to a State regulatory action, I believe it would be hopelessly difficult to seek appellate review of a Federal District court's action overturning a State of Alaska regulation on the grounds that the court failed to give the State's decision sufficient deference.

The guidelines for judicial deference to agency discretion are so fuzzy that it would be a delusion to look for a "bright line" test with which to compare a state agency's decision before and after the proposed change to ANILCA § 807.[21]

> "Different judges often impose inconsistent limits on the same agency. The involvement of a particular judge with any particular agency is far too episodic to permit the judge to obtain a broad perspective on the agency's many initiatives and its methods of allocating its scarce resources to accomplish its goals."

Davis, Pierce. Administrative Law Treatise, § 17.4, p. 115 (3rd ed. 1994).

Even with the proposed amendment to ANILCA § 807 and its grant of conceptual parity to the State of Alaska for purposes of deference, neither the Board of Game nor the Board of Fisheries will qualify as "an agency entrusted with administration of the statute [ANILCA]."

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[21] e.g., Arkansas v Oklahoma, 503 U.S. 91 (1992). (EPA is entitled to discretion to enforce its own regulations and those regulations are entitled to the appropriate level of deference.)

The amendment to § 807 does not alter the status of USFWS, which is the "comparable federal agency." USFWS would once again be charged with oversight of the State's implementation, not "administration."

Only two of the four grounds relied on by the court in Kenaitze inhere in the nature of a state agency. Just like a state agency, a federal agency may also lack experience in implementing the federal law or policy that is before a reviewing court as a result of agency action or inaction. And, as is the case with a state agency, a "comparable federal agency" may not actually be charged with administering a particular federal statute.

In other words, if the "comparable federal agency" or a state lacked expertise in implementing the specific federal law or policies under scrutiny, or was not actually charged with direct administration of a statute, it would be a simple matter for a reviewing court to note that defect, and then declare for the record that it was treating the state agency's decision "with the same deference it would give the same decision of a comparable federal agency." This would dictate application of a minimally deferential standard of review.

The judicial branch is generally reluctant to accept legislative constraints on judicial discretion.[22] Perhaps this is an inherent problem in a government organized under principles of the separation of powers, with coordinate branches.

In my opinion, the impact of the provision in proposed ANILCA § 807 according the State of Alaska "the same deference" as a "comparable federal agency" allows the federal district court to be deferential to a decision by the Board of Game or Board of Fisheries **if, in its discretion, the federal court chooses to do so**, but it is unlikely that the principle of vicarious deference would be enforceable through appellate review.

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[22] c.f. Yakus v United States, 321 U.S.414, 429 (1944) (investing an emergency court with exclusive jurisdiction to consider certain regulations); Adamo Wrecking Co. v United States, 434 U.S. 275, 277 (1978) (statute expressly precluding judicial review of certain regulations).

THE POSSIBILITY OF REDUCING FEDERAL INTERVENTION

II. QUESTION PRESENTED: Can the chances of federal court intervention in State management within the framework of ANILCA and ongoing federal oversight be reduced?

SHORT ANSWER: Yes, within limits.

As long as ANILCA generously provides for judicial review in federal court (ANILCA § 807), periodic legal challenges are a certainty. Inherent in the American judicial process is broad discretion on the part of a reviewing judge.

The first issue addressed in this memo was the standard of review that federal courts will bring to bear in their review of federal oversight of the State of Alaska's implementation of ANILCA. We have strongly suggested that the "arbitrary and capricious" standard allows a reviewing federal court immense discretion to void State of Alaska actions that do not meet a particular judge's perception of "reasonableness."

We have also strongly suggested that for reasons that inhere in the separation and balance of powers of the three coordinate branches of government in a republican system, it is no easy matter for the legislative branch to shackle the judicial branch. With that caveat in mind, perhaps the State could be given greater authority by changing ANILCA § 807 to alternative language:

> The decision in Kenaitze Indian Tribe v Alaska, 860 F.2d 312 (9th Cir. 1988) is expressly rejected, and reviewing courts are directed to give substantial deference to state agency interpretations of ANILCA, and to state agency findings of fact, and to state agency decisions involving complex issues that require agency expertise, applying to judicial review under this section the Alaska case of Kelly v Zamarello, 486 P.2d 906 (Alaska 1971). No injunctive relief shall be available in federal court.[23]

We express no opinion in this memo on the political feasibility of the foregoing changes, nor do we address the normative issues raised by the alternative language set out above.

One of the principal issues discussed in this memo has been the measure of deference which a court should pay to State of Alaska

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[23] It would be helpful, also, to revise proposed AS 16.05.261 to allow the Boards to reject Regional Council recommendations that are "not in the broad public interest."

interpretations of ANILCA. We have suggested that the proposed language of the Governor's Subsistence Task Force (1997) may be inadequate to effectively require federal courts to defer to State interpretations of ANILCA.

If Congress truly wishes to legislatively overrule the effect of Kenaitze and Alexander, that intent must appear explicitly and unambiguously in the legislative history or in the statute itself.

If the complex of State Constitutional and statutory changes, plus federal statutory changes becomes law, and if as a result of those changes, the State regains management authority for fish and wildlife on federal public lands in Alaska, then the "comparable federal agency" will once again merely be charged with monitoring the State's implementation, as was the case at the time of Kenaitze. (ANILCA § 806.) It is thus at least conceptually possible that the language proposed in the (1997) Task Force's package of amendments may be of no effect at all.

In fairness, it is also possible that a reviewing court could interpret the proposed amendment to require judicial deference to State of Alaska interpretations of Congressional intent, where the intent of the statute is ambiguous.

My best guess, which is all anyone can do at this point, is this: courts quite properly consider themselves to be more adept at interpreting statutes than administrative agencies. Courts defer to agencies' interpretations of statutes only when the court finds the agency interpretation to be reasonably close to what the court itself would have said independently of the agency's interpretation.

Neither the Board of Fisheries nor the Board of Game will ever be possessed of the essential characteristics that comprise the rationale for the policy of judicial deference to agency decisions. SEE: Kenaitze, 860 F.2d 312, 316 (9th Cir. 1988), and cases cited therein.

Consequently, I believe it is unlikely (though not impossible) that the proposed statutory language in the second sentence of ANILCA § 807 will be of much practical effect in inducing federal courts to defer to interpretations of federal law (ANILCA) by the State of Alaska.

The State will need to devote substantial additional resources to its administrative procedures. In particular, as a preventive measure, the Boards will need to receive more and firmer legal counsel during their deliberations in order to comply with ANILCA. Additionally, the Boards will need additional staff assistance crafting post-decisional documents that can pass muster under the scrutiny of a federal judge.

A federal Court of Appeals will generally uphold an administrative agency's decision if, but only if, the court can discern a reasoned path from the facts and considerations before the agency to the decision reached. United Distribution Companies v FERC, 88 F.3d 1105 (D.C. Cir. 1996); **cert denied**, 117 S.Ct. 1723.

For example, under principles of federal administrative law, an agency's view of what is in the public's interest may change, either with or without a change in circumstances, but a federal agency changing its course must supply a reasoned analysis of why it is doing so. Motor Vehicle Manufacturers Assn. v State Farm Mutual Insurance Co., 463 U.S. 29, 57 (1983); SEE ALSO Northwest Motorcycle Assn. v U.S.D.A., 18 F.3d 1468, 1480 (9th Cir. 1994) (upholding an agency's change of policy based on a rational and principled reason.)

Another example of the more rigorous judicial review common under principles of federal administrative law involves predictive models. Under federal law, an agency may use a predictive model, PROVIDED it explains the assumptions and methodologies used in preparing the model. If the model is challenged, the agency must provide a full analytical defense. Eagle-Picher Industries, Inc. v EPA, 759 F.2d 905, 921-922 (D.C. Cir. 1985). Given the frequency with which scientific models are used in fisheries and wildlife management regulatory actions, this principle provides an abundant storehouse of federal court challenges to state regulatory actions.

Under federal common law, when specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, the court might find contrary views more persuasive. Southwest Center for Biological Diversity v Glickman, 932 F. Supp. 1189 (D.Ariz. 1996); **affirmed**, 100 F.3d 1443.

In the usual Alaska state law situation, findings of fact are required even in the absence of a statutory duty. Mobil Oil Corp. v Local Boundary Commission, 518 P.2d 92, 97 n. 11 (Alaska 1974), **cited with approval** in Faulk v Board of Equalization, 934 P.2d 750, 751 (Alaska 1997). However, in certain cases, the issues are such that, based on the record, detailed findings are not necessary for the court to understand the agency's reasoning process. Fields v Kodiak City Council, 628 P.2d 927, 932 (Alaska 1981), **cited with approval** in Faulk v Board of Equalization, 934 P.2d 750, 751 (Alaska 1997).

> This court has consistently stressed the importance of decisional documents when asked to review action taken by an administrative body. Trustees for Alaska v State, 795 P.2d 805, 809 (Alaska 1990); Alaska Survival v State, 723 P.2d 1281, 1287 (Alaska 1986) (decisional document should disclose that the agency has taken a hard look at factors, and engaged in reasoned decision making); Ship Creek Hydraulic Syndicate

v State, 685 P.2d 715, 717-718 (Alaska 1984) ("...if a statute requires reasoned decisions, and the legislature has not expressly or by implication limited judicial authority to decide how to review administrative actions, courts may and should require agencies to explain their decisions."

HALO v Anchorage, 927 P.2d 728, 744-745 (Alaska 1996), (C.J. Compton, dissenting).

Despite this general rule, Alaska courts generally exempt the Board of Fisheries and Board of Game from any requirement of producing a written document containing Finding of Facts and Conclusions of Law to support each regulation adopted. The Alaska Supreme Court has nonetheless written that "it is vital that the agency clearly voice the grounds upon which the regulation was based in its discussions of the regulation or in a document articulating its decision." Alaska Fish Spotters Assn v ADF&G, 838 P.2d 798, 801 (Alaska 1992).

It is fair to say that federal courts are generally more demanding than State of Alaska courts when it comes to requiring an agency to make written findings clearly articulating all of the evidence heard and the reasons for an agency's final decision.[24]

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[24] In Alaska, the challenger of an administrative regulation has the burden of proving its invalidity. State v Cosio, 858 P.2d 621, 624 (Alaska 1993).

Under Alaska law, State courts often show substantial deference to Board of Fisheries, and Board of Game decisions. e.g., Stepovak-Shumagin Set Net Assn. v Board of Fisheries, 886 P.2d 632 637 (Alaska 1994). SEE ALSO: Kelso v Rybachek, 912 P.2d 536 (Alaska 1996) (DEC regulations).

Under Alaska law, judicial deference to the expertise of the Boards is appropriate in light of the complexity of the subject matter, the Boards' long-standing track record of responsible exercise of its regulatory authority, and the need for the Boards to hear and consider complex biological staff reports, public testimony, and other information when making regulatory decisions. State v Tanana Valley Sportsmen's Association, 583 P.2d 854, 859 (Alaska 1978).

The Boards were given extremely broad statutory authority to make conservation and allocation decisions partly because of the perceived impossibility of the legislative or judicial branches finding the time to do so.

Courts are ill-equipped, and do not have the resources, to serve as the forum for complex, highly dynamic, wildlife and fishery management decisions that are based on months of testimony assessed by agency members with many years of expertise in the field. Formulation of fishery management policies and implementation of conservation and development goals are properly left to the Board process. If a regulation appears reasonable, (continued...)

The Boards will need to adopt regulations that will guide their discretion in applying the sustained yield principle. Such regulations may be extremely difficult to craft. It is very unlikely that a reviewing federal court will defer to State action premised on an unarticulated concept of "sustained yield," applied in an **ad hoc** manner. SEE: Kwethluk IRA Council v State of Alaska, 740 F. Supp. 765 (D. Alaska 1990).

In conclusion, there is nothing reasonably plausible the State can do to guarantee itself immunity from federal court challenges to State management within the framework of ANILCA.

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[24](...continued)
then a court is not to substitute its judgment for a Board's. SEE: Meier v State, 739 P.2d 172, 174-75 (Alaska 1987).

In Alaska, a reviewing court applies the "reasonable basis" test when reviewing administrative decisions involving complex issues that require agency expertise. Kelly v Zamarello, 486 P.2d 906, 917 (Alaska 1971); Ellis v State 944 P.2d 491, 493 (Alaska 1997). Under the reasonable basis test, the court gives deference to the agency determination "so long as it is reasonable, supported by the evidence in the record as a whole, and there is no abuse of discretion." Kodiak Western Alaska Airlines, Inc., v Bob Harris Flying Service, Inc., 592 P.2d 1200, 1203 n. 7 (Alaska 1979).

Alaska courts exercise "independent judgment" when determining whether an agency complied with procedural requirements. Moore v State, 553 P.2d 8, 33 (Alaska 1976).

The test of the validity of a Board of Game or Board of Fisheries regulation should generally be simple and deferential:

> was the regulation adopted in accordance with APA [Administrative Procedure Act] procedures; is the regulation within the discretion vested in the agency by the legislature; is the regulation consistent with the statute and reasonably necessary to its purpose; is the regulation reasonable and not arbitrary.

State v Morry, 836 P. 2d 358, 362, fn.3, (Alaska 1992), citing Kelly v Zamarello, 486 P.2d 906, 910-911 (Alaska 1971).

THE CONFUSING REQUIREMENT OF "DEFERENCE"

IN PROPOSED AS 16.05.261(h). AND (i)

III. QUESTION PRESENTED: What is the import of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h), (i)?

SHORT ANSWER: The proposed Regional Subsistence Councils are given very significant advisory authority. The Boards retain final, regulatory authority. The Boards' need for staff support is likely to increase in order to cope with the demand for creating post-decisional documents.

A. Summary Description of the Proposed Statutory Framework

Governor Knowles' Subsistence Task Force (1997) has proposed a change to Alaska's Local Fish and Game Advisory Committee system. The Task Force proposes a new statute to create six "Alaska Regional Subsistence Councils." (proposed AS 16.05.261.)

Under the Governor's proposal, each Regional Subsistence Council is to have ten members. All members are appointed by the Governor. Four members must be selected from nominees submitted by tribal councils in the region; the remaining six members are selected from nominees submitted by local governments and local advisory committees.

The primary task of the proposed Regional Councils overlaps with and duplicates the existing task of Local Advisory Committees. The Regional Councils are to review, evaluate, and make recommendations to the Boards on regulations relating to subsistence, sport, personal use, and commercial fishing and hunting. Other tasks are also assigned to the Regional Councils, including identifying and evaluating subsistence needs and recommending a management strategy to accommodate the identified subsistence needs.

B. Proposed AS 16.05.261(h)

This proposed statute is quite convoluted. It is necessary to analyze it one sentence at a time. The analysis below will follow that approach.

The Regional Subsistence Councils will be a new creature, to my knowledge unprecedented in Alaska law. The Councils will be quasi-regulatory agencies. Since the Regional Councils will not possess actual regulatory authority, they will be less powerful than the Boards.

The authority of the Regional Councils will somewhat diminish the independent authority of the two, regulatory Boards. It seems likely that the cumulative recommendations from six, separate Regional Councils will very substantially add to the two Boards' workload. Yet, as shown below, although the Regional Councils will have vastly more authority than a Local Advisory Committee, the two Boards will retain their regulatory authority.

1. The first sentence of proposed AS 16.05.261(h) provides:

> (h) The appropriate board shall consider the reports and recommendations of the regional subsistence councils and shall give deference to their subsistence recommendations.

First, it is appropriate to list the "subsistence recommendations" to which the Board of Fisheries and Board of Game must defer. Regional Councils have authority to make five distinct categories of recommendations. The Councils' recommendations may involve:

> 1) any existing or proposed regulation, policy, or management plan, or any other matter directly relating to the subsistence use of fish and wildlife within its region. (AS 16.05.261(d)(3).)
>
> 2) permits provided in AS 16.05.330(d) and .405(g). (These statutes refer to other parts of the Task Force's package of amendments. They involve subsistence permits for areas, villages, communities, groups, or individuals.)[25]

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[25] Without an amendment to the Alaska Constitution, place-of-residence-oriented permits would be **ultra vires**.

The Alaska Constitution, Article VIII, § 3, "is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves 'to the people for common use' wild fish and game '<u>[w]herever occurring</u>." (Emphasis in original. <u>State v Kenaitze</u>, 894 P.2d 632, 642 n. 21 (Alaska 1995).

Under existing Alaska law, people who reside near a fish or game population do not have a higher claim to that population than state residents whose domiciles are more distant:

> 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.

(continued...)

(AS 16.05.261(d)(5).)

3) strategies for the management of fish and wildlife populations within the region to accommodate the fish and wildlife uses and needs identified by the Regional Councils in an annual report to be submitted to the Secretary of Interior and Secretary of Agriculture.[26]
(AS 16.05.261(d)(6)(C).)

4) policies, standards, guidelines, and regulations to implement the foregoing subsistence management strategies.
(AS 16.05.261(d)(6)(D).)

5) inter-regional proposals and issues.
(AS 16.05.261(g).)

Under proposed AS 16.05.261(h), the Boards are required to "give deference" to all five types of recommendations. No specific level of deference is specified in the statute.

Unless a unanimous recommendation of a Regional Council is involved, the Boards would not be any more obligated to follow a Regional Council's recommendation than they are currently obligated to follow an Advisory Committee's recommendation.[27]

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[25](...continued)
Kenaitze, supra, at 638, citing McDowell, 785 P.2d 1, at 12 (Alaska 1989) (quoting Lewis v. State, 110 Ark. 204, 161 S.W. 154, 155-56 (1913)) (emphasis added by the court in McDowell).

[26] Given the parlous state of ADF&G's budget, one cannot help wondering where sufficient funds will come from for the staff time necessary to create these reports.

[27] AS 16.05.260 requires the Boards to state their reasons for not following the recommendations of an Advisory Committee. This is the functional equivalent of the last sentence of proposed AS 16.05.261(h).

2. The second sentence of proposed AS 16.05.261(h) provides:

> If the [Regional] council recommendation is unanimous, there is a presumption in favor of adoption by the board.

The negative implication of this provision is that whenever a recommendation of a Regional Council is **less than** unanimous, there is **no** presumption in favor of adoption by the appropriate Board.

When a Regional Council makes a unanimous recommendation, and the appropriate Board wishes to make a contrary decision, the Board will need to create a "written statement of the factual basis and reasons for its decision" (proposed AS 16.05.261(h).)

Thus, it seems appropriate to presume that a reviewing court would hesitate to overturn a Board decision that was contrary to a non-unanimous recommendation of a Regional Council.

3. The third sentence of proposed AS 16.05.261(h) provides five, alternative reasons on which the Board may rely to reject a Regional Council's recommendation:

> ...the board may decide not to adopt any recommendation which it determines violates the sustained yield principle, is not supported by substantial evidence, is detrimental to subsistence uses, involves an unresolved statewide or inter-regional subsistence management issue, or is contrary to an overriding statewide fish or wildlife management interest.

Use of the disjunctive "or" makes each one of these five reasons sufficient in itself for a Board to reject a Regional Council recommendation.[28] Each reason will be examined briefly below.

The first reason does very little to affect the Boards' discretion. It would be unconstitutional for one of the Boards to approve an action in violation of the sustained yield principle. (Alaska Const., Art. VIII, § 2.)

Perhaps this first reason for which the Board may reject a Regional Council's recommendation is less significant for mentioning the sustained yield principle, and is more significant for what it omits? For example, if a Regional Council recommendation violated principles of equal protection, or due process, would the Boards be precluded from rejecting the recommendation?

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[28] This litany of reasons is not necessarily an exclusive list of the reasons for which the Board can reject a Regional Council's recommendation.

It is curious that proposed AS 16.05.261(h) does not include a provision allowing the Boards to reject a Regional Council recommendation that is not "otherwise not in accordance with law or that is contrary to the broad public interest."

Even permitting the Board to reject a Regional Council recommendation if it violates the sustained yield principle may be merely a chimerical grant of authority.

In Kwethluk IRA Council v State of Alaska, 740 F. Supp. 765 (D.Alaska 1990), a group of Native Alaskans sought a TRO and preliminary injunction under authority of ANILCA (16 U.S.C. § 3117). The plaintiffs sought an emergency caribou hunt. The Alaska Board of Game had previously denied their request. The Board had reasoned that creating the hunt would violate the sustained yield principle. (SEE: AS 16.05.258(b).)

Federal District Court Judge Holland reversed the Board of Game's decision and granted the Natives the relief they had requested. Kwethluk, 740 F.Supp. 765, 767 (D. Alaska 1990).

The Board of Game's rejection of the Kwethluk petition for an emergency caribou hunt had been premised on a Board policy decision that the Kilbuck caribou herd should be allowed to continue to grow before any hunting was reinstated. (All hunting on the Kwethluk caribou herd had been suspended since 1985.)

The District Court Judge in Kwethluk found it significant that there is no State statutory or regulatory definition for "sustained yield" in the context of wildlife management. Kwethluk, at 766; SEE ALSO: G. Cook, "The Sustained Yield Principle of Article VIII, § 4," Colloquy on the Natural Resources Article of the Alaska Constitution (WAFLI: 1991).

> The court concludes that the term "sustained yield" is potentially broad enough to include authority in the game board to restrict even subsistence hunting in order to rebuild a damaged game population. However, the board does not have absolute discretion in this area. There must be a balance of minimum adverse impact upon rural residents who depend upon subsistence use of resources and recognized scientific principles of game management. 16 U.S.C. § 3112(1) and (2).
>
> The board having put in place neither a game management plan for the Kilbuck herd nor an articulated and evenly applicable definition of sustained yield, the board and, in its turn, this court have no meaningful standard against which to measure plaintiff's application for a subsistence hunt. The game board appears to have acted not on the basis of a formulate policy, but rather in 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.

Kwethluk IRA Council v State of Alaska, 740 F.Supp. 765, 766-767 (D.Alaska 1990).

It does the State little good for ANILCA to statutorily grant the State the right to reject recommendations on the basis of violation of the sustained yield principle unless the State can first articulate a definition of "sustained yield" for wildlife and fishery management[29] and show that it applies that elusive definition fairly enough and consistently enough to satisfy a reviewing court.

Until the State adequately defines "sustained yield" in the context of wildlife and fisheries management, it is unlikely that any reviewing federal court will defer to State action premised on an unarticulated concept of "sustained yield," applied in an **ad hoc** manner.

Regarding the second of the five alternative reasons, we have discussed, **supra**, the vagueness of the "substantial evidence" standard.

The final three alternative reasons are also quite broad. It would be a mistake, however, to assume that mere recitation by either Board of one of these reasons will suffice to insulate from judicial scrutiny either Board's rejection of a Regional Council's recommendation. The Boards' post-decisional documents will need to comprehensively address the issues presented and must clearly articulate a rational decision.

4. The fourth sentence of proposed AS 16.05.261(h) provides:

The (fourth) final sentence of proposed AS 16.05.261(h) states what the Boards must do in the event they reject a Regional Council recommendation:

> If a recommendation is not adopted by the board, the board shall provide a written statement of the factual basis and reasons for its decision and shall remand the recommendation to the regional subsistence council for further consideration.

This requirement will apply to all recommendations of Regional Councils, regardless of whether or not the recommendation is unanimous.

In addition to this post-decisional document, the necessities of judicial review will require that the Board create an adequate

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[29] c.f. AS 38.04.910(11).

administrative record at the time of its deliberations that demonstrates it has given careful consideration to the Regional Council's recommendation, and considered all of the supporting factual material adduced by the Regional Councils.

C. Conclusion: the impact of the "deference" standard contained in Governor Knowles' proposed AS 16.05.261(h) will primarily be to increase public participation in the fish and game regulatory process and increase ADF&G's workload (providing the Councils with staff support and providing the Boards with staff support).

It seems beyond doubt that the new Regional Council system will allow for increased public participation in the fish and game regulatory process. Whether or not this will be qualitatively superior to the current system, or be cost-effective, is impossible to predict.

Similarly, it is not possible at this time to predict whether the administrative burdens of adequately responding to recommendations from six, separate Regional Councils will eventually overwhelm the Boards with an excess of work that requires fundamental changes to Alaska's system of regulatory Boards.

Under Governor Knowles' proposed AS 16.05.261(h), the Boards are obligated to "consider" the reports and recommendations of the Regional Subsistence Councils. No deference is required for the Councils' reports. Only recommendations are accorded deference.

In my opinion, it is primarily when a Regional Council's recommendations are unanimous that a Board will need to show a meaningful measure of "deference" to a Regional Council recommendation. In those instances, the Board will have to create a defensible administrative record during its deliberations. Afterwards, the Board and staff will need to carefully craft a written decisional document that rationally explains the Board's actions in a manner that will meet federal judicial approval.

The statewide Boards retain full regulatory authority. The reasons enumerated in the third sentence of proposed AS 16.05.261(h) and which will suffice for a Board to reject a Regional Council recommendation are very similar to the reasons which the two Boards presently adduce when they reject a recommendation of a Local Advisory Committee.

The main impact of the "deference" requirement appears to be that

it can serve as a subject of litigation.[30] In order to pre-empt most legal challenges, the Boards will need to spend a great deal of time crafting post-decisional documents explaining their actions.

The Boards' post-decisional documents must be drafted with the knowledge that they may be subjected to judicial review under the broad rubric of "arbitrary and capricious" review, which, as a practical matter, generally will mean the broad concept of "reasonableness."

D. The deference requirement of proposed AS 16.05.261(I)

This short provision provides:

> (I) A regional subsistence council shall give deference to proposals from local governments, tribal councils, and local advisory committees, which identify local subsistence needs and uses, the methods, means, seasons, and other issues related to local subsistence management.[31]

At the outset, we reiterate the vagueness of the concept of "deference." We note, additionally, that when the word "deference" stands alone, unmodified by adjectives, it generally denotes a relatively low level of deference is necessary for compliance.

As a practical matter, it is hard to imagine this provision being provocative of litigation. The principal parties comprising Regional Councils will be the same parties to whom this proposed statute accords deference.

Members of the general public who are unaffiliated with the foregoing entities, and representatives of government agencies, will not be entitled to deference before the Regional Councils.

My opinion is that AS 16.05.261(I) 's a toothless and insignificant provision.

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[30] It is beyond the scope of this memo to assess how, in light of the presence on the Regional Councils of tribal nominees, the deference requirement may affect the issue of tribal sovereignty in Alaska.

[31] It is beyond the scope of this memo to consider the impact on tribal sovereignty in Alaska of this proposal. It should suffice to note that it involves governmental recognition of some role for tribal governments in the fish and game regulatory process.

PLAIN ENGLISH SUMMARY

1. FEDERAL JUDICIAL REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES INVOLVES IMMENSE DISCRETION ON THE PART OF THE INDIVIDUAL REVIEWING JUDGE.[32]

2. THE SCOPE OF JUDICIAL REVIEW OF THE ACTIONS OF FEDERAL AGENCIES IS SO BROAD, AND THE MEASURE OF JUDICIAL DISCRETION IN REVIEWING THOSE DECISIONS IS SO GREAT, THAT IT IS OF LITTLE IMPORTANCE (AND ALSO PROBABLY UNENFORCEABLE) FOR ANILCA § 807 TO DECLARE THAT STATE AND FEDERAL AGENCY DECISIONS SHALL BE GIVEN EQUAL DEFERENCE. IT IS LIKELY THAT COURTS WILL CONTINUE TO ACCORD WHATEVER MEASURE OF DEFERENCE THE JUDGES, IN THEIR RESPECTIVE WISDOM, DEEM APPROPRIATE.

3. REGARDLESS OF THE STATUTORY STANDARD OF REVIEW, AN AGENCY MAY SEEK TO DISGUISE AN ACTION THAT IS BASED ON IMPROPER MOTIVES. THE AGENCY CAN 1) RELY ON PLAUSIBLE REASONS THAT DIFFER FROM ITS ACTUAL, UNSTATED MOTIVES; 2) DISTORT ITS FACT FINDING PROCESS TO ACHIEVE RESULTS IN ACCORD WITH ITS UNSTATED, REAL MOTIVES; OR 3) ENGAGE IN SELECTIVE INSPECTION, INVESTIGATION, AND ENFORCEMENT.[33]

4. WHEN THE SCOPE AND EFFECT OF A STATUTORY LIMIT ON JUDICIAL REVIEW IS AMBIGUOUS, COURTS TYPICALLY STRAIN TO NARROWLY INTERPRET THE LIMIT ON THE SCOPE OF REVIEW.[34] THE PROPOSED AMENDMENT TO ANILCA § 807 DOES NOT APPEAR TO SET UP ANY GENUINE BARRIER TO PENETRATING FEDERAL COURT REVIEW OF STATE AGENCY ACTIONS IMPLEMENTING ANILCA.

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[32] The foremost treatise on administrative law notes that judicial review can, in itself, be a source of excessive discretion.

> "...to the extent that administrative law doctrines have the effect of conferring on reviewing courts discretion to resolve identical cases in different ways, the problem of discretion is simply transferred from agency heads to judges."

K.C. Davis, Pierce. Administrative Law Treatise, § 17.3, p. 106 (3rd ed. 1994).

[33] SEE: Davis, Pierce. Administrative Law Treatise, §17.2, p. 105 (3rd ed. 1994).

[34] SEE: Adamo Wrecking Co. v United States, 434 U.S. 275 (1978); Bowen v Michigan Academy of Family Physicians, 476 U.S. 667 (1986).