SPECIAL SESSION:

SUBSISTENCE

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 5/26/98

FURTHER: Finance

Date of 5-Day Notice: 5/21/98
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 5/27/98

Resources Committee considered SENATE JOINT RESOLUTION NO. 101

Proposing an amendment to the Constitution of the State of Alaska authorizing a priority for subsistence uses of renewable natural resources that is based on place of residence; and providing for an effective date.

and recommends:

[ ] be **replaced** with _____ CS _____(_____)

[ ] adopt **previous** _____ CS _____(_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR# _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
	/		✓		
			✓		
					✓
				✓	
				✓	
CHAIR:		*CHAIR:* Rick Halford		✓	

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
LAW	5/19	X	
GOV	5/26		3.0

[ ] APPROPRIATION -- no fiscal note

***include fiscal notes accompanying Governor's bill**

SENATE JOINT RESOLUTION NO. 101

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SPECIAL SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 5/26/98
Referred: Resources, Finance

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska authorizing a priority for subsistence uses of renewable natural resources that is based on place of residence; and providing for an effective date.

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

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

Section 19. Subsistence. The legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses in the taking of fish and wildlife and other renewable natural resources based on place of residence.

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

* **Sec. 3.** If adopted by the voters at the next general election, the amendment proposed by this resolution takes effect immediately upon certification of the election returns by the

New Text Underlined [DELETED TEXT BRACKETED]

lieutenant governor.

G

FISCAL NOTE No. 1

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SJR 101
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Title: Constitutional Amendment: Subsistence
Sponsor: Rules Committee at the Governor's Request
Requester:

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary Election
Component Serial No.: #22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Dana LaTour — Phone: 465-5347
Division: Division of Elections — Date: 5/26/98
Approved by: Lt. Governor Fran Ulmer — Date: 5/26/98
Agency: Office of the Lieutenant Governor

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FISCAL NOTE No. 2

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SJR 101
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Dept. Affected Law
Title Proposing an amendment to the Constitution . . .
BRU Civil Division
priority for subsistence use of renewable natural resources . .
Component Natural Resources
Sponsor Rules Committee
Requester Governor
Component Serial No. 2212

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This joint resolution would provide for a vote of the people to amend the Constitution of the State of Alaska concerning subsistence uses of renewable resources. The amendment would allow the legislature to establish a priority for those uses based on a person's place of residence.

Passage of the constitutional amendment would have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson
Phone 465-5370
Division Attorney General's Office
Date 5/19/98
Approved by Commissioner Bruce M. Botelho, Attorney General
Date 5/19/98
Agency Department of Law

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(Rev 9/97) 98fnform xls/OMB

SENATE BILL NO. 1001

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SPECIAL SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 5/26/98
Referred: Resources

A BILL

FOR AN ACT ENTITLED

"An Act establishing a priority for subsistence uses of fish and wildlife that is based on place of residence; relating to the management and taking of fish and wildlife for subsistence uses; relating to certain definitions for the fish and game code; delaying the repeal of the current law regarding subsistence use of fish and game; amending the effective date of secs. 3 and 5, ch. 1, SSSLA 1992; and providing for an effective date."

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

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

(a) <u>In areas or communities classified as rural</u> [EXCEPT IN NONSUBSISTENCE AREAS], the Board of Fisheries and the Board of Game shall identify the fish stocks and <u>wildlife</u> [GAME] populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner <u>may</u> [SHALL] provide recommendations to the boards concerning the

stock and population identifications. [THE BOARDS SHALL MAKE IDENTIFICATIONS REQUIRED UNDER THIS SUBSECTION AFTER RECEIPT OF THE COMMISSIONER'S RECOMMENDATIONS.]

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

(b) The appropriate board shall determine whether a portion of a fish stock or **wildlife** [GAME] population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a **fish** stock or **wildlife** population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

(1) if the harvestable portion of the **fish** stock or **wildlife** population is sufficient to provide for all consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those **fish** stocks or **wildlife** populations;

(B) shall adopt regulations that provide for other uses of those **fish** stocks or **wildlife** populations, subject to preferences among beneficial uses; and

(C) may adopt regulations to differentiate among uses;

(2) if the harvestable portion of the **fish** stock or **wildlife** population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those **fish** stocks or **wildlife** populations;

(B) may adopt regulations that provide for other consumptive uses of those **fish** stocks or **wildlife** populations; and

(C) shall adopt regulations to differentiate among consumptive uses that provide for a **priority** [PREFERENCE] for [THE] subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the **fish** stock or **wildlife** population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the **fish** stocks or **wildlife**

populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and —

(4) if the harvestable portion of the **fish** stock or **wildlife** population is not sufficient to provide a reasonable opportunity for **human consumptive** subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses[,] other than **human consumptive** subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or **wildlife** [GAME] population by the subsistence user for human consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the **fish** stock or **wildlife** population; and

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

*** Sec. 3.** AS 16.05.258(c) is repealed and reenacted to read:

(c) The Board of Fisheries and the Board of Game, acting jointly, shall determine by regulation whether communities or areas in the state should be classified as rural and whether communities or areas classified as rural should no longer be classified as rural.

*** Sec. 4.** AS 16.05.258(d) is amended to read:

(d) **The boards may permit subsistence hunting or fishing under the priority in this section only in areas or communities classified as rural.** Fish stocks and **wildlife** [GAME] populations, or portions of fish stocks and **wildlife** [GAME] populations not identified under (a) of this section may be taken only under nonsubsistence regulations.

*** Sec. 5.** AS 16.05.258(e) is amended to read:

(e) Takings and uses of fish and **wildlife** [GAME] authorized under this section are subject to regulations regarding open and closed areas, seasons, methods

and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

* **Sec. 6.** AS 16.05.258(f) is amended to read:

(f) For purposes of this section, "reasonable opportunity"

(1) means an opportunity, **consistent with customary and traditional uses,** [AS DETERMINED BY THE APPROPRIATE BOARD, THAT ALLOWS A SUBSISTENCE USER] to participate in a subsistence hunt or fishery [THAT PROVIDES A NORMALLY DILIGENT PARTICIPANT] with a reasonable expectation of success;

(2) **does not mean a guarantee** of taking of fish or **wildlife** [GAME].

* **Sec. 7.** AS 16.05.258 is amended by adding a new subsection to read:

(g) This section does not require the Board of Fisheries to close non-retention fishing if the board has made a finding that the mortality caused by non-retention fishing does not jeopardize subsistence uses or the conservation of healthy stocks.

* **Sec. 8.** AS 16.05.259 is amended to read:

Sec. 16.05.259. No subsistence defense. In a prosecution for the taking of fish or **wildlife** [GAME] in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses.

* **Sec. 9.** AS 16.05.260 is repealed and reenacted to read:

Sec. 16.05.260. Advisory committees. (a) The Board of Fisheries and the Board of Game may adopt regulations they consider advisable in accordance with AS 44.62 (Administrative Procedure Act) establishing, at places in the state designated by the individual boards, advisory committees to be composed of persons who collectively represent user groups in the area and who are well informed on the fish or wildlife resources of the locality. The boards shall set the number and terms of each of the members of the advisory committees, shall delegate one member of each committee as chairperson, and shall give the chairperson authority to hold public hearings on fish or wildlife matters.

(b) Recommendations from the advisory committees on uses other than subsistence shall be forwarded to the appropriate board for its consideration but if the

Board of Fisheries or the Board of Game chooses not to follow the recommendations of the local advisory committee the appropriate board shall inform the appropriate advisory committee of this action and state the reasons for not following the recommendations.

(c) An advisory committee shall send its recommendations on subsistence uses to the appropriate regional subsistence council. If the regional subsistence council does not adopt the recommendation of the advisory committee, the council shall inform the advisory committee, shall state the reasons, and shall forward the advisory committee recommendation with the council's reasons to the appropriate board.

(d) The commissioner shall delegate authority to advisory committees for emergency closures during established seasons. The commissioner is empowered to set aside and make null and void only opening of seasons set by the advisory committees under this section. The appropriate board shall adopt the necessary regulations governing these closures.

* **Sec. 10.** AS 16.05 is amended by adding a new section to read:

Sec. 16.05.262. Regional subsistence councils. (a) The Board of Fisheries and the Board of Game jointly shall adopt regulations necessary to implement this section, including regulations establishing at least six subsistence resource regions that, taken together, cover the entire state. The number and boundaries of the regions must be sufficient to assure that regional differences in subsistence uses are adequately accommodated.

(b) Each subsistence resource region must be represented by a regional subsistence council with members appointed by the governor. Each regional subsistence council must have 10 members, four of whom shall be selected from nominees who reside in that region of the state submitted by tribal councils in the region, and six of whom shall be selected from nominees submitted by local governments and local advisory committees. Three of these six must be subsistence users who reside in the region of the state and three must be sport or commercial users. Sport and commercial representatives may be residents of any subsistence resource region in the state. The regulations must provide for staggered terms of council members. The maximum term is three years, with no limit on the number of

terms served. A quorum is a majority of the members of a council.

(c) Regional subsistence councils shall strive for consensus, but recommendations must be decided by majority vote.

(d) Each regional subsistence council has the authority to

(1) elect officers and adopt rules of procedure;

(2) hold public meetings on fish and wildlife matters and solicit proposals from the public on subsistence uses;

(3) in consultation with the local fish and game advisory committees in its region and with the department, review, evaluate, and make a recommendation to a board on 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;

(4) comment on sport, personal use, and commercial proposals;

(5) make recommendations concerning permits provided in AS 16.05.330(e) and 16.05.405(g);

(6) submit to the boards, the department, and the secretaries of the United States Departments of the Interior and Agriculture, by November 15 of each year, an annual report, containing the following:

(A) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region, and other fish and wildlife uses that the council identifies;

(B) an evaluation of current and anticipated subsistence needs for use of fish and wildlife populations within the region, and of other fish and wildlife needs that the council identifies;

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

(D) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy; and

(7) perform other duties specified by a board.

(e) Each council shall provide a forum for, and assist its region's local fish and

game advisory committees in, obtaining the opinions and proposals of persons interested in fish and wildlife matters so as to achieve the greatest possible local participation in the decision-making process.

(f) Regulatory proposals submitted to a board relating primarily to subsistence issues, initiated by the public or by a local fish and game advisory committee, must be reviewed by the appropriate regional subsistence council before the board takes action on the proposal.

(g) Regional subsistence councils may meet to develop recommendations on inter-regional proposals and issues.

(h) The appropriate board shall consider the reports and recommendations of the regional subsistence councils and shall give deference to their subsistence recommendations. If the council recommendation is unanimous, there is a presumption in favor of adoption by the board. However, the board may decide not to adopt any recommendation that 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. 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.

(i) A regional subsistence council shall give deference to proposals from local governments, tribal councils, and local advisory committees that identify local subsistence needs and uses and the methods, means, seasons, and other issues related to local subsistence management.

(j) Regional subsistence councils may use a mediation process.

(k) When implementing the provisions of this section, the boards, the regional subsistence councils, and the department shall seek data from, consult with, and make use of the special knowledge of subsistence users. If appropriate to implement the provisions of this section, the department may contract for services with subsistence users and local groups in order to utilize their special knowledge of resources in the region.

(l) The regional subsistence councils shall be adequately financed.

* **Sec. 11.** AS 16.05.330(a) is amended to read:

(a) Except as otherwise permitted in this chapter, without having the appropriate license or tag in actual possession a person may not engage in

(1) sport fishing, including the taking of razor clams;

(2) hunting, trapping, or fur dealing;

(3) the farming of fish, fur, or **wildlife** [GAME]; or

(4) taxidermy.

* **Sec. 12.** AS 16.05.330(c) is amended to read:

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of fish and **wildlife** [GAME]. **To be eligible to take fish or wildlife in a rural community or area using the subsistence priority in AS 16.05.258, a person must be a resident domiciled in that community or area** [THE BOARDS SHALL ADOPT THESE REGULATIONS WHEN THE SUBSISTENCE PREFERENCE REQUIRES A REDUCTION IN THE HARVEST OF A FISH STOCK OR GAME POPULATION BY NONSUBSISTENCE USERS].

* **Sec. 13.** AS 16.05.330 is amended by adding a new subsection to read:

(e) The Board of Fisheries and the Board of Game shall adopt regulations allowing the commissioner to issue permits for the taking of fish and wildlife in order to teach and preserve historic or traditional uses and harvest practices. The permits issued under the regulations adopted under this subsection do not entitle successful applicants to the subsistence priority under AS 16.05.258.

* **Sec. 14.** AS 16.05.405 is repealed and reenacted to read:

Sec. 16.05.405. Taking fish and wildlife by proxy. (a) Subject to regulations adopted by the Board of Fisheries or the Board of Game to implement this section, including regulations relating to or restricting seasons, areas, methods and means, and species, a resident may take fish or wildlife harvested primarily for food on behalf of another person under this section.

(b) Notwithstanding AS 16.05.420(c), a resident holding a valid resident

hunting license may take wildlife on behalf of a person who is blind, has physical disabilities, or is 65 years of age or older if the resident possesses on the resident's person

(1) a document signed by the person on whose behalf the wildlife is taken, stating that the resident possesses the person's hunting license or permanent identification card in order to take wildlife on behalf of that person; and

(2) the person's

(A) resident hunting license issued under AS 16.05.403 or permanent identification card issued under AS 16.05.400(b); and

(B) harvest ticket, tag, stamp, or other document required by law as a condition of taking the wildlife.

(c) Notwithstanding AS 16.05.420(c), a resident holding a valid noncommercial fishing license may take fish on behalf of a person who is blind, has physical disabilities, or is 65 years of age or older if the resident possesses on the resident's person

(1) a document signed by the person on whose behalf the fish is taken, stating that the resident possesses the person's sport fishing license, subsistence fishing permit, personal use fishing permit, or permanent identification card in order to take fish on behalf of that person;

(2) the person's

(A) resident sport fishing license issued under AS 16.05.403 or permanent identification card issued under AS 16.05.400(b);

(B) resident subsistence fishing permit issued under AS 16.05.403; or

(C) resident personal use fishing permit issued under AS 16.05.403; and

(3) all other documents issued to the person that are required by law as a condition of taking the fish.

(d) Subject to applicable regulations of the Board of Fisheries or the Board of Game, a resident who takes fish or wildlife under this section on behalf of another person may take the fish or wildlife only under those conditions that would apply to

the other person if the other person took the fish or wildlife personally.

(e) A resident who takes, or attempts to take, fish or wildlife under this section on behalf of a person may also simultaneously engage in fishing or hunting for the resident's use; however, the resident may not take or attempt to take fish or wildlife by proxy for more than one person at a time. For the purposes of this subsection, a resident is engaged in taking, or attempting to take, fish or wildlife by proxy while the resident has possession of

(1) another person's

(A) license, permit, or identification card and all other documents issued to the person that are required by law as a condition of taking the fish or wildlife being pursued; and

(B) signed document under (b)(1) or (c)(1) of this section; or

(2) fish or wildlife taken on behalf of another person.

(f) A resident who takes fish or wildlife on behalf of another person under this section shall

(1) complete reports relating to the taking of the fish or wildlife as required by the commissioner of fish and game under AS 16.05.370;

(2) deliver all parts of fish and wildlife removed from the field to the person on whose behalf the fish or wildlife was taken within a reasonable time after the fish or wildlife is taken; and

(3) until the fish or wildlife is delivered to the person on whose behalf the fish or wildlife was taken, retain the person's

(A) license or permit and all other documents issued to the person that are required by law as a condition of taking the fish or wildlife; and

(B) signed document required under (b)(1) or (c)(1) of this section.

(g) In addition to the proxy hunting and fishing opportunities authorized by (a) - (f) of this section, the Board of Fisheries and the Board of Game shall adopt regulations to permit a resident who is (1) a member of the family of a resident domiciled in a rural community or area, or (2) domiciled in a rural community or area, to participate in subsistence harvest activities as a proxy for a resident eligible for the

subsistence priority under AS 16.05.258, regardless of the eligible resident's age or physical ability to hunt or fish. A proxy hunter or fisherman who is not part of the eligible resident's family must be domiciled in the area in which the eligible resident lives. The amount of fish or wildlife permitted to be taken for subsistence uses in a rural community or area may not be increased because of proxy hunting or fishing. Fish or wildlife taken by a proxy under this section belongs to the person on whose behalf it was taken, and the majority of the fish and wildlife taken by a proxy must remain in the rural community or area in which it was taken. A person may not give or receive cash remuneration in connection with a proxy harvest. A person who gives a proxy under this section may not participate in the hunt or fishery for which the proxy was given. The proxy hunting and fishing authorized by this section are subject to the limitations and reporting requirements of (d), (e), and (f) of this section. For purposes of this subsection, "family" has the meaning given "family" in the definition of "subsistence uses" in AS 16.05.940.

*** Sec. 15.** AS 16.05.940(2) is amended to read:

(2) "barter" means the exchange or trade of fish or **wildlife** [GAME], or their parts, taken for subsistence uses

(A) for other fish or **wildlife** [GAME] or their parts; or

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

*** Sec. 16.** AS 16.05.940(7) is amended to read:

(7) "customary and traditional" means the noncommercial, long-term, and consistent taking of, use of, **or** [AND] reliance upon fish or **wildlife** [GAME] in a specific area and the [USE] patterns **of taking or use** of that fish or **wildlife** [GAME] that have been established over a reasonable period of time taking into consideration the availability of the fish or **wildlife** [GAME];

*** Sec. 17.** AS 16.05.940(8) is amended to read:

(8) "customary trade" means the limited noncommercial exchange, for **cash, of fish or wildlife or their parts in** minimal **quantities** [AMOUNTS OF CASH], as restricted by the appropriate board[, OF FISH OR GAME RESOURCES]; the terms of this paragraph do not restrict money sales of furs and furbearers;[.]

* **Sec. 18.** AS 16.05.940(11) is amended to read:

(11) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; [DOMICILE MAY BE PROVED BY PRESENTING EVIDENCE ACCEPTABLE TO THE BOARDS OF FISHERIES AND GAME;]

* **Sec. 19.** AS 16.05.940(27) is repealed and readopted to read:

(27) "rural community or area" is a community or area classified by the Board of Fisheries and the Board of Game to be substantially dependent on fish and wildlife for nutritional and other subsistence uses;

* **Sec. 20.** AS 16.05.940(30) is amended to read:

(30) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF THE STATE] for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

* **Sec. 21.** AS 16.05.940(31) is amended to read:

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

* **Sec. 22.** AS 16.05.940(32) is amended to read:

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

* **Sec. 23.** AS 16.05.940(33) is amended to read:

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

or in any manner capture or kill fish or **wildlife** [GAME];

*** Sec. 24.** AS 16.05.940 is amended by adding new paragraphs to read:

(37) "wildlife" has the same meaning given "game" in this section; wildlife may be classified by regulation as big game, small game, fur bearers, or other categories considered essential for carrying out the intention and purposes of AS 16.05 - AS 16.40;

(38) "wildlife population" has the meaning given "game population" in this section.

*** Sec. 25.** Section 12, ch. 1, SSSLA 1992, as amended by sec. 3, ch. 68, SLA 1995, sec. 3, ch. 130, SLA 1996, and sec. 1, ch. 109, SLA 1997 is amended to read:

Sec. 12. Sections 3 and 5 of this Act take effect October 1, **1999** [1998].

*** Sec. 26.** Sections 3 and 5, ch. 1, SSSLA 1992 are repealed.

*** Sec. 27.** Section 12, ch. 1, SSSLA 1992, as amended by sec. 3, ch. 68, SLA 1995, sec. 3, ch. 130, SLA 1996, sec. 1, ch. 109, SLA 1997, and sec. 25 of this Act, is repealed.

*** Sec. 28.** TRANSITION: AREAS AND COMMUNITIES CLASSIFIED AS RURAL. All communities and areas outside the nonsubsistence areas established by regulations adopted by the Board of Fisheries and the Board of Game and effective on May 15, 1993, are classified as rural for the purpose of this Act. The classifications made under this section are subject to the provisions of AS 16.05.258(c) as repealed and reenacted by sec. 3 of this Act.

*** Sec. 29.** TRANSITION: REGULATIONS. Notwithstanding sec. 31 of this Act, the Board of Fisheries, the Board of Game, and the Department of Fish and Game may immediately proceed to adopt regulations to implement this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date provided in sec. 31 of this Act.

*** Sec. 30.** Sections 25 and 29 of this Act take effect immediately under AS 01.10.070(c).

*** Sec. 31.** Except as provided in sec. 30 of this Act, this Act takes effect on the effective date of an amendment to the Constitution of the State of Alaska, approved by the voters in 1998, authorizing a priority for subsistence uses of renewable natural resources that is based on place of residence.

FISCAL NOTE No. 1

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 100/
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Dept. Affected: Fish and Game
Title: Subsistence Use of Fish and Wildlife
BRU: Administration and Support
Component: Advisory Committees
Sponsor: Rules Committee
Requester: Governor Knowles
Component Serial No.: 2231

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	256.6	256.6	256.6	256.6	256.6	256.6
Travel	488.0	210.7	210.7	210.7	210.7	210.7
Contractual	24.0	16.0	16.0	16.0	16.0	16.0
Supplies	1.0	1.0	1.0	1.0	1.0	1.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**769.6**	**484.3**	**484.3**	**484.3**	**484.3**	**484.3**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	577.2	363.2	363.2	363.2	363.2	363.2
1003 GF Match						
1004 GF	192.4	121.1	121.1	121.1	121.1	121.1
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**769.6**	**484.3**	**484.3**	**484.3**	**484.3**	**484.3**

Estimate of any current year (FY98) cost: 0.0

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	4	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

These are estimated additional costs for staff, regional council members, and advisory committee members to attend meetings of the 10 new regional councils and to attend additional Board of Fisheries and Board of Game meetings. Also included is staff support time for the twice-yearly regional council meetings. Four part-time seasonal positions will be created and five seasonal positions will be expanded. Assumptions include one additional Joint Board meeting, Fish Board meeting, and Game Board meeting in the first year to establish the regional councils and perform regulatory reviews, and an additional regional council meeting for each region in the first year for organization and orientation. By funding source, 75% of increased costs will be federally funded, 25% will be funded by general funds.

Prepared by: Diana Cote, Exec. Director — Phone: 465-6095
Division: Boards Support Section — Date: 5/21/98
Approved by: Commissioner Frank Rue — Date: 5/21/98
Agency: Department of Fish and Game

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FISCAL NOTE No. 2

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Dept. Affected Law
Title An Act establishing a priority for subsistence uses of fish and wildlife that is based on place of residence ...
BRU Civil Division
Component Natural Resources
Sponsor Rules Committee
Requester Governor
Component Serial No. 2212

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation is the companion bill to the joint resolution calling for a statewide vote on a constitutional amendment allowing a subsistence priority. The bill changes Alaska law to mirror the main feature of the subsistence provisions of the federal Alaska National Interest Lands Conservation Act in giving rural residents of Alaska a priority for subsistence uses of fish and wildlife on federal land. In addition, the bill would establish a system of regional councils to ensure Alaskans can participate in decision-making that affects fish and wildlife subsistence resources near where those Alaskans live; clarifies definitions of several terms in the subsistence statutes, including "customary and traditional"; and enables a state resident to hunt and fish for subsistence resources while holding a proxy given by a family member or other person who qualifies for the subsistence priority under state law.

Passage of this bill would have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson
Division Attorney General's Office
Phone 465-5370
Date 5/19/98

Approved by Commissioner Bruce M. Botelho, Attorney General
Agency Department of Law
Date 5/19/98

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FISCAL NOTE No. 3

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Dept. Affected Fish and Game
Title Subsistence Use of Fish and Game
BRU Commercial Fisheries
Component Headquarters Fish Management
Sponsor Rules
Requester Governor
Component Serial No. 2171

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	48.5	48.5	48.5	48.5	48.5	48.5
Travel	13.6	13.6	13.6	13.6	13.6	13.6
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	62.1	62.1	62.1	62.1	62.1	62.1
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	46.6	46.6	46.6	46.6	46.6	46.6
1003 GF Match						
1004 GF	15.5	15.5	15.5	15.5	15.5	15.5
1005 GF/Program Receipts						
1037 GF/Mental Health						
1024 Fish and Game Fund						
TOTAL	62.1	62.1	62.1	62.1	62.1	62.1

Estimate of any current year (FY98) cost: 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

ANALYSIS: *(Attach a separate page if necessary)*

No new positions are being requested. However, funding for 10 months of staff time utilizing existing permanent/seasonal PCNs is required. A list of assumptions used is attached as page 2.

Prepared by Bob Clasby Phone 4210
Division Commercial Fisheries Management & Development Date 5/20/98
Approved by Commissioner Frank Rue Date 5/21/98
Agency Fish and Game

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#3
SB 1001

Assumption

FISCAL NOTE Continuation
Title: Subsistence Use of Fish and Game
Commercial Fisheries Management and Development Division

Assumptions used for Subsistence Use of Fish and Game Bill cost calculations

1 Assume 10 subsistence councils.
2 Each council will meet twice yearly.
3. Council meetings will consume 1 week of staff time for travel, meeting, and preparation time.
4 Proposals generated by each council meeting will consume 1 week of staff time for analysis.
5 No new positions are being requested, but staff time amounting to 10 months will be required; FB III step A for 10 months = $48,500.
6 Per diem costs will be $342 per meeting times 18 meetings = $6, 156.
7 Transportation costs are outlined below:

Region 1 – Southeast (in Ketchikan) Juneau to Ketchikan RT 2X = $532
Region 2 – Southcentral (in Glennallen) Anchorage to Glennallen RT 2X mileage =$200
Region 3 – Kodiak/Aleutian Islands (in Kodiak) – no travel required = $0
Region 4 – Bristol Bay (in Dillingham) Anchorage to Dillingham RT 2X $904
Region 5 – Yukon/Kuskokwim Delta (in Bethel) Anchorage to Bethel RT 2X = $852
Region 6 – Western Interior (in Galena) Fairbanks tc Galena RT 2X - $1,700
Region 7 – Seward Peninsula (in Unalakleet) Anchorage to Unalakleet RT 2X = $1,200
Region 8 – Northwest Arctic (in Kotzebue) Anchorage to Kotzebue RT 2X = $800
Region 9 – Eastern Interior (in Minto) Fairbanks to Minto RT 2X = $226
Region 10 – North Slope (in Barrow) Anchorage to Barrow RT 2X = $1,025
Total = $7,439

FISCAL NOTE No. 4

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Title: Subsistence Use of Fish and Wildlife
Sponsor: Rules Committee
Requester: Governor Knowles

Dept. Affected: Fish and Game
BRU: Administration and Support
Component: Boards of Fisheries and Game
Component Serial No.: 2048

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	6.7	6.7	6.7	6.7	6.7	6.7
Travel	145.0	25.7	25.7	25.7	25.7	25.7
Contractual	32.4	7.2	7.2	7.2	7.2	7.2
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**184.1**	**39.6**	**39.6**	**39.6**	**39.6**	**39.6**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	138.1	29.7	29.7	29.7	29.7	29.7
1003 GF Match						
1004 GF	46.0	9.9	9.9	9.9	9.9	9.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**184.1**	**39.6**	**39.6**	**39.6**	**39.6**	**39.6**

Estimate of any current year (FY98) cost: 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

ANALYSIS: *(Attach a separate page if necessary)*

These are estimated additional costs for the Board of Fisheries and Board of Game to implement the regional council system. Included are costs for additional board meeting days for the Joint Board, Board of Fisheries, and Board of Game. Additional staff time is accomplished by extending two seasonal positions; no new positions will be created. Assumptions include one additional Joint Board meeting, Fish Board meeting, and Game Board meeting in the first year to establish the regional councils and perform regulatory reviews. We estimate the respective boards will add a total of eight days to their current annual meeting schedules to accommodate the new system. By funding source, 75% of the increased costs will be federally funded, 35% will be funded by general funds.

Prepared by: Diana Cote, Exec. Director — Phone: 465-6095
Division: Boards Support Section — Date: 5/21/98
Approved by: Commissioner Frank Rue — Date: 5/21/98
Agency: Department of Fish and Game

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FISCAL NOTE

No. 5

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Title: Subsistence Use of Fish and Wildlife
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Fish and Game
BRU: Subsistence
Component: Subsistence Field Offices
Component Serial No.: 483

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	103.6	103.6	103.6	103.6	103.6	103.6
Travel	11.8	11.8	11.8	11.8	11.8	11.8
Contractual	2.5	2.5	2.5	2.5	2.5	2.5
Supplies	0.6	0.6	0.6	0.6	0.6	0.6
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**118.5**	**118.5**	**118.5**	**118.5**	**118.5**	**118.5**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	88.9	88.9	88.9	88.9	88.9	88.9
1003 GF Match						
1004 GF	29.6	29.6	29.6	29.6	29.6	29.6
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**118.5**	**118.5**	**118.5**	**118.5**	**118.5**	**118.5**

Estimate of any current year (FY98) cost: 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

ANALYSIS: *(Attach a separate page if necessary)*

These are the estimated additional costs of attending twice-yearly meetings of 10 new regional subsistence councils by one staff person at a Subsistence Resource Specialist II level, plus the staff time for reviewing and commenting on fish and game proposals developed and/or deliberated by the new regional subsistence councils using existing information. The Division will deal with the largest number of proposals (both fish and game proposals), leading to greater staff time costs compiling responses compared with other department divisions. The Division is called on to provide the basic information on customary and traditional use patterns and harvest amounts necessary for subsistence uses. Assumptions: Additional staff time (.825 months per meeting) is accomplished by extending seasonal PCNs; no new positions will be created. Four days per diem is expended per meeting. By funding source, 75% federal, 25% GF. Costs do not reflect additional expenditures in updating subsistence information (collection, analysis, and presentation of updated subsistence harvest and use information) required by the councils and boards for making informed decisions.

Prepared by: Robert J. Wolfe, Research Director — Phone: 465-4147
Division: Subsistence — Date: 5/21/98
Approved by: Frank Rue, Commissioner — Date: 5/21/98
Agency: Alaska Department of Fish and Game

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FISCAL NOTE No. 6

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date (Note if correction)
Dept. Affected: Fish and Game
Title: Subsistence Uses of Fish and Game
BRU: Wildlife Conservation
Component: Wildlife Conservation
Sponsor: Rules Committee
Requester: Governor
Component Serial No.: 473

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	87.1	88.0	88.9	89.8	90.7	91.6
Travel	20.6	18.5	18.5	18.5	18.5	18.5
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**107.7**	**106.5**	**107.4**	**108.3**	**109.2**	**110.1**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (1024)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	107.7	106.5	107.4	108.3	109.2	110.1
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other -- F&G Fund (1024)						
TOTAL	**107.7**	**106.5**	**107.4**	**108.3**	**109.2**	**110.1**

Estimate of any current year (FY98) cost: 0.0

POSITIONS

Full-time	1	1	1	1	1	1
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

The estimated costs of representing the division at and coordinating with regional councils and the expanded Game Board meeting schedule are in addition to funds currently expended working with federal subsistence regional advisory councils.

Assumptions: (1) Additional staff time (10 days/each regional council meeting) will be offset by extending seasonal PCNs; (2) A project coordinator (Range 18) will be hired to work with the board and division staff on subsistence issues; (3) Additional travel costs will be incurred for area staff to attend regional council meetings (6 staff for 6 days annually) and division staff to attend expanded Game Board meetings (3 staff for 19 days each in FY99 and for 14 days each in FY00).

Prepared by: Wayne Regelin, Director — Phone: 465-4190
Division: Wildlife Conservation — Date: 5/19/98
Approved by Commissioner: Carol Brice for — Date: 5/21/98
Agency: Alaska Department of Fish and Game

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FISCAL NOTE No. 7

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Bill Version: SB 1001
(S) Publish Date: 5-26-98

Revision Date
Title: Subsistence Use of Fish and Game
Sponsor: Rules
Requester: Governor

Dept. Affected: Fish and Game
BRU: Sport Fish
Component: Sport Fish
Component Serial No.: 464

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	48.5	48.5	48.5	48.5	48.5	48.5
Travel	16.8	16.8	16.8	16.8	16.8	16.8
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**65.3**	**65.3**	**65.3**	**65.3**	**65.3**	**65.3**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	49.0	49.0	49.0	49.0	49.0	49.0
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1024 Fish and Game Fund	16.3	16.3	16.3	16.3	16.3	16.3
TOTAL	**65.3**	**65.3**	**65.3**	**65.3**	**65.3**	**65.3**

Estimate of any current year (FY98) cost: 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

ANALYSIS: *(Attach a separate page if necessary)*

No new positions are being requested. However, funding for 10 months of staff time utilizing existing permanent/seasonal PCNs is required. A list of assumptions used to calculate costs is attached as page 2.

Prepared by: Kevin Delaney
Division: Sport Fish
Phone: 465-4180
Date: 5/21/98

Approved by Commissioner: Ceon Bruce for
Agency: Fish and Game
Date: 5/21/98

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Assumptions used for Subsistence Bill cost calculations:

1. Assume 10 subsistence councils.
2. Each council will meet twice yearly.
3. Council meetings will consume 1 week of staff time for travel, meeting, and preparation time.
4. Proposals generated by each council meeting will consume 1 week of staff time for analysis.
5. No new positions are being requested, but staff time amounting to 10 months will be required: FB III step A for 10 months = **$48,500**
6. Per diem costs will be $342 per meeting times 20 meetings = **$6,840**
7. Transportation costs are outlined below:

- Region 1 – Southeast (in Ketchikan) Juneau to Ketchikan RT 2X = $532
- Region 2 – Southcentral (in Glennallen) Fairbanks to Glennallen RT 2X mileage = $250
- Region 3 – Kodiak/Aleutian Islands (in Kodiak) Anchorage to Kodiak RT 2X = $908
- Region 4 – Bristol Bay (in Dillingham) Anchorage to Dillingham RT 2X = $904
- Region 5 – Yukon/Kuskokwim Delta (in Bethel) Fairbanks to Bethel RT 2X = $1,270
- Region 6 – Western Interior (in Galena) Fairbanks to Galena RT 2X = $1,700
- Region 7 – Seward Peninsula (in Unalakleet) Fairbanks to Unalakleet RT 2X = $1,670
- Region 8 – Northwest Arctic (in Kotzebue) Fairbanks to Kotzebue RT 2X = $1,540
- Region 9 – Eastern Interior (in Minto) Fairbanks to Minto RT 2X = $226
- Region 10 – North Slope (in Barrow) Fairbanks to Barrow RT 2X = $1,000
- Total = **$10,000**

SUBSISTENCE MYTHS

May 6, 1998

1) ***Amending the State Constitution will return subsistence management to the Pre-McDowell period, where the state had implemented a subsistence priority for almost 10 years and no problems existed.***

The rural subsistence priority in state law was established in 1986. Between then and the McDowell decision in 1989, there were very few regulations implementing the state law. Most subsistence regulations were developed only when a crisis developed and the Boards were forced to deal with the situation.

The Fisheries Boards, for instance, adopted very few regulations either identifying customary and traditional uses or providing for subsistence preferences as required by federal law. Certainly, the number of regulations in existence then were minuscule in comparison to those in place today.

There were a number of state court cases initiated prior to 1989, many advocating more specific subsistence priorities. The vast majority of these cases were dealt with by specific board action or were eventually declared moot due to the McDowell decision.

Since 1989, numerous federal and state court decisions have been issued, which makes returning to the pre-McDowell period virtually impossible. A simple rural preference would require myriad changes to state and federal regulations in order to satisfy the complex web of post-McDowell requirements. For instance, the state will have to effectively deal with the effects of the Bobby case which essentially interprets federal law to provide a subsistence priority at all times. It also requires elimination of all competing uses before restricting subsistence uses, and it establishes precedent for subsistence regulations which could include no closed seasons, no bag limits and no restrictions on methods and means.

If the Ninth Circuit Court of Appeals addresses fisheries issues as it did in the Quinhagak case, we can logically expect similar regional and statewide conflicts over subsistence taking of all fisheries including king salmon, cohos, steelhead, reds, pinks, chums and all fresh water fisheries. The state Fisheries Board will be forced to finally address many C & T fisheries uses which they have conveniently ignored.

It is only logical to conclude that the situation would not be at all like that which existed before the McDowell decision. It is an attempt to dupe the public by implying that all of the problems can be eliminated by simply amending the State Constitution and returning to state management prior to 1989.

2) The subsistence priority in ANILCA applies only in times of shortage.

Nothing contained in Title VIII of ANILCA restricts the rural subsistence priority to periods of shortage of fish and game resources. In fact, federal case law and a 1992 U.S. Interior Department Solicitor's opinion has interpreted ANILCA to mean that a rural priority exists any time there are restrictions on harvest. Of course, there are seasons and bag limits—which mean restrictions—on every stock and population in the state. Thus, under federal law, the priority exists at all times.

Unlike federal law, HB 406 does not apply a preference for subsistence until a shortage exists. In other words, if there is ample resource to provide a reasonable opportunity to harvest for all consumptive uses, there is no reason to apply the preference.

3) The federal government will take over management on December 1, 1998. Amending the State Constitution will avert a federal takeover.

The federal government has managed the subsistence taking of wildlife on federal lands within Alaska since 1990, shortly after the rural preference was stricken from state law. In addition, Senator Stevens and the Interior Department require that an entire package be passed to avoid federal management. That package includes not only a constitutional amendment, but changes to state law as well. And ultimately, authority rests with the Secretary of Interior to determine whether the State has done enough to "comply" with the requirements of ANILCA in order to avert federal takeover.

Finally, the recently added Stevens amendments also grant the Secretary new authority to bring a judicial action himself to enforce the provisions of ANILCA against the state.

4) The state must pass a constitutional amendment to provide a subsistence preference.

The McDowell court made it abundantly clear that the state may provide a subsistence preference to some Alaskans and not others. It simply ruled that one's place of residence cannot constitutionally be the qualifying criterion. The court stated: "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." Therefore, it is not necessary to use a rural preference scheme—which would require a constitutional amendment—to provide a subsistence preference in Alaska.

HB 406 is one approach which would afford a subsistence preference to true subsistence users based on customary and traditional use, and which would not require a constitutional amendment (See Myth # 21).

5) ***The state must comply with ANILCA to avoid a federal takeover.***

Congress can amend the federal statute to provide a fair and equitable approach to subsistence in Alaska. Alaskans have been told repeatedly by Interior Secretary Babbitt and Senator Stevens that they must amend the Alaska Constitution to prevent federal takeover. The fact is that we must amend the Constitution only if Babbitt and Stevens continue to force that upon us. It is their decision that mandates a constitutional amendment—not any other procedural barriers. The solution to this dilemma is only as narrow as federal leaders make it.

6) ***The Task Force Proposal returns effective management to the state. Once the state has amended its constitution, the federal government will leave the state alone and allow it to manage its own resources.***

Although the Governor's Subsistence Task Force proposal does afford the state the opportunity to assume subsistence management on federal lands in Alaska, it does not return "effective" management to the state. It will primarily extend the provisions of a bad federal law to all existing state and private lands and waters. Any aggrieved subsistence user will have direct access to the federal courts and, most likely, will be joined and supported by the Department of Interior in any court action. The result will be continued meddling by the federal courts and consistent second guessing of state management actions by federal bureaucrats--essentially state implementation of a federal law.

7) ***ANILCA cannot be amended.***

ANILCA has been amended about 30 times since its inception. If Congressional leaders don't try, it won't be changed. Note that the most recent sweeping ANILCA changes occurred in the Senate Appropriations Committee virtually without facing any opposition.

In addition, presently there is no money available for Interior subsistence regulations in Alaska because of a moratorium placed on their implementation budget by our senior senator. If the federal government does take over, it can only do so if millions of dollars are appropriated through the same Appropriations Committee.

8) ***A subsistence priority is necessary for survival of some Alaskans.***

No one in Alaska is faced with a life or death situation based on access to a subsistence priority for harvesting fish and wildlife. Numerous programs throughout the state assure that taking of fish and wildlife is not necessary for survival. There are

recognized varied dependencies on fish and wildlife throughout the state, however, which contribute significantly to the life styles and economies of Alaskans.

Often forgotten are the ample opportunities under normal non-subsistence regulations to harvest fish and wildlife for food. For example, in many coastal communities most of the salmon taken for subsistence purposes are taken in the process of commercial fishing. Similarly, ordinary hunting and fishing regulations in a typical rural Alaskan area could provide a family with thousands of pounds of fish and game each year—more than enough to exist off of exclusively. The subsistence law merely provides a preference, not an exclusive right to take at all times or a guarantee of success.

9) ***The Task Force Proposal contains mandatory linkage language tying a constitutional amendment to ANILCA changes.***

Under the Stevens amendments and the Task Force proposal, ANILCA amendments are not effective unless the state changes its constitution, but the reverse is not true. Nothing in the proposed constitutional amendment requires that specific ANILCA changes be made and remain in effect after the state passes a constitutional amendment.

Once changed, the state has no particular guarantee that ANILCA won't be amended afterward. For instance, several critical ANILCA amendments have not been addressed by either the Stevens amendments or the Task Force proposal—like the provisions relating to federal court oversight and the definition of 'public lands.'

10) ***The federal government has the authority to take over all fisheries management in Alaska.***

This is untrue. The Alaska Supreme Court ruled in the Totemoff case that "ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in navigable waters." ANILCA has been held by the federal courts to give the federal agencies management authority over subsistence uses on federal public lands in Alaska when the state is out of compliance with federal law. It does not, however, grant any authority to mange any other uses, including sport, personal use, and commercial.

Even in Katie John, the federal courts ruled that in some federal reserved waters the federal government may manage subsistence uses. The case has been remanded back to the trial court for a full determination of which bodies of water contain such a federal reserved water right. Until that determination is made, there is no right to manage under a reserved water right. Virtually no reserved water rights have been adjudicated in Alaska. Until such right is adjudicated, it simply does not exist.

Even taking the federal decision as correct (which again is contrary to Alaska Supreme Court rulings, and the appeal of which was dropped by Governor Knowles),

reserved water rights do not include the right to manage fish and game use. The law is clear on this point, and the asserted authority to manage fish and game under reserved water rights is completely unprecedented and contrary to law.

It has further been argued that *Kleppe v. New Mexico* clarifies that through the federal Property Clause, the federal government has carte blanche authority to manage all fish and game on lands and waters in Alaska. The *Kleppe* case upheld Congress' authority under the Property Clause of the U.S. Constitution to specifically regulate, protect and manage wild burros and horses on federal public lands.

The decision does not grant unlimited pre-emption of state jurisdiction over fish and wildlife on federal public lands. In fact, *Kleppe* suggests that Congress may exceed its powers under the Property Clause where a federal action goes so far as to establish exclusive federal jurisdiction over the public lands in a state. In December 1998, the Department of Interior is poised to do exactly that in Alaska.

Furthermore, the *Kleppe* Court specifically refused to address the issue of the permissible extent of federal authority to state and private lands and waters. The case does not authorize federal intrusion into the traditional state realm of management over private and state lands and waters.

11) Regional subsistence councils are merely advisory.

Under ANILCA, the Regional Advisory Councils' recommendations may be rejected only if the recommendations are not supported by substantial evidence, violate recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. This language has been interpreted by the Department of Interior Solicitor to mean that the Boards must adopt the recommendations in virtually every case. As a result, the Federal Subsistence Board has in fact adopted virtually every recommendation put forth by the Regional Councils.

The Task Force Proposal goes one step further by mandating that the Regional Councils' recommendations be given full deference by the Board. HB 406 provides that the Regional Councils' recommendations may be rejected if the Board feels they are contrary to sound public policy.

12) The Stevens amendments overturned the Katie John case.

The Katie John case, in direct contravention to the Alaska Supreme Court in Totemoff, found that "public lands" in ANILCA—which are the lands to which the statute applies—include navigable waters in which the federal government holds a reserved water right. Since that decision, the federal government has treated Alaska as though it holds a reserved water right in virtually every water where a salmon swims.

The Stevens amendments redefined "federal lands," which is irrelevant to the issue addressed in Katie John, and therefore does nothing to affect the validity of that decision. To the contrary, the Stevens amendments added a new provision not even contained in the Task Force Proposal which validates the Katie John case as good law. In other words, if Alaska changes its constitution and complies with ANILCA, we will have effectively put our stamp of approval on the federal decision in Katie John and have forever given up the right to challenge the federal government's authority to pre-empt and manage our fisheries.

13) The Stevens amendments to ANILCA match those proposed by the Task Force.

In fact, significant additions to the Task Force Proposal are included in the Stevens amendments, which create further doubt and controversy. For instance, as mentioned above, the Stevens amendments added two provisions which effectively recognize and validate two important federal decisions, Katie John and Babbitt. Taken together, hose two cases have done more damage to Alaska's sovereign management authority over its own fish and game than any other court cases in history. Through them, the Interior Department must manage subsistence in Alaska, and the jurisdiction is extended to Alaska's navigable waters. The Task Force did not address the issues, but the Stevens amendments added them.

Additionally, the Stevens amendments add a provision by which the Secretary of Interior may unilaterally bring an action to enforce the terms of ANILCA against Alaska.

The amendments also broaden the federal courts' authority to declare a state agency action invalid. Specifically, Section 807(b), as amended, authorizes courts to invalidate any state agency action that is "not in accordance with law." That additional language was added to the Task Force Proposal by Senator Stevens in PL 105-83.

The Stevens amendments add a section authorizing co-management arrangements, another provision not contemplated by the Task Force Proposal.

14) Only two villages will qualify for a subsistence preference under HB 406.

The State Department of Fish and Game has asserted that only two villages will qualify for subsistence under HB 406. The assertion is an absurd misinterpretation of the proposed law. In fact, it is estimated that between 150 and 180 villages are likely to be afforded an immediate presumption in favor of the preference under HB 406.

Unlike the Task Force proposal or ANILCA, individuals living anywhere may overcome the presumption against them if they are able to meet the Boards' qualification criteria established in HB 406. The preference is based on a customary and traditional dependence on subsistence resources and the demonstrated importance

of subsistence harvested fish and game in the economies of the communities. The Bill is designed to protect the "true subsistence user." For instance, it is immediately evident that more Alaska Natives are likely to qualify for subsistence under HB 406 than under an urban-rural classification scheme.

15) HB 406 will be impossible to administer.

It is acknowledged that providing constitutional guarantees to every resident of Alaska may create additional costs and inconveniences to the agencies. It is a questionable public policy that sacrifices public rights for agency conveniences. It is debatable, however, whether the administrative costs and difficulties will even remotely approach those expressed by the openly antagonistic state administration.

There is a reasonable argument that the state will spend considerably less on litigation costs if a subsistence program is implemented that fits within the confines of our existing State Constitution and provides a subsistence preference for those that the public believes are truly dependent on the resources.

The costs of administration of HB 406 are also greatly inflated by the Department of Fish and Game and the Department of Law. For instance, the Department of Law projects that eight cases will be appealed to the Supreme Court the first year and six per year thereafter. A perpetual level of appeal to the State Supreme Court seems highly unlikely.

The Subsistence Division has estimated costs of over $2.5 million to administer the permit system associated with the individual qualifications mechanism embodied in HB 406. They project an annual processing requirement of 120,000 permit applications annually. In contrast, the Division of Wildlife Conservation processes 10,000 to 12,000 Tier II permit applications annually for the Nelchina caribou hunt. The division is required to score each application, computerize the applications and issue each permit. The costs are estimated to be between $30,000 to $50,000 annually. Even if the Division of Wildlife Conservation costs were multiplied by 10, it adds up to only $500,000 annually.

Under HB 406 it is anticipated that a cooperating state agency can competently administer the non-presumptive applicants by requiring a simple qualifying affidavit to be signed prior to permitting, not unlike the current Permanent Fund Dividend applications.

Any additional expense to be incurred through application of HB 406 must be read in context of a little known provision contained in Title VIII of ANILCA. The statute specifically provides for reimbursement by the federal government to Alaska for subsistence management on federal lands up to $5 million. Unfortunately, the State of Alaska has never received more than $1 million for management.

16) The presumption method suggested by HB 406 is unconstitutional.

In 1992, an Alaska Attorney General's Opinion was issued under then-Attorney General Charlie Cole, relating to the constitutionality of a community-based rebuttable presumption. The opinion concluded that the rebuttable presumption system would not violate the equal access provisions of the Alaska Constitution. The current Attorney General's office has argued that like the 'proximity' provision challenged in the Kenaitze case, this provision would violate the state constitution.

It is likely the rebuttable presumption system would not be found to violate the Alaska Constitution's equal access provisions. Under the terms of HB 406, where one lives ultimately has no bearing on whether one qualifies for the preference. All Alaska residents, regardless of where they live, may qualify for subsistence by meeting the exact same standards of dependence. Place of residence is not a factor-as it was in the Kenaitze and McDowell cases-to be considered in assessing one's ultimate ability to qualify. The residence criterion is merely an administrative hurdle, and it does not rise to the level of creating an equal access challenge.

17) State and private lands are protected if we comply with federal law and adopt a constitutional amendment.

If the state adopts a constitutional amendment and complies with federal law, all lands and waters in Alaska—including state and private—will be managed according to the provisions of ANILCA. If, on the other hand, the state does not comply and instead passes a law like HB 406, its equitable provisions would apply to more than 150 million acres of land and untold navigable and non-navigable waterways—even if the federal government takes over under ANILCA.

As an aside, it should be noted that the proposed regulations make it clear that the Interior Department intends to inappropriately exercise extra-territorial jurisdiction, effectively "reaching out" from its federal land jurisdiction onto state and private lands and waters where it deems appropriate. If and when it does so, the Alaska Department of Law will be obligated to challenge each invalid pre-emption. Litigation will undoubtedly ensue, ultimately to be resolved in the United States Supreme Court, where the Katie John case left off.

18) The Task Force Amendment is merely permissive; the state legislature will still be free not to impose a rural priority if it chooses.

If the Legislature fails to pass a rural preference in statute according to the permissive constitutional amendment, Alaska will continue to be out of compliance with ANILCA, and will therefore still face federal takeover. Similarly, if the state passes a rural preference it will not be free to amend such a preference in the future, as it will again be deemed out of compliance. Further, any future changes made to or interpretations of ANILCA will require matching changes in state law, or we will

again be deemed out of compliance, thus putting the State at the mercy of Congressional and judicial whim.

There is ultimately little practical difference between a permissive and a mandatory rural preference amendment to the Alaska Constitution.

19) The state subsistence law, which allows equal access for all subsistence users, has failed to provide for the subsistence needs of Alaskans.

As the Department of Fish and Game has stated in public hearings on this topic, subsistence users have not been denied any of their subsistence needs under state law. Yet the continuing cry is for more subsistence access. It is simply a fact that the current state law has provided the resources to those who are most heavily dependent upon them.

20) A rural priority provides subsistence resources to those who need it most.

Available census data indicate that some of the most needy communities are categorically excluded from participating in subsistence harvesting. At the same time, some of the richest and best off communities in the state qualify for subsistence down to the last member of the community. Yet one of the primary purposes of ANILCA was ostensibly to provide adequate protection for the Native and non-Native subsistence needs throughout Alaska.

In addition, many have argued that ANILCA is the fulfillment of promises to Native Alaskans made in ANCSA and other legislation to provide for Native subsistence needs. Yet ANILCA categorically excludes over one-third of the Natives living in Alaska today from a subsistence priority.

May 20, 1998

To: Tom McKay, Chairman
Republican Party of Alaska

Under this cover letter is the booklet "An Examination of U.S. Supreme Court Decisions and Other Authorities on Management of Fish and Wildlife in Alaska" which may shed more light on the subsistence issue. I believe it to be well-documented and authenticated. Its main purpose is to further educate the public.

How the Legislature and even the Governor's task force on the subsistence issue would have handled any new information provided in this booklet may well be forged in the special session of the State Legislature next week. However, people I have spoken with who have read the document, agree that the only permanent solution is for the issue to go before the Federal Supreme Court. That would require a "stay" of the federal takeover of fish and game management in the state.

Although reading this document may inspire several different conclusions, it is, nevertheless, important and interesting reading.

Sincerely,

Hugh B. Fate, Jr., DMD
Vice-Chair
Republican Party of Alaska

AN EXAMINATION OF FEDERAL AUTHORITY TO MANAGE FISH AND GAME IN ALASKA

I. INTRODUCTION

The United States Government threatens Alaska with a takeover of fish and wildlife "management" on Federal public lands, in certain navigable streams and eventually on all lands and in all waters in Alaska, unless Alaskans amend their Constitution and install State laws complying with Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA").[1]

The Federal Government claims that, by virtue of the Property Clause of the U.S. Constitution,[2] certain provisions of Title VIII of ANILCA, and by certain 1995 determinations of the Ninth Circuit Court of Appeals in *Alaska v. Babbit*,[3] the Secretary of the Department of Interior has the authority to allocate wildlife on Federal public lands and to allocate fish harvest in Alaska's navigable waters in order to provide for a subsistence priority for "rural" Alaska residents. Title VIII of ANILCA applies only to fish, wildlife, lands and waters in Alaska. No such Federal demands are made of any other State.

The Alaska Supreme Court has ruled that State compliance with Title VIII of ANILCA violates the Alaska Constitution. The State cannot discriminate against one class of its citizens in favor of another.[4]

Before attempting to craft a "solution" to the U.S. Government vs. Alaska dilemma, one must understand the basis of the conflict and applicable laws. There are obvious conflicting claims of government powers. What power is given by the U.S. Constitution to the Federal Government in this matter? Are fish and wildlife Federal "property?" Are Alaska's sovereign rights superseded by the Federal Government ? What rights does Alaska have regarding fish and wildlife within its boundaries?

Our research shows that, nation-wide, fish and wild game are among those public trust assets which are required to be managed under strict trust law principles. One fundamental trustee responsibility (Federal and State) is that of impartiality, which requires the trustee to treat all trust beneficiaries equally and fairly. Consequently, even if the Federal Government has management authority over wildlife resources in Alaska (and you will soon see it does not), it cannot favor one group of trust beneficiaries over any other.

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[1] 16 U.S.C. 3101 et seq. (1980).

[2] U.S. Constitution, art. IV, §3 cl. 2. ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing shall be construed as to prejudice any claims of the United States, or of any particular state.")

[3] 73 F.3d 698.

Said differently, we believe it is very clear that the provisions of Title VIII of ANILCA violate the U.S. Constitution and the Federal Government's trust responsibility.

II. APPLICABLE LAWS

Several Federal Acts, Executive Orders, and Proclamations as well as two well established Doctrines are key to the issue at hand. Each is an essential element and all must be considered in order to fully understand the matter.

A. Alaska Statehood Act:

The Alaska Statehood Act[5] contains four very important provisions:

1. Section 1 provides that Alaska was admitted into the Union on an equal footing with and with all the same rights and responsibilities as the other States. It says:

> ... upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared ... admitted into the Union on an equal footing with the other States in all respects whatever

2. Section 6(e) contemplated and provided for the transfer of fish and game management from the Federal Government to the State of Alaska with the same measure of administration and jurisdiction over fisheries and wildlife as possessed by all the other States.[6] It says:

> All real and personal property of the United States situated in the Territory of Alaska which is used for the sole purpose of conservation and protection of the fisheries and wildlife in Alaska ... **shall** be transferred and conveyed to the State of Alaska by the appropriate Federal agency; *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: ... (emphasis added)

3. Section 7(m) includes Alaska as a beneficiary to the Submerged Lands Act of 1953 – with all the same rights under that act as all the other States. It says:

> The Submerged Lands Act of 1953 ... shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

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[4] *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

[5] Public Law 85-508 - July 7, 1958.

[6] *Metlakatla Indians v. Egan*, 369 U.S. 45, 57 (1962)("Section 6 (e) of the Alaska Statehood Act...providing for the conveyance of United States properties 'used for the sole purpose of' conservation and protection of the fisheries and wildlife of Alaska,' contemplated transfer to the State of the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States.")

4. Section 8(c) provides that Alaska would enter the Union with all the same rights as the original 13 States -- as soon as the President issued his proclamation to that effect. It says:

> Upon the issuance of said proclamation by the President, the State of Alaska shall be deemed admitted into the Union as provided in section 1 of this Act (i.e. equal footing with the other States in all respects whatever).

B. The Alaska Omnibus Act:

The Alaska Omnibus Act was passed to "Amend Certain Laws of the United States in Light of the Admission of the State of Alaska into the Union, ..."[7]

Section 45(a) authorizes the President to TERMINATE Federal management of fish and wildlife in Alaska and to transfer any property or interest in property owned or held by the United States in connection with fish and wildlife management to the State of Alaska. It says:

> If the President determines that any function performed by the Federal Government in Alaska has been terminated or curtailed by the Federal Government and that performance of such function or substantially the same function has been or will be assumed by the State of Alaska, the President may, until July 1, 1966, in his discretion, transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with such function, the assumption of which function is pursuant to this Act or the Act of July 7, 1958 (72 Stat. 339). (emphasis added)

C. Presidential Proclamation No. 3269:

Proclamation No. 3269, signed by President Eisenhower, dated January 3, 1959 is titled, "ADMISSION OF THE STATE OF ALASKA IN TO THE UNION." This Proclamation declared Alaska admitted into the United States as an equal with the other States of the Union. It says:

> ... I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby declare and proclaim that the procedural requirements imposed by the Congress on the State of Alaska to entitle that State to admission into the Union have been complied with in all respects and that admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished. (emphasis added)

D. Executive Order No. 10857:

Executive Order No. 10857, signed by President Eisenhower, effective December 29, 1959 is titled, "TERMINATION OF FEDERAL FUNCTIONS IN ALASKA AND TRANSFER OF PROPERTY HELD BY UNITED STATES." This Executive Order TERMINATES Federal management of fish and wildlife and quitclaims any interest owned or

[7] Public Law 86-70 - June 25, 1959.

held by the Federal Government in fish and wildlife in Alaska effective December 31, 1959. It says:

> WHEREAS section 6(e) of the act of July 7, 1958, 72 Stat. 339, as amended, ... provides that the administration and management of the fish and wildlife resources of Alaska **shall be transferred to the State of Alaska** on the first day of the first calendar year following expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of such resources in the broad national interest; and
>
> WHEREAS the Secretary of the Interior made such certification to the Congress on April 27, 1959; and
>
> WHEREAS section 45(a) of the Alaska Omnibus Act (73 Stat. 152) ... provides that if the President determines that **any** function performed by the Federal Government has been **terminated** by that Federal Government and that performance of such function or substantially the same function has been or will be assumed by the State of Alaska, the President may...transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with such function; and
>
> WHEREAS it appears that it would be in the public interest to delegate to the Secretary of the Interior, to the extent hereunder indicated, the authority vested in the President by section 45(a) of the Alaska Omnibus Act
>
> NOW THEREFORE, by virtue of the authority vested in me by section 45(a) of the Alaska Omnibus Act (73 Stat. 152) and section 301 of title 3 of the United States Code, and as President of the United States, it is ordered as follows:
>
> Section 1. It is hereby determined that the functions performed by the United States in Alaska pursuant to the Alaska game law of July 1, 1943, ... the act of June 26, 1906, ... and act of June 6, 1924, ... and the acts amending or supplementing such acts, **will terminate on December 31, 1959**, and that the same functions or substantially the same functions will be assumed by the State of Alaska ...
>
> Section 2. There is hereby delegated to the Secretary of the Interior, effective January 1, 1960, the authority vested in the President by section 45(a) of the Alaska Omnibus Act to transfer and convey to the State of Alaska, without reimbursement, any property or interest in property, real or personal, situated in Alaska which is owned or held by the United States in connection with the functions described in section 1 hereof. (emphasis added)

E. 1953 Submerged Lands Act:

Section 6(m) of the Alaska Statehood Act provides that the State will be beneficiary of the Submerged Lands Act of 1953[8] -- passed six (6) years prior to Alaska statehood. It says:

> (m) The Submerged Lands Act of 1953 ... shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

[8] Public Law 31, 83rd Congress, Second Session.

The Submerged Lands Act is a quitclaim of Federal authority or ownership and provides that, like all the other States, Alaska owns its navigable waters, submerged lands and the fish that swim in those waters. It also provides that management of those resources are subject to State (not Federal) law. It says:

> § 1311. **Rights of States** (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use. It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof; (underlining added)

F. **Equal Footing Doctrine:**

It was the Equal Footing Doctrine[9] which brought the 37 new States -- including Alaska -- into the Union as equals with the original 13 States. The U.S. Government recognizes Alaska as a beneficiary of the Equal Footing Doctrine. For example:

1. Section 1 of the Alaska Statehood Act provides:

   > the State of Alaska is hereby declared...admitted into the Union on an equal footing with the other States in all respects whatever.[10]

2. Presidential Proclamation No. 3269 provides:

   > that admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished.

In 1997, the U.S. Supreme Court held that title to public trust assets passed from the Federal Government to Alaska at statehood through the equal footing doctrine as an essential element of sovereignty – not by Federal permission.[11]

G. **The Public Trust Doctrine:**

The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. It has been used and upheld by the U.S. Supreme Court, the lower Federal Courts and State Courts since the earliest days of this Nation.

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[9] The Northwest Ordinance. 1 Stat. 50., Art. 5. (such state shall be admitted, by its delegates, into the Congress of the United States in all respects whatsoever). *See also* The Alaska Statehood Act, 72 Stat. 339 (the State of Alaska is hereby declared ... admitted into the Union on an equal footing with the other States in all respects whatever).

[10] Public Law 85-508, § 1: Alaska Statehood Act.

[11] *See United States of America v. Alaska*, No. 84, Orig. (1997).

The "trust" referred to is an actual trust in a legal sense. The trust assets are generally in the form of navigable waters, the lands beneath and the living resources within those waters, and free roaming wildlife. The beneficiary is the public, which includes "not just present generations but those to come."[12] The trustees are the State Legislatures or, in some limited circumstances, the U.S. Congress.[13] These trustees have a legal duty to protect the trust. The purpose is clear: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses.

H. Title VIII of ANILCA:

Title VIII of ANILCA, in its original form, does not provide for Federal management of fisheries or wildlife if Alaska does not comply. It says:

> "(a)...persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses...may, upon exhaustion of any State or Federal...administrative remedies...file a court action in the United States District Court...to require such actions to be taken as are necessary to provide for the priority..."

And, under ANILCA, until recently (see Para. III(F), below), the only Federal remedy for any failure by the State of Federal Government to provide the rural subsistence priority was to file a court action. Paragraph (c) says:

> "(c) **Section as sole Federal judicial remedy.** This section is the sole Federal judicial remedy by this title..." (bold type in original)

III. DISCUSSION

This discussion deals with the provisions of Title VIII of ("ANILCA"). It does not deal with the sociological issue of "subsistence." A guiding principle throughout our research has been that no matter how laudable the purpose for passing ANILCA, or how great the ultimate end might be for the common good, the end cannot be allowed if it is outside constitutional bounds.

A. Property Clause Cannot Eclipse States' Rights

When Congress manages Federal Property, its authority comes from the Property Clause of the U.S. Constitution.[14] The Property Clause reads:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

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[12] *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. App. Div. 1, 1991).

[13] For example: lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife prior to statehood such as Denali National Park, would be managed by Congress as "Trustee" for all of the people of the United States. Congress has a duty as "trustee for the people of the United States" to prevent monopolization by any corporation, group or individual for private gain. *Camfield v. United States*, 167 U.S. 518, 524 (1897).

[14] U.S. Constitution, art. IV, §3 cl. 2.

The Federal Government claims that, because the Constitution's Property Clause gives Congress the power to make needful rules and regulations respecting Federal lands, any action taken by Congress by virtue of that Clause with respect to Federal lands is valid; that Congress has unlimited power over the administration of public lands; and that normal constitutional constraints are not effective against such rules. Hence, they say, Congress can, by virtue of the Property Clause, grant the Interior Secretary the authority to allocate wildlife harvest on Federal public lands in Alaska and to allocate fish harvest in certain (if not all) of Alaska's navigable waters simply by passing an act authorizing those actions.

They claim Congress, when invoking authority under the Property Clause, is immune from even those amendments to the Constitution contained in the Bill of Rights.[15] Therefore, they claim, Congress is free, when using the Property Clause, to usurp a State's traditional sovereign power of fish and wild game management, and to do so without judicial review of its action.

These claims by the Federal Government are not without precedent.

A similar argument was presented to the U.S. Supreme Court in *Kansas v. Colorado*, 206 U.S. 46, 89. (1907), but held untenable. Mr. Justice Brewer, speaking for the Court, disposed of it, saying:

> [T]he proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendment, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution, which was seemingly adopted with prescience of just such a contention as the present, disclosed the wide-spread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that, if in the future further powers seemed necessary, they should be granted by the people in the manner they have provided for amending that act. * * * Its principle purpose was not the distribution of power between the United States and the states, but a reservation of the people of all powers not granted.

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[15] To illustrate the broad acceptance of this theory, in his 12/12/97 written response to a group called Alaskans Together, Senator Ted Stevens said: "The 10th Amendment t[illegible] United States Constitution says 'The powers not delegated to the United States by the Constitution, not pro[illegible]ted by it to the States, are reserved to the States respectively, or to the people.' Article IV, section 3 of the Constitution [Property Clause] says 'The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the Unites States...' The 10th Amendment does not apply because the Constitution delegated to the United States' Legislative Branch the power to regulate its land. Congress passed ANILCA, and included Title VIII, which governs federal regulation of subsistence uses of United States land."

Clearly, the U.S. Supreme Court has held that the 10th Amendment constrains Congress, even when Congress invokes the Property Clause. Congress cannot act outside the enumerated powers granted by Article 1, Section 8.

Next, we turn to the 1976 case of *Kleppe v. New Mexico.*[16] In that case, Mr. Kleppe, then Secretary of Interior, claimed the Property Clause gave the Federal Government unlimited power on Federal Lands and totally exempted Federal lands within state borders from all state or local power or sovereignty. The Court disagreed when it held (at 543) such total exemption was "totally unfounded." Justice Marshall, writing for the Court said:

> [T]he Secretary [of Interior]'s position...that "the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states," ...is totally unfounded.

And, that same *Kleppe* Court (at 545) recognized a State's broad powers over wild animals on Federal property and removed any possibility that the Property Clause can be used to dictate an ANILCA-type allocation system. The Court said:

> Unquestionably, the States have broad trustee and police powers over wild animals within their jurisdictions...No doubt it is true that as between a State and its inhabitants the State may regulate the killing...of [wildlife]. (paren. in original)

Absent any overriding Supreme Court decision to the contrary (and there are none), the matter is settled. The rural preference allocation provisions demanded by ANILCA violate Alaska's broad trustee powers and police powers over wild animals on Federal lands within her boundaries. Alaska -- not the Federal Government -- regulates the harvest of wildlife within its borders. Title VIII of ANILCA cannot be legally sustained.

B. Before Statehood - All Alaska Assets Were Held in Trust

The *Kleppe* Court, above, said the States have broad "trustee" powers over wild animals. It's important then that we understand where those "trustee" powers came from and equally important that we understand the "trustee" responsibilities accompanying those powers.

As in other purchased territories, when the Federal Government bought Alaska from Russia, it was acquired by the United States for the people of the United States for their equal benefit through their agent and trustee, the Federal Government.[17] The United States acquired title from Russia to tide-lands (and other public trust assets) equally with the title to uplands. Significantly, it is well settled law that, when a territory is purchased from a foreign government, that new U.S. Territory's "Public Trust Assets" (i.e. submerged lands, navigable waters, the lands beneath those waters, the living resources therein and free roaming wildlife), are held in trust by the United States Government for the future state and that state's future citizens.

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[16] *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

[17] See discussion in *Scott v. Sandford*, 60 U.S. 393, 395 (1856)

Hence, before statehood, all "public trust" lands and assets in the Territory of Alaska, were managed by the Federal Government as "trustee" (1) for the future State of Alaska and (2) for all of Alaska's future citizens.[18]

With respect to uplands not transferred to Alaska by the Statehood Act, the United States holds its interests, in Alaska as elsewhere, "in trust for all the people."[19]

C. **Congressional Power is Constrained By Its Trustee Role**

Before statehood, Congress acted as trustee for all Alaska's lands and assets including lands which would later remain in Federal ownership. That trust was, and still is, "based upon common law equitable principles. That is, the administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general."[20]

Even though the U.S. Constitution gives Congress power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"[21] that power is constrained. For example, the Property Clause itself provides that no Act of Congress can prejudice a State's rights and, when dealing with Federal property, Congress must operate as "trustee" and stay within the boundaries of trust law.

One of the fundamental responsibilities of all trustees is to deal impartially and fairly with all the beneficiaries of that "trust."[22] Therefore, Congress, like all other trustees , must deal impartially with all citizens when it comes to Federal lands or assets.

When it comes to public lands, Congress cannot favor one group of citizens over others. Therefore, since Title VIII of ANILCA violates the fundamental trustee responsibilities of impartiality and fairness which Congress must use when managing U.S. property, Title VIII cannot be sustained.

D. **Property Clause Cannot Override Trustee Responsibilities**

Discussing the Property Clause authority in light of the "trustee" responsibilities of Congress, the U.S. Supreme Court, in *Scott v. Sandford*, 60 U.S. 393, 489-490 (1856), held:

> But whatever the power vested in Congress...Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or

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[18] *Pollard's Lessee v. Hagan*, 44 U.S. 212 (3 How.) (1845). *See also Knight v. U.S. Land Association*, 142 U S 161, 183 (1891)("Upon acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.").

[19] *United States v. State of California*, 332 U.S. 19, 40 (1947)("The Government, which holds its interests here as elsewhere in trust for all the people...").

[20] Bogert & Bogert, *Law of Trusts*, §6 (1973).

[21] U.S. Constitution, art. IV, §3 cl. 2.

[22] *Restatement (second) of Trusts*, § 170-199 (1959). *See also The Law of Trusts*, § 171 (4th ed. 1987).

> portion of the people, to the exclusion of others, politically and constitutionally equals, but every citizen would, if any *one* could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory. (underlining added)

Title VIII of ANILCA establishes a privileged class -- "rural" Alaska residents -- and disenfranchises all others. It demands that rural residents (rich or poor) have an absolute preference for the taking of fish and game on Federal public lands.

The U.S. Supreme Court emphatically addressed this type of scenario in *Scott v. Sandford, supra*, when it said that it is patently illogical to imagine that the Property Clause of the Constitution could be used to establish inequalities among U.S. citizens. The Court said:

> Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution [Property Clause] a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disenfranchisement of other portions or classes by degrading them from the position they previously occupied.

Time has not eroded that absurdity any more than it has eroded the Constitution's principle of inalienable individual rights for all citizens. It's still patently illogical to suppose that the Property Clause can be used: (1) to destroy or impair the civil and political rights of U.S. citizens; (2) to establish inequalities amongst citizens by creating privileges in one class of citizens; or (3) to disenfranchise any class by degrading them from the position they previously held -- all of which are demanded by Title VIII of ANILCA.

No matter how expedient, Congress cannot, in asserting the Property Clause, breach its trustee responsibilities. It must manage Federal lands equitably. If Federal public land is open to any, or if harvest of natural resources on that land is permitted by any, it must to be open to all and permitted by all citizens on an equal basis.

Title VIII of ANILCA cannot override the trustee responsibility of Congress by asserting the Property Clause. On this basis alone, Title VIII cannot be sustained.

E. Alaska Controls Fishing as Essential Element of Sovereignty

At Statehood, Alaska became a sovereign. Her new-found sovereignty contained several essential attributes relevant to the matter at hand. One of those is ownership of submerged lands and the powers accompanying that title which includes collective ownership of all living creatures in those waters.

By virtue of the Equal Footing Doctrine, as referenced in Section 1 of the Alaska Statehood Act, as proclaimed by President Eisenhower's historic January 3, 1959 Proclamation,

and as most recently held in *United States of America v. Alaska,*[23] (the "Dinkum Sands" case), Alaska was admitted into the Union on an equal footing with the other States.

On June 19, 1997, Justice O'Connor, writing the opinion of the U.S. Supreme Court in Dinkum Sands held that the State of Alaska succeeded to the United States' title to the beds of navigable waters within Alaska's boundaries at statehood and, thereafter, the State of Alaska has the power to control fishing in Alaska's waters. She wrote:

> Ownership of submerged lands--which carries with it the power to control... fishing, and other public uses of water--is an essential attribute of sovereignty ...Under the doctrine of *Lessee of Pollard v. Hagan* ...new States are admitted to the Union on an "equal footing" with the original 13 colonies and succeed to the United States' title to the beds of navigable waters within their boundaries...
>
> In 1953...Congress enacted the Submerged Lands Act...That Act "confirmed" and "established" State's title to the beds of navigable waters within the boundaries of the respective States...The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska...As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline. (emphasis added)

Once title passed to Alaska, any attempt by the Federal Government to defeat that title cannot succeed. Also in Dinkum Sands, the Court declared that the Federal Government cannot take back lands or powers that were transferred to Alaska at statehood. They said:

> In our equal footing cases, "[a] court deciding a question of title to the bed of navigable waters must...begin with a strong presumption" against defeat of a State's title...We will not infer an intent to defeat a future State's title to inland submerged lands "unless the intention was definitely declared or otherwise made very plain."...
>
> and:
>
> ...a State receives title to submerged lands...unless the United States," *expressly*" retain[s] them.

The U.S. Supreme Court is clear. At statehood, Alaska received title to all submerged lands that had not been "expressly" retained by the United States prior to statehood. A later act of Congress cannot reclaim property already given away. Along with that title came the power to control fishing in all State waters.

Another 1997 U.S. Supreme Court case, *Idaho v. Coeur d'Alene Tribe of Idaho,* No. 94-1474 (June 23, 1997) went to great lengths to reach an even more expansive rendering of the same conclusion. The Court traced the principle that navigable waters are sovereign assets

[23] No. 84, Orig. (1997).

under the ownership and control of the States all the way back to the Institutes of Justinian.[24] The *Idaho* Court reviewed its own history in which the U.S. Supreme Court had acknowledged and concluded that a State has sovereign control over its submerged lands; that lands underlying navigable waters are a State's "sovereign lands;" that State ownership of submerged lands are considered an essential attribute of sovereignty; that States hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights surrendered to the Constitution of the General Government; that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these sovereign lands; that a State's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself;" and that ownership of these sovereign lands and waters brings with it the right to control fishing and other public uses of the water.

And, interestingly, the *Idaho* Court reminded the States that submerged lands are infused with a "public trust" the State itself is bound to respect; and reminded State Legislators that, because of legislator's trustee responsibilities, an attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual.[25]

The Federal threat to "take over fishing" in Alaska is hollow at best. The Secretary of Interior's power to control fishing in Alaska's navigable waters was destroyed at Statehood. Alaska's title was perfected 21 years before ANILCA. The State, in its sovereign and collective capacity, holds title to the fish within trust waters in the State for the benefit of the people.[26] And, since fish are not Federal property and the navigable waters are not Federal property, the Property Clause cannot authorize a Federal takeover of Alaska's fisheries. (Once again, assuming arguendo that the Federal Government could manage Alaska's fisheries, it could not violate its trustee responsibilities by mandating a discriminatory "rural" preference to fishery resources.)

F. Management Authority Over Wild Game Belongs to Alaska

Other essential attributes of sovereignty which passed to Alaska at Statehood include power to manage all wild game to the same full measure as possessed by other States.

The rule of law which all American courts have recognized is that wild game, are owned [to the fullest extent that any wild animal may be owned] by the states in their sovereign

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[24] *See* Institutes of Justinian, Lib. II, Tit. I, §2 (T. Cooper transl. 2d. ed. 1841)("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common").

[25] *See Idaho v. Coeur dAlene Tribe of Idaho*, 000 U.S. 94-1474 (1997) referring to *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892).

[26] *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977).

capacity as the representatives and for the benefit of all their people in common.[27] The wild animal and bird life present in a state is the common heritage of all the people of that state and the title thereto is vested in the state -- in trust for all the people of the state.[28] The wild game within a state, at common law, belongs to the sovereign, and in this country to the people in their collective capacity.[29] And, the State "has the power to manage and conserve wild game, and to that end to make such laws and regulations as are necessary to protect and preserve it.[30]

The original 13 colonies owned the wild game that roamed their lands. They did not cede that ownership to the new national constitution. Those original colonies (now States) still successfully maintain the power to control and manage their wild game. And, the U.S. Supreme Court has recognized a State's authority to manage wild game on Federal property within its borders.[31]

In that same respect, at statehood, Alaska gained management authority over wild game as an inseparable attribute of its new-found sovereignty to the same measure of administration and jurisdiction as possessed by other States.[32] To maintain otherwise is to deny that Alaska was admitted into the Union on equal footing with the original States.

All American courts have also recognized that wild game animals are owned by the States, not as proprietors, but in their sovereign capacity as trustee for the benefit of all their people in common. This principle has been upheld by all the highest courts of the states in which the question has arisen, and has had the approval of the Supreme Court of the United States in every case which has come before it.

And even assuming arguendo that prior to statehood the Federal Government may have held title to wild game in Alaska and that, somehow that title did not transfer at statehood to Alaska as an essential element of sovereignty, the Alaska Omnibus Act (pg. 3, supra) and Executive Order No. 10857 (pg. 3 & 4, supra) quitclaimed that title to fish and wild game to the State of Alaska. Section 45(a) of the Alaska Omnibus Act provided the President with the authority to transfer any interest held by the United States in connection with fish and wildlife to the State of Alaska. Executive Order 10857 terminated Federal management of fish and wildlife

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[27] *See United States v. Shauver*, 214 Fed. 154 (1914); *See also State v. Hume*, 52 Or. 1,5,95 P. 808 (1908)("It is a generally recognized principle that migratory fish in navigable waters of a state, like game within its borders, are classed as animals *ferea naturae*, the title of which ...is held by the state, in its sovereign capacity for all its citizens[.]").

[28] *See United States v. McCullagh*, 221 Fed. 154 (1915).

[29] *See* Judson on Interstate Commerce, § 11.

[30] *Montana Outfitters Action Group v. Fish and Game Commission*, 417 F. Supp. 1005, 1009 (Mont. 1976) Upheld by the U.S. Supreme Court in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978).

[31] In *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), The Court recognized that 75% of the elk taken in Montana are killed on Federal Land. Yet, that same Court held that the State had the power to manage and conserve the elk, to make such laws are necessary to protect and preserve the elk and that the elk are entrusted to the care of the State by the people of Montana.

and transferred title to any "property" or to any "interest" "held" by the United States in connection with fish and game management in Alaska to the State of Alaska. Hence, if the U.S. Government ever held title to fish or wildlife in Alaska, they quitclaimed that interest to the State of Alaska effective December 31, 1959.

Since Alaska's game animals are not property of the United States, the Property Clause cannot be used as authority for a Federal takeover of Alaska's wild game.

G. U.S. Government Quitclaimed Title to Fish and Wildlife

The Submerged Lands Act applies to Alaska and unequivocally provides that title to fish in Alaska's navigable waters belong to the State of Alaska.[33] In fact, in *Douglas v. Seacoast Products, Inc.*, Justice Rhenquist described the Submerged Lands Act as, "a quit claim of the entire interest held by the Government when the Act was enacted."[34] And, in *United States v. California*, Mr. Chief Justice Burger said, "When Congress enacted the Submerged Lands Act of 1953...the United States, in effect, quitclaimed...whatever interest the Federal Government may have had in, and to all lands and natural resources lying within three geographical miles seaward of the...coastline."[35]

So there would be no confusion about Alaska being beneficiary to the Submerged Lands Act, section 7(m) of the Alaska Statehood Act clearly provided that the Act, "shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder."

The Alaska Statehood Act anticipated and provided that the United States would transfer administration, jurisdiction and management of fish and game to the State of Alaska equal to that possessed by other States.[36]

Executive Order No. 10857 (Dec. 29, 1959) accomplished that transfer and **terminated** Federal management of fish and wildlife in Alaska effective December 31, 1979. This Order also affirmatively quitclaimed all fish and wild game to the State of Alaska.

As an essential element of sovereignty and by quitclaim from the Federal Government, title to all fish and wild game in Alaska rests in the sovereign State of Alaska in its trustee capacity for all its people. After statehood, the Federal Government is without any

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[32] *See Metlakatla v. Egan*, 369 U.S. 45, 57 (1962).

[33] *United States of America, Plaintiff v. State of Alaska*, No 84, Orig. (1997).

[34] *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 289 (1977)("Such a view would take the statute for what it appears to be on its face - a quitclaim to the entire interest by the Government when the Act was enacted.").

[35] *United States v. California*, 447 U.S. 1, 3 (1980). Interestingly, Congress quitclaimed its interests to the States by authority of the Property Clause -- which it now cites as authority to reclaim resources previously given away.

[36] *Metlakatla Indians v. Egan*, 369 U.S. 45, 57 (1962)("Section 6 (e) of the Alaska Statehood Act...providing for the conveyance of United States properties 'used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska,' contemplated transfer to the State of the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States.")

authority to make any rule or regulation allocating fish and/or wild game which belong in common to the citizens of the sovereign State of Alaska.

H. ANILCA Is Unconstitutional Interference in Alaska's Affairs

The U.S. Constitution does not make a general grant of legislative power. It reads: "Article 1, § 1. All legislative powers herein granted shall be vested in a Congress..." And then, in Article 8, it mentions and defines the legislative powers that are granted. Because there is no general grant of legislative power it has become an accepted constitutional rule that the United States Government is a government of enumerated powers.

> In M'Culloch v. Maryland, 4 Wheat. 405, 4L. ed. 601, Chief Justice Marshall said:
>
> This government is acknowledged by all to be one of enumerated powers. The principal that it can exercise only the powers granted to it seems too apparent to have required to be enforced by all those arguments which its enlightened friends... found it necessary to urge. The principle is now universally admitted."

Therefore, when Congress claims a legislative power, even when it applies to public lands, the question is whether or not that power is one of those granted by the Constitution, either in explicit terms or by necessary implication.

The allocation of Alaska's fish and wildlife to a special class based on residence is not one of the powers granted to Congress by the Constitution.

The Property Clause very clearly bans any action which prejudices the rights or claims of any individual State.[37] The 10th amendment clearly reserves to the people those powers not granted to Congress.

It is settled law that, when it comes to internal affairs, the states retained their police power, which they, as sovereign nations, possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation.[38] Any police power over a State's internal affairs belongs solely to the State. Management and regulation of fish and game is a universally recognized police power belonging to the State.

Title VIII of ANILCA demands a priority for Alaska residents who live in rural areas of the State of Alaska. The lifestyle ANILCA "protects" is confined to the State of Alaska. ANILCA does not demand any similar priority in any other State in the nation. ANILCA is not a "national" law.

Allocation or appropriation of fish and wildlife in Alaska is an internal Alaska affair.[39]

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[37] "and nothing in this Constitution shall be so construed as to prejudice and claims...of any particular state."

[38] *See United States v. Shauver*, 214 Fed. 154 (1914).

[39] *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976)("No doubt it is true that as between a State and its inhabitants the State may regulate the killing...of [wildlife].")

Alaska, on an equal footing with the other States, has the power to regulate, control, or prohibit the hunting and killing of fish and wild game within its sovereign boundaries.[40]

Clearly, this matter is an Alaska internal affair and even through the Property Clause, the Federal Government does not have any enumerated power under the U.S. Constitution to interfere in Alaska's internal affairs.

4. SUMMARY

It is without question that, within Constitutional constraints, Congress has the complete power and authority to manage federal lands. But this question isn't about "land management." It is about the illegal allocation of Alaskan public trust assets (fish and wild game) to a select portion of Alaska's citizens at the exclusion of others -- based solely on where they live. It's a question of equality!

Though Congress has exclusive power over the territory and property of the United States, that power is constrained. Congress cannot manage as if it is a private land owner who can pick and choose who gets to use his land. Congress must manage Federal lands as a "trustee" for all the people of the United States and cannot breach its trust responsibility by granting one class or portion of the people access to the land for hunting or fishing while excluding others.

When Alaska became a State, as an essential element of sovereignty, and through quitclaim from the 1953 Submerged Lands Act, the Alaska Omnibus Act and Executive Order No. 10857, certain lands, waters and other trust assets transferred from the Federal trust into the new State of Alaska trust. Though the Federal Government retained millions of acres of Alaska's "uplands," those lands remain in the Federal trust and Congress, as trustee, is still required to manage them without discrimination.

Thus, once Alaska was admitted, the Federal authority over trust assets including wildlife, navigable waters and fish was terminated. All the resources in those waters, including fish, and free roaming wildlife became assets transferred to the State. Alaska's Legislature became the trustee[41] and Alaska's citizens became the beneficiaries. Thereafter, the United States could not defeat that trust.[42]

Neither Congress (the old Trustee) nor the Alaska State Legislature (the new Trustee) can appropriate fish or wildlife or any other trust asset to any one class or portion of its citizens (beneficiaries) to the exclusion of others.[43] The concept of impartiality is embodied in the Alaska Constitution. It is that concept which is violated by Title VIII of ANILCA.

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[40] *See Kleppe v. New Mexico*, 426 U.S. 529, 548, 549 (1976).
[41] The State Legislature is also bound by the law to deal equitably with all its citizen beneficiaries.
[42] *See Pollard v. Hagan*, 44 U.S. 212, 216.
[43]

It is the well settled law of the United States: (1) that fish and wild game are "Public Trust Assets;" (2) that fish and wild game are among those Public Trust Assets transferred to all of the 37 "new" States; and (3) that each individual sovereign State -- not the Federal Government -- has the power to regulate the taking of fish and wild game within its borders.

Amending our constitution will not allow either the State or the Federal Government to breach their trust duties of impartiality and equal protection to all beneficiaries such that a successful suit could be filed by anyone who, under rural preference, would not be treated equally!

However, if Congress wants to implement the provisions contained in Title VIII of ANILCA on Federal public lands in Alaska, their only course lies first in amending the U.S. Constitution -- not in demanding Alaska amend hers.

"Every man...has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*." 2 W. Blackstone, Commentaries 411 (1766).

"Subsistence is a basic human right." Alaska Federation of Natives (1997).

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 capricio s" 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 developed 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 between 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 'binding 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 <u>also</u> 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 decisior partly because of the perceived impossibility of the legislativ 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 ar 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 '[w]herever occurring." (Emphasis in original. State v Kenaitze, 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) is 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).

PUBLIC LAW 105-83

PREPARED BY THE OFFICE OF
SENATOR TED STEVENS

For the reader's convenience, the text of the Alaska National Interest Lands Conservation Act (ANILCA), as amended by section 316 of Public Law 105-83, is printed below. The changes made to ANILCA by Public Law 105-83 appear in *italics*, and words stricken from ANILCA by Public Law 105-83 appear with a line through them. Public Law 105-83 was enacted on November 14, 1997.

Appearing before the amended text of ANILCA are the provisions of section 316 which: (1) extended the moratorium on federal management of subsistence fishing through December 1, 1998; (2) specified that section 316 does not affect certain issues relating to federal tribal recognition, Indian country, Indian law, and assertions of Secretarial power; and (3) make the ANILCA amendments conditional on State law changes that conform to the new provisions.

Section 316 (a) MORATORIUM ON FEDERAL MANAGEMENT.– None of the funds made available to the Department of Interior or the Department of Agriculture by this or any other Act hereafter enacted many be used prior to December 1, 1998 to issue or implement final regulations, rules, or policies pursuant to Title VIII of the Alaska National Interest Lands Conservation Act to assert jurisdiction, management, or control over the navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959.

Section 316 (c) SAVINGS CLAUSE.– No provision of this section, amendment made by this section, or exercise of authority pursuant to this title may be construed to validate, invalidate, or in any way affect–

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq.), as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska;

(2) any assertion that Indian country, as defined in section 1151 of title 18, United States Code, exists or does not exist within the boundaries of the State of Alaska;

(3) any assertion that the Alaska National Interest Lands Conservation Act, as amended, (16 U.S.C. 3101 et seq.) is Indian law; or

(4) the authority of the Secretary of the Interior under section 1314(c) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3202(c)).

Section 316 (d) EFFECTIVE DATE.– Unless and until laws are adopted in the State of Alaska which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3111 et seq), the amendments made by subsection (b) of this section shall be effective only for the purposes of determining whether the State's laws provide for such definition, preference, and participation. The Secretary shall certify before December 1, 1998 if such laws have been adopted in the State of Alaska. Subsection (b) shall be repealed on such date if such laws have not been adopted.

Section 316 (b) AMENDMENTS TO THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.-

(1) Amendment of ANILCA.- Except as otherwise expressly provided, whenever in this subsection an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.)

(2) (Below are subsistence-related parts of ANILCA, as amended by Section 316(b)(2) of P.L. 105-83)

TITLE I — PURPOSES, DEFINITIONS AND MAPS

PURPOSES

SEC. 101. (A) In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on free flowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

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

(d) This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary for more intensive use and disposition, and thus Congress believes that future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

DEFINITIONS

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

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

(2) ~~The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.~~ *The term "Federal land" means lands the title to which is in the United States after December 2, 1980. `Federal land' does not include lands the title to which is in the State, a Native Corporation, or other private ownership.*

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

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

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

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

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated or expanded hereafter.

(5) The term "Alaska Native Claims Settlement Act" means "An Act to provide for the settlement of certain land claims of Alaska Natives, and for other purposes", approved December 18, 1971 (85 Stat. 688), as amended.

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, and Urban Corporation, and any Native Group.

(7) The term "Regional Corporation" has the same meaning as such term has under section 3(g) of the Alaska Native Claims Settlement Act.

(8) The term "Village Corporation" has the same meaning as such term as under section 3(j) of the Alaska Native Claims Settlement Act.

(9) The term "Urban Corporation" means those Native entities which have incorporated pursuant to section 14(h)(3) of the Alaska Native Claims Settlement Act.

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h)(2) of Alaska Native Claims Settlement Act.

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of the date of enactment of this Act, had

been selected under the Alaska Native Claims Settlement Act by a Native Corporation or Native Group and had not been conveyed by the Secretary (except to the extent such selection is determined to be invalid or has been relinquished) and land referred to in Section 19(b) of the Alaska Native Claims Settlement Act.

(12) The term "Secretary" means the Secretary of the Interior, except that when such term is used with respect to any unit of the National Forest System, such term means the Secretary of Agriculture.

(13) The terms "wilderness" and "National Wilderness Preservation System" have the same meaning as when used in the Wilderness Act (78 Stat. 890).

(14) The term "Alaska Statehood Act" means the Act entitled "An Act to provide for the admission of the State of Alaska into the Union", as approved July 7, 1958 (72 Stat. 339), as amended.

(15) The term "State" means the State of Alaska.

(16) The term "Alaska Native" or "Native" has the same meaning as the term "Native" has in section 3(b) of the Alaska Native Claims Settlement Act.

(17) The term "fish and wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or part thereof.

(18) The term "take" or "taking" as used with respect to fish or wildlife, means to pursue, hunt, shoot, trap, net, capture, collect, kill, harm, or attempt to engage in such conduct.

. . .

TITLE VIII-SUBSISTENCE MANAGEMENT AND USE

FINDINGS

SEC. 801. *(a)* The Congress finds and declares that–

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

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

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

with recognized principles of fish and wildlife management;

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

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

(b) The Congress finds and declares further that--

(1) subsequent to the enactment of this Act in 1980, the subsistence law of the State of Alaska (AS 16.05) accomplished the goals of Congress and requirements of this Act in providing subsistence use opportunities for rural residents of Alaska, both Native and non-Native;

(2) the Alaska subsistence law was challenged in Alaska courts, and the rural preference requirement in the law was found in 1989 by the Alaska Supreme Court in McDowell v. State of Alaska (785 P.2d 1, 1989) to violate the Alaska Constitution;

(3) since that time, repeated attempts to restore the validity of the State law through an amendment to the Alaska Constitution have failed, and the people of Alaska have not been given the opportunity to vote on such an amendment;

(4) in accordance with Title VIII of this Act, the Secretary of the Interior is required to manage fish and wildlife for subsistence uses on all public lands in Alaska because of the failure of State law to provide a rural preference;

(5) the Ninth Circuit Court of Appeals determined in 1995 in State of Alaska v. Babbitt (73 F.3d 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior;

(6) management of fish and wildlife resources by State governments has proven successful in all 50 states, including Alaska, and the State of Alaska should have the opportunity to continue to manage such resources on all lands, including public lands, in Alaska in accordance with this Act, as amended; and

(7) it is necessary to amend portions of this Act to restore the original intent of Congress to protect and provide for the continued opportunity for subsistence uses on public lands for Native and non-Native rural residents through the management of the State of Alaska.

POLICY

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

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is

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

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

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

DEFINITIONS

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

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

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

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

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

(3) "customary and traditional uses" means the noncommercial, long-term, and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish or game;

(4) "customary trade" means, except for money sales of furs and furbearers, the limited, noncommercial exchange for money of fish and wildlife or their parts in minimal quantities; and

(5) "rural Alaska resident" means a resident of a rural community or rural area. A "rural community or area" means a community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses.

PREFERENCE FOR SUBSISTENCE USES

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

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

(2) local residency; and

(3) the availability of alternative resources.

(b) The priority granted by this section is for a reasonable opportunity to take fish and wildlife. For the purposes of this subsection, the term "reasonable opportunity" means an opportunity,consistent with customary and traditional uses (as defined in section 803(3)), to participate in a subsistence hunt or fishery with a reasonable expectation of success, and does not mean a guarantee that fish and wildlife will be taken.

LOCAL AND REGIONAL PARTICIPATION

SEC. 805. (a)*(1)* Except as otherwise provided in subsection (d) of this section, ~~one year after the date of enactment of this Act,~~ the Secretary in consultation with the State shall establish-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) (1) Upon certification by the Secretary that the State has enacted and implemented laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804, and 805, the Secretary shall not implement subsections (a), (b), and (c) of this section, and the State may immediately assume management for the taking of fish and wildlife on the public lands for subsistence uses pursuant to this title. Upon assumption of such management by the State, the Secretary shall not implement subsections (a), (b), and (c) of this section unless a court of competent jurisdiction determines that such laws have been repealed, modified, or implemented in a way that is inconsistent with, or does not provide for, the definition, preference, and participation specified in sections 803, 804, and 805, or that the State has failed to cure any such inconsistency after such determination. The State laws shall otherwise supercede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. The Secretary may bring a judicial action to enforce this subsection.

(2) (A) Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on the public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

(B) The members of each regional advisory council shall be appointed by the Governor of Alaska. Each council shall have ten members, four of whom shall be selected from nominees who reside in the region submitted by tribal councils in the region, and six of whom shall be selected from nominees submitted by local governments and local advisory committees. Three of these six shall be subsistence users who reside in the subsistence resource region and three shall be sport or commercial users who may be residents of any subsistence resource region. Regional council members shall have staggered terms of three years in length, with no limit on the number of terms a member may serve. A quorum shall be a majority of the members of the council.

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

to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

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

FEDERAL MONITORING

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

JUDICIAL ENFORCEMENT

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

(b) State agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. When reviewing any action within the specialized knowledge of a State agency, the court shall give the decision of the State agency the same deference it would give the same decision of a comparable Federal agency.

[Note: The original subsection (b) had been repealed by P.L.98-620 so there is no strike out of current language. The text of the original subsection (b) was as follows: "b) A

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

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSION

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engaged in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

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

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

COOPERATIVE AGREEMENT

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

SUBSISTENCE AND LAND USE DECISION

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

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

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

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

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

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

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

ACCESS

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

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

RESEARCH

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

PERIODIC REPORTS

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

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

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

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

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

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

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

(7) such other recommendations the Secretary deems appropriate.

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

REGULATIONS

SEC. 814. The Secretary, *and the State at any time the State has complied with section 805(d),* shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title. *During any time that the State has complied with section 805(d), the Secretary shall not make or enforce regulations concerning section 805(a),(b) or (c).*

LIMITATIONS, SAVINGS CLAUSES

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

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

which may be granted by the State to any individual with respect to subsistence uses may be assigned to any other individual;

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

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

(4) modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the National Wildlife Refuge System Administration Act of 1966 (80 Stat. 927; 16 U.S.C. 668dd-jj), the National Park Service Organic Act (39 Stat. 535, 16 U.S.C. 1,2,3,4), the Fur Seal Act of 1966 (80 Stat. 1091; 16 U.S.C. 1187), the Endangered Species Act of 1973 (87 Stat. 884; 16 U.S.C. 1531-1543), the Marine Mammal Protection Act of 1972 (86 Stat. 1027; 16 U.S.C. 1361-1407), the Act entitled "An Act for the Protection of the Bald Eagle", approved June 8, 1940 (54 Stat. 250; 16 U.S.C. 742a-754), the Migratory Bird Treaty Act (40 Stat. 755; 16 U.S.C. 703-711), the Federal Aid in Wildlife Restoration Act (50 Stat. 917; 16 U.S.C. 669-669i), the Fishery Conservation and Management Act of 1976 (90 Stat. 331; 16 U.S.C. 1801-1882), the Federal Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts; *or*

(5) prohibiting the Secretary or the State from entering into co-management agreements with Native organizations or other local or regional entities when either is managing fish and wildlife on public lands in Alaska for subsistence uses.

CLOSURE TO SUBSISTENCE USES

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

(b) Except as specifically provided otherwise by this section, nothing in this title is intended to enlarge or diminish the authority of the Secretary to designate areas where, and establish periods when, no taking of fish and wildlife shall be permitted on the public lands for reasons of public safety, administration, or to assure the continued viability of a particular fish or wildlife population. Notwithstanding any other provision of this Act or other law, the Secretary, after consultation with the State and adequate notice and public hearing, may temporarily close any public lands (including those within any conservation system unit), or any portion thereof, to subsistence uses of a particular fish or wildlife population only if necessary for reasons of public safety, administration, or to assure the continued viability of such population. If the Secretary determines that an emergency situation exists and that

extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when subsequently extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.

A Cross Comparison of the Elements in ANILCA Changed by Public Law 105-83 and the Subsistence Task Force Proposal

ANILCA PROVISIONS:	**ANILCA TODAY**	**PUBLIC LAW 105-83 (SENATOR STEVENS' AMENDMENTS)**	**SUBSISTENCE TASK FORCE PROPOSAL (September 1997)**
Sec. 316(a): Moratorium		Extended until December 1, 1998	
Sec. 316(b): Amendments to ANILCA		Amendment or repeal refers to ANILCA in this section	
Sec. 316(c): Savings Clause		Does not affect Native governmental authority over lands or fish and wildlife; assertions of Indian Country in Alaska; assertion that ANILCA is Indian Law; or the authority of the Secretary of Interior under Sec. 1314(c) of ANILCA	Added as Sec. 816(c)(1),(2), and (3): Same as PL 105-83, except no provision regarding authority of Secretary of Interior
Sec. 316(d): Effective Date		State must adopt laws providing for the definition, preference, and participation specified in Sec.'s 803, 804, and 805 of ANILCA by December 1, 1998 or the amendments to ANILCA will be repealed. Secretary must certify that State is in compliance before amendments become effective	Adds Sec. 806(a): When State enacts state laws and constitutional amendment contained in proposal, it will immediately assume fish and game management.
Sec. 102(2): Definition of "Federal Land"	The lands the title to which is in the United States after the date of enactment of this Act	Lands the title to which is in the United States after December 2, 1980. 'Federal Lands' does not include lands the title to which is in the State, a Native Corporation, or other private ownership.	[Amended in Title I] The term "federal land" means land the title to which is in the United States after December 2, 1980. "Federal land" does not include lands the title to which is in the State after December 2, 1980, Native lands, other private lands, or Native Corporation and State land selections defined in subsection (3)(A) and (B) below

ANILCA PROVISIONS:	**ANILCA TODAY**	**PUBLIC LAW 105-83 (SENATOR STEVENS' AMENDMENTS)**	**SUBSISTENCE TASK FORCE PROPOSAL (September 1997)**
Sec. 801(b): Findings	Sec. 801(a): National interest in protecting the subsistence way of life for Natives and Non-Natives alike in rural areas of the state.	Sec. 801(b) added: (1) rural preference law formerly passed by Alaska accomplished goals of ANILCA; (2) *McDowell* case found preference unconstitutional; (3) no constitutional amendment since then; (4) in accordance with Title VIII, Secretary is required to manage on all public lands because state law failed to provide rural preference; (5) *State v. Babbitt* determined that priority applies to navigable waters in which U.S. has reserved water rights; (6) State of Alaska should have opportunity to manage its own resources	
Sec. 803: Definitions: **Sec. 803(3): "Customary and Traditional Uses"**		The noncommercial, long-term and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish or game	Essentially the same as PL 105-83
Sec. 803(4): "Customary Trade"		Except for money sales of furs and furbearers, the limited, non-commercial exchange for money of fish and wildlife or their parts in minimal quantities	Essentially the same as PL 105-83
Sec. 803(5): "Rural Alaska Resident"		A resident of a rural community or rural area. A "rural community or area" means a community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses	Essentially the same as PL 105-83

ANILCA PROVISIONS:	ANILCA TODAY	PUBLIC LAW 105-83 (SENATOR STEVENS' AMENDMENTS)	SUBSISTENCE TASK FORCE PROPOSAL (September 1997)
Sec. 804(b): "Reasonable Opportunity"	Sec. 804(a) provides that subsistence taking of resources is afforded a priority over other purposes. When necessary to restrict subsistence taking, priority and limitations are based on customary and direct dependence, local residency, and the availability of alternative resources	Adds Sec. 804(b) which states that the priority afforded under this section is for a reasonable opportunity to take fish and wildlife only. "Reasonable opportunity" means an opportunity, consistent with customary and traditional uses, to participate in a subsistence hunt or fishery with a reasonable expectation of success, and does not mean a guarantee that fish and wildlife will be taken	Essentially the same as PL 105-83

ANILCA PROVISIONS:	ANILCA TODAY	PUBLIC LAW 105-83 (SENATOR STEVENS' AMENDMENTS)	SUBSISTENCE TASK FORCE PROPOSAL (September 1997)
Sec. 805: Local and Regional Participation	Established at least six subsistence resource regions, local advisory committees, and regional advisory councils	Adds Sec. 805(d): when Secretary certifies that State has passed laws consistent with 803, 804, and 805, state shall assume management on public lands. Secretary shall then not implement sections a,b, and c (federal management structure) unless a court of competent jurisdiction determines that state is out of compliance Secretary may bring a judicial action to enforce this subsection (2)(A) regional councils will present recommendations to state boards, which may choose not to follow recommendations which are not supported by substantial evidence, violate recognized principles of fish and wildlife conservation, or are detrimental to the satisfaction of rural subsistence needs (B) members of each regional advisory council appointed by Governor. 10 members, 4 selected from nominees who live in region and presented by tribal councils; 6 from nominees submitted by local governments and advisory committees. 3 of the 6 are subsistence users who live in the region; 3 of 6 are sport or commercial users who live in any subsistence region. 3 year staggered term on councils	Sec. 806(b) added which essentially mirrors 805(d) except that sections (a), (b), and (c) (the federal management structure) shall not be implemented unless a court of competent jurisdiction determines that the State has substantially failed to implement the provisions of Title VIII No similar provision in Task Force Proposal Adds two additional grounds upon which the Boards may base a rejection of a recommendation: 1.) involves an unresolved statewide or inter-regional subsistence management issue; or 2.) is contrary to an overriding statewide fish or wildlife management interest. Essentially the same as PL 105-83

ANILCA PROVISIONS:	ANILCA TODAY	PUBLIC LAW 105-83 (SENATOR STEVENS' AMENDMENTS)	SUBSISTENCE TASK FORCE PROPOSAL (September 1997)
Sec. 807: Judicial Enforcement	Individuals aggrieved by State's failure to implement provisions of Title VIII may, upon exhaustion of administrative remedies, file a civil action in U.S. District Court for enforcement	Adds Sec. 807(b): State agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. When reviewing any action within the specialized knowledge of a State agency, the court shall give the decision of the State agency the same deference it would give the same decision of a comparable Federal agency	Essentially the same as PL 105-83, except does not contain the added phrase "or otherwise not in accordance with law"
Sec. 814: Regulations	The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title	The Secretary, and the State at any time the State has complied with section 805(d), shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title. During any time that the State has complied with section 805(d), the Secretary shall not make or enforce regulations concerning section 805(a), (b), or (c)	Essentially the same as PL 105-83
Sec. 815: Limitations, Savings Clauses	Title is consistent with conservation of healthy fish and wildlife populations; no assignment of rights; no hunting in permanently closed areas; no restricting non-subsistence uses unless necessary to continue subsistence uses or to maintain healthy populations; does not modify or repeal other federal lands Acts	Adds Sec. 815(5): Nothing prohibits Secretary or the State from entering into co-management agreements with native organizations or other local or regional entities when either is managing fish and wildlife on public lands in Alaska for subsistence uses	

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1997 AFN CONVENTION

SUBSISTENCE REVIEW AND ANALYSIS

(OCTOBER 23, 1997)

1997 has been a difficult year for the Native community's effort to maintain and improve federal subsistence protections. This critical period began with Senator Stevens' April speech to the Alaska Legislature. It produced the Governor's Task Force's deliberations and proposed package in the summer. It continued through the statewide Native Subsistence Summit in late August. **Above all, it resulted, on September 30, 1997, in a congressional extension of the *Katie John* moratorium and the passage of several amendments to Title VIII of ANILCA.**

CHRONOLOGY

On April 2, Senator Stevens gave his annual address to a joint session of the Legislature in Juneau. He warned that another congressional moratorium against implementation of the *Katie John* decision (federal management of subsistence fishing on reserved navigable waters) would not be possible this year. He told them that, if they wanted to avoid such a federal takeover, the only solution was a consensus in state politics. Governor Knowles and legislative leaders (e.g., Senate President Miller and House Speaker Phillips) took the Senator at his word; and the Governor began building momentum for a negotiating process among Alaskans.

On May 6, the Governor met with the AFN Board and other Native leaders in Anchorage. He reiterated his commitment to two overriding principles: resuming state management and keeping the rural preference. He added a third principle: "...that I will not support any resolution of that problem that does not have the support of Native Alaskans." The Governor then proposed a "stakeholders" process involving competing user groups. Fearing another round of inconsequential speechmaking, AFN urged that his process involve "decision makers" - officeholders with the power to make law. AFN never suggested that the process exclude stakeholders - merely that the decision makers be involved.

Throughout May, the Governor put together his seven-member Task Force (in addition to himself, Lieutenant Governor Ulmer, Senate President Miller, House Speaker Phillips, former Governor Hammond, former Attorney General Cole and Byron Mallott). It held the first of its several meetings in early June. What became clear at the outset was that this Alaskan negotiating process would exclude any and all representatives chosen by Native people. The Task Force process was never a negotiation by or with us; it was a negotiation about us. What unfolded was a series of bargaining sessions that placed the Governor on one side of the table and Gail Phillips, Mike Miller, Ted Popely and Ron Somerville on the other. Anti-subsistence stakeholders were abundantly represented at the table - indeed, it was primarily with them that the Governor was negotiating. What emerged from this process was a list of policy losses for village people that the legislative leadership got as the price of their support for a constitutional amendment.

The Alaska Native community got its first complete look at the Task Force's draft package (composed of amendments to Title VIII, a complying state statute, and a state constitutional amendment to permit the latter) when it was publicly released on July 9. The deadline for public comment was July 23. AFN, RurALCAP, AI-TC and others wrote to Attorney General Botelho requesting an extension of the deadline until the Native community could hold a Subsistence Summit to consider the Task Force's complex package. That request was granted, although the only workable dates for the Summit were at the end of August.

AFN, RurALCAP and AI-TC sponsored the Summit on August 26-28 because that brief window between late subsistence fishing and the opening of subsistence hunting was literally the only time we could get village people into Anchorage and provide them with meeting space during a busy tourist season. AFN invited the legislative leadership to attend; all had other commitments. But the response from our own people was overwhelming: **nine hundred** Native people and their advisors met for three solid days and worked through a maze of issues and proposals. What did we accomplish? We held the Native community together and achieved consensus; we educated our own people; we debated, amended and voted on every issue before us; we shaped twelve specific recommendations to the Task Force on its proposal; and we adopted a resolution and guiding principles offering to sit down and negotiate same.

The Summit's 12 policy recommendations were:

1) to extend federal subsistence protections to urban Natives - especially those living in "formerly rural" Native communities (i.e, that lose the preference by non-Native in-migration and socio-economic change);

2) to assure that subsistence regulations mirror local customary and traditional harvest and use patterns, without limiting the definition of "customary and traditional" to that in state law;

3) to maintain ANILCA's standard of protection ("least adverse impact" on C&T), rather than replacing it with the Task Force's "reasonable opportunity" to harvest for subsistence;

4) to rely on the federal courts, rather than the language of the current State statute, plus the discretion of the State Boards, to define "customary trade;"

5) to add "cultural and religious" uses to ANILCA's standard list of protected subsistence uses of fish and game;

6) to reform the State's management structure - by using effective regional advisory councils (possibly empowering them as regional regulatory boards), by restructuring the Boards of Fisheries and Game, and by the possible creation of a State Subsistence Board;

7) to require real co-management agreements between the State and the Native tribes as co-equal partners in running the system;

8) to ensure that federal jurisdiction, during State non-compliance, cover:
   --all federal public lands, including all reserved navigable waters,
   --selected/unconveyed lands under ANCSA and the Statehood Act,
   --federal "extraterritorial" reach off such lands to protect subsistence practiced on such lands;

9) to impose no State-sponsored limitation on the powers of the federal courts and/or the Secretary of the Interior to enforce the federal law;

10) to make the State constitutional amendment for a rural preference mandatory, rather than permissive, and to recognize in its text the political status of Alaska Natives;

11) to ensure that federal and State laws permit a subsistence defense in court; and

12) to enact no ANILCA amendments that weaken current federal subsistence protections.

On Saturday, September 13, AFN, RurALCAP and AI-TC finally got the chance to testify before the Task Force, and we all presented the results of the Summit. When the hearing ended, the Task Force went back into deliberations, which were open to the public but provided no further opportunity for public comment,

negotiation or debate. Thus, the direct participation of representatives chosen by Natives, as required by the Summit, was reduced to a single opportunity for three organizations to testify for 20 minutes each. On September 23, after incorporating a few comments from the Native community, the Task Force adopted its final package and discontinued its work.

With the Legislature deliberately stalling consideration of any subsistence solution before October 1, the Alaska Congressional Delegation informed AFN that they felt the ball was now in their court. They reiterated that they would never allow federal management of fisheries on any navigable waters of Alaska. But that was precisely what was looming. Clearly, the Delegation intended to extend the moratorium; but a simple extension, without some additional action to address the federal-state impasse itself, was not likely, since Senator Stevens had told the Legislature in April that they would not do that. Indications were that the Senator would use the House-passed rider on the Interior Department's FY '98 appropriation in his Conference Committee to extend the moratorium - but would combine that with congressional enactment of the ANILCA amendments proposed by the Governor's Task Force. That way, he could keep federal managers off navigable waters, deliver his part of the Task Force's proposal (supported by Governor Knowles, President Miller and Speaker Phillips), and hold the Legislature's feet to the fire on delivering its part.

That is why AFN, RurALCAP, AI-TC and other Native organizations went to Washington, D.C. and worked for ten straight days - from September 22 to October 2. Among those present were AFN's Albert Kookesh, Julie Kitka and staff; attorneys Norman Cohen, Sky Starkey, David Case, Carol Daniel, Mike Walleri, Alan Mintz, and Rick Agnew; AFN Subsistence Committee members Rosita Worl, Will Mayo and Myron Naneng; AFN Board members Bert Griest and Morris Thompson; Vernita Herdman, Carl Jack, Jonathon Solomon and Myra Olsen from RurALCAP; Steve Ginnis from AI-TC and Harold Martin from Tlingit & Haida Central Council. Other Native leaders were in continual contact with us from Alaska; and we held a teleconferenced meeting of the full AFN Board (with Senator Stevens and Secretary Babbitt attending in D.C.) on October 1.

When it became clear that we could not stop the amendatory thrust by the Task Force and the Senator, our urgent task shifted to changing the Task Force's amendments as much as possible to reflect the Summit's recommendations. By the end of our effort, we had achieved parts of that goal - even though, as we had expected, we could not keep ANILCA from being amended.

Just before arriving in D.C., AFN was contacted by Secretary Babbitt, who tried at the same time to contact RurALCAP and AI-TC. He told us that, after talking with Senator Stevens, he was going to get involved in negotiating what Congress would do on Title VIII. Although the Secretary of the Interior has a traditional trust responsibility to protect Native American peoples, the Clinton Administration also has to deal with the Alaska Delegation and the Governor of Alaska. Interior

initially seemed willing to bring Native representatives to the table with the State and the Delegation in order to get the Summit's recommendations considered before Congress acted. What ensued in the next ten days involved hundreds of phone calls, a dozen media interviews, four face-to-face meetings with Solicitor Leshy, repeated consultations with the Delegation and its staffs, and our own strategy sessions several times a day. Our lawyers provided Interior with a stream of draft language and policy justifications in order to change the Task Force's ANILCA amendments to conform to the Summit's recommendations. In the end, Interior never brought Native representatives to the table itself. Instead, their lawyers met at length with the State's lawyers and, using our group's materials, negotiated the package of ANILCA amendments that both the State and Interior would recommend to Senator Stevens. Alaska Natives were again kept out of the room and allowed only to slip recommendations under the door. Some of our ideas were accepted, in whole or in part; others were simply dismissed by those at the table.

Following congressional passage of the Stevens amendments, AFN, along with other Native organizations, wrote to President Clinton, requesting a White House veto of the FY '98 Interior Department appropriation as long as it has these amendments in it. Because Secretary Babbitt and Governor Knowles have concurred in the Stevens action, the President is not expected to veto the bill over our issue.

POLICY SUBSTANCE

Here is what came out of Senator Stevens' ANILCA amendments, organized by the Summit's 12 issues, listed above:

1. **Federal Protections for Urban Natives**. The Stevens amendments maintain ANILCA's subsistence preference for rural Alaska residents. But they define a rural community or area as one that is "...substantially dependent on fish and wildlife for nutritional and other subsistence uses."

By not stating a quantifiable percentage of a rural community's or area's nutrition that must come from fish and game, this leaves the term "substantially dependent" to the discretion of the State Boards. Does "substantially dependent" mean 50% of the community's or area's nutrition? Is it more than 50%? Is it less? The higher it is set, the fewer the communities and areas that will qualify; the lower it is set, the greater the number of communities and areas that will be designated as rural.

Once nutritional dependency has been considered, the Boards would have to evaluate the community's or area's non-nutritional subsistence uses of fish and game (e.g., clothing, transportation, handicrafts, customary trade, sharing, barter, etc.). It is possible that a community or area with a high nutritional

dependency on subsistence could still fall out of the "rural" category for failing to exhibit a sufficient level of non-nutritional subsistence uses. Defining all of that is also left to the State Boards' discretion.

This amendment has the effect of overturning the *Kenaitze* ruling, which added a more objective population criterion to that of socio-economic characteristics. Population counts are now out, making the process of rural designations by the State Boards more subjective and making it harder for anyone to challenge them for violating ANILCA. Depending on how this is implemented by the State Boards, it may be more - or less - restrictive than was the definition struck down by *Kenaitze*.

All communities and areas now on the State's list of non-subsistence use areas (e.g., Saxman, certain Railbelt communities that have been rural under the original ANILCA, and others) will not be rural.

The Task Force's alternative of educational permits for communities that fail to meet this standard can be granted only at the discretion of the Alaska Department of Fish and Game and are accorded no preference in federal law. The Stevens amendments do not contain it, and whether it remains in State law depends on the Legislature.

The "proxy hunting and fishing" provisions of the Task Force's proposal would allow a non-rural resident (either Native or non-Native) to return to his or her customary and traditional use area to hunt or fish for a local resident. The catch would belong to the person for whom the hunting or fishing was done - but the non-rural resident would be allowed to bring some of the catch back to his or her non-rural residence as customary and traditional sharing, as long as a majority of the catch remains in the rural community or area. While this would be a definite step forward for some urban Natives, the proxy provisions would be included only in the State statute. As with educational permits (above), the Stevens amendments do not contain the proxy provisions, and whether they ever become law depends on the Alaska Legislature.

2. Defining C&T. ANILCA, without defining the term, has always required that subsistence regulations mirror "customary and traditional" methods, means, and uses (including locations, seasons, bag limits, proxy hunting and fishing). The Stevens amendments, reflecting the Task Force's proposal and ignoring the recommendations of the Summit, now define C&T as "...the noncommercial, long-term, and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish and wildlife." This new federal definition is basically from the current State law, with the exception of the words "and practices," which we were able to insert. That insertion made the Stevens amendment better than what the Task Force had proposed.

3. **Standard of Subsistence Protections.** The original ANILCA standard, as interpreted by the federal courts in *Bobby*, was that subsistence regulations must be consistent with customary and traditional patterns and practices (season, bag limits, methods and means). The federal courts have also required that subsistence be regulated so as to have the "least adverse impact" on C&T harvest and use patterns. The Governor's Task Force proposed changing this to "reasonable opportunity" (to participate in a subsistence fishery or hunt with a reasonable expectation of success). The Summit expressed strong support for the standards traditionally recognized by the federal courts and opposed any ANILCA amendment that would weaken them. The Stevens amendments changed ANILCA to "reasonable opportunity." We managed to add the qualifier that "reasonable opportunity" regulations must be consistent with customary and traditional uses (defined above).

This improvement reduces the State Boards' discretion in important ways, but it remains to be seen how the Boards will implement the new standard. It also remains to be seen how the federal courts will interpret "reasonable opportunity," particularly in how much deference they will give to the Boards under the new standard of judicial review (Section 9 of this memo). Finally, it remains to be seen how "reasonable opportunity" will affect the courts' standard of "least adverse impact."

"Least adverse impact" on C&T still remains in the original FINDINGS of Title VIII - which were added to, but not deleted by, Senator Stevens' amendments.

4. **Defining Customary Trade.** The Stevens amendments put the State's definition into federal law: "...the limited noncommercial exchange for money of fish and wildlife or their parts in minimal quantities." This change is more restrictive than the original ANILCA, which had no statutory definition and therefore depended on the federal courts to draw the line, case-by-case, between a legitimate subsistence use and a commercial activity in the guise of subsistence. The inclusion of three subjective words ("limited," "noncommercial," and "minimal") hand considerable discretion to the State Boards. Note: The new definition does not apply to the sale of furs and furbearers.

5. **Cultural and Religious Uses of Subsistence.** The Stevens amendments did not add "cultural and religious" uses to ANILCA's list of protected subsistence uses, contrary to the recommendation of the Summit. The federal list remains:

--direct personal or family consumption (food, shelter, transportation, fuel, clothing tools);
--handicrafts production/sale;
--barter;
--sharing for personal or family consumption; and

--customary trade for cash.

6. **Reforms of State Management**. The Task Force's package proposed that the State Boards establish at least six 10-member advisory councils, appointed by the Governor:

--4 members from lists submitted by tribal councils in the region;
--6 members (3 must be subsistence users from the local region, and 3 sport and commercial users from any region) from lists submitted by local governments and local advisory committees.

The Stevens amendments do not specify a minimum number of regional advisory committees that must be established, but they do specify the same membership and appointments as proposed by the Task Force (above) - when the State is in compliance. Council members will have three-year staggered terms, with no limit on the terms a member may serve. A quorum is a simple majority. When the State is out of compliance, the regional council provisions of the original ANILCA would be in force.

The Stevens amendments require the State Boards to "consider the advice and recommendations" of the regional councils for regulations within their respective regions. As in the original ANILCA, the Boards may choose not to follow such recommendations only if they are not supported by substantial evidence, violate recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of rural subsistence needs. The Governor's Task Force proposed to add two more grounds on which a State Board could refuse to follow a regional council's recommendation: because it involves an unresolved statewide or inter-regional subsistence management issue, and because it is contrary to an overriding fish or wildlife management interest. But the Stevens amendments did not add these, for reasons unknown. As a result, it is unlikely that they can be placed in State law, for fear of being inconsistent with ANILCA. Note: It is unclear, under the Task Force's proposed changes to the State law, whether council recommendations will be given such deference if they are not unanimous.

7. **Co-Management**. Despite the critical recommendation of the Summit that federal and State laws mandate co-management agreements and relationships, no such thing was contained in either the Task Force proposal or the Stevens amendments. The Stevens amendments merely confirm the status quo by saying that nothing in ANILCA prohibits the Secretary or the State from entering into such agreements. That is precisely the situation of the last 17 years, and so this represents no progress on co-management.

8. **Extent of Federal Jurisdiction**. The Governor's Task Force had proposed to amend the definition of "federal lands" to exclude State and Native selected-but-unconveyed lands. The intent of that amendment was to limit the

ability of the Secretary, in times of State non-compliance, to apply the federal subsistence program to such lands, as he had indicated he would do in his preliminary regulatory notice for the federal subsistence fishing program under *Katie John*. Through Interior-State negotiations, we were able to get that portion of the "federal lands" definition dropped. The new definition enacted by Congress is "lands the title to which is in the United States after December 2, 1980." It specifically exempts from federal jurisdiction "lands the title to which is in the State, a Native Corporation, or other private ownership" (i.e., conveyed State and ANCSA lands), but it does not specifically exempt selected/unconveyed lands.

The Governor's Task Force and Senator Stevens have stated that this change is not intended to exempt navigable waters from the definition of "public lands," thereby overturning *Katie John*. We are informed that the congressional Conference Committee Report will clarify that the new definition does not affect subsistence fishing and does not overturn *Katie John*. The danger in this is that courts tend to look at legislative history only when the statutory language is unclear, and therefore the assurances in the Report may not be determinative.

9. **ANILCA Oversight Authority of Secretary and Federal Courts.**

Secretarial Certification of State's Return to Compliance: Under the Task Force's proposal, the State could have immediately regained management, once it had passed a constitutional amendment and the new statute. But that process could have permitted the State to pass a statute substantially different from the requirements of ANILCA and still be deemed as complying with the federal law. This provision was removed and replaced with a requirement of Secretarial certification. In order for the State now to come back into compliance, the Secretary must certify that the Alaska Constitution has been amended to permit a complying statute and that such a complying statute has been enacted. This is definite improvement over the Task Force's original ANILCA amendment.

AUGUST 28, 1997

NATIVE SUBSISTENCE SUMMIT

RESOLUTION 97-01

Concerning the subsistence rights of the Alaska Native People.

Whereas, representatives of the Alaska Native peoples and their tribal governments, corporations, and other organizations from throughout the State of Alaska assembled at the Native Subsistence Summit co-sponsored by the Alaska Federation of Natives, the Alaska Inter-Tribal Council and the RurAL Community Action Program in Anchorage, Alaska, on August 26-28, 1997, to consider proposals to amend state and federal laws relating to subsistence hunting, trapping, gathering and fishing; and

Whereas, the delegates to the Native Subsistence Summit expressed their deep concern over the need to protect and promote the customary and traditional ways of taking fish and wildlife, and other subsistence activities in connection with any proposals to change subsistence laws, regulations and policies; and

Whereas, the delegates to the Native Subsistence Summit carefully reviewed, discussed and carefully considered numerous proposals to resolve the current subsistence impasse;

Now, therefore, be it resolved, by the representatives of the Alaska Native people assembled at the Native Subsistence Summit, that:

1.

(a) Appreciation is extended to the many Native delegates who came despite pressing unfinished subsistence work to demonstrate their deep commitment to the preservation of their customary and traditional subsistence lifestyle.

(b)The delegates to the Native Subsistence Summit express their appreciation for the hard work and dedication of Governor Knowles and the other members of the Governor's Task Force in developing its proposal and

for the attendance of the Governor and other members of the Task Force at the Native Subsistence Summit.

2. The delegates to the Native Subsistence Summit express their appreciation to the members of the Alaska Congressional delegation for their efforts to resolve the subsistence impasse and their support for a State Constitutional amendment which will allow the State of Alaska to comply with the provisions of Title VIII of the Alaska National Interest Lands Conservation Act.

3. The delegates to the Native Subsistence Summit express the willingness of the Alaska Native community to work for the development of a consensus on a package to address subsistence.

4. In order to ensure an acceptable resolution of the current impasse on the subsistence issue, the delegates to the Native Subsistence Summit demand that the development of any further proposal to resolve this issue of crucial importance to the future of the Alaska Native people be accomplished only with the full participation and endorsement by representatives of the Alaska Native people chosen by the Alaska Native people themselves and with the consent of Alaska Native tribes.

5. In order to effectuate the recommendations set forth in this resolution, the delegates to the Native Subsistence Summit authorize and direct the leadership of the Alaska Federation of Natives, the Alaska Inter-Tribal Council and the RurAL Community Action Program:

a) To continue the work of the Native Subsistence Summit to resolve the subsistence impasse; and

b) To work with Governor Knowles, the members of the Governor's Task Force, the members of the Alaska Legislature, the members of the Alaska Congressional Delegation and other interested parties to develop a resolution to the subsistence impasse consistent with the guiding principles adopted by the delegates to the Native Subsistence Summit.

6. Any resolution negotiated by the representatives must be ratified through the full and informed consent of the Alaska native tribes and other organizations.

7. The delegates to the Native Subsistence Summit call upon the Governor, the members of the Alaska Legislature, the members of the Alaska Congressional Delegation and other interested parties to work with the representatives of the Alaska Native people to reach consensus to resolve the current subsistence impasse.

GUIDING PRINCIPLES

Establishment of a legal system based upon principles which achieve:

1. Full participation and consent of the Alaska Native Community, including hearings in villages in each region;

2. A subsistence priority based on Alaska Native, community, religious/spiritual, nutritional, medicinal and cultural practices rather than an individualized or a needs based system;

3. Only amendments which enhance subsistence rights and maintain federal oversight to at least its current level;

4. Co-management including state, federal and tribal co-equal involvement;

5. Full recognition of customary and traditional uses including religious/spiritual and ceremonial;

6. Effective comprehensive reform of the State management system;

7. Recognition that subsistence is a basic human right.

Subsistence Proposal Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
A The Priority: Who is eligible?	Federal Lands: Rural residents with C&T uses. "Rural defined by Federal Subsistence Board, based on population and rural characteristics of community/area. State, Private Lands: All Alaska residents. Only priority is for subsistence use over other uses, not for any Alaska residents over other Alaskan residents.	Residents of Alaska communities that are rural (as defined in *Kenaitze* case); priority applies only to specific fish stocks and game populations customarily and traditionally used by community. Applies to communities and areas: no individual qualification.	Alaska Natives only.	AVCP will provide information before the presentation.	Members of federally recognized tribes within their customary and traditional hunting and fishing grounds. The priority would apply to all tribes, including those currently located within "non-subsistence" areas. No individual qualification.	Rural, plus urban Natives; repeal Sec 4(b) of ANCSA	SUPPORT GOVERNOR'S TASK FORCE PROPOSAL FOR STATE MANAGEMENT IF IT IS MODIFIED AND AMENDED AS SET FORTH BELOW, and in August 19, 1997 North Slope Subsistence Workshop and Summit Resolution. Governor's proposal must make it clear that larger communities like Barrow and Bethel qualify as "rural," and that residents receive a Rural subsistence priority.	Native preference is the best option, but a rural preference is acceptable.	Alaska Natives and their descendants, and those Alaska residents having a customary and traditional use.
B Definition: "Customary & Traditional"	Federal Lands: No definition in ANILCA. Regulations' definition: "A long-standing, consistent pattern of use, incorporating beliefs and customs, transmitted from generation to generation...use plays important role in economy of community." State, Private Lands: "...Non-commercial, long term taking of, use of, and reliance upon fish or game in a specific area and the se patterns of that fish or game that have been established over a reasonable period of time, taking into consideration the availability of the fish or game."	No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing).	No statutory definition proposed.		No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing).	No statutory definition. Hunting and fishing regulations must mirror customary and traditional methods, means and uses (including locations, seasons, bag limits, and proxy hunting and fishing).	Add "trapping" to hunting and fishing. See Section 2 of Resolution.	Maintain current federal regulatory definitions. Hunting and fishing regulations would have to conform to local customary and traditional uses, as was the original intent of Title VIII of ANILCA.	Hunting and fishing regulations would have to conform to local customary and traditional uses, as was the original intent of Title VIII of ANILCA. Local input would be necessary.

Subsistence Proposal Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
C **Definition: "Customary Trade"**	Federal Lands: No definition in ANILCA. Regulations' definition: "Cash sale of fish and wildlife resources regulated herein, not otherwise prohibited by State or Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise." State, Private Lands: "Exchange for cash of fish or game in minimal, noncommercial quantities, as determined by regulation." (State Boards set regulations.) Does not restrict money sales of furs and furbearers.	Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in *Alexander* case) any claim that subsistence crossed into commercial.	Federal Lands: No definition in ANILCA. Regulations' definition: "Cash sale of fish and wildlife resources regulated herein, not otherwise prohibited by State or Federal law or regulation, to support personal and family needs; and does not include trade which constitutes a significant commercial enterprise." State, Private Lands: "Exchange for cash of fish or game in minimal, noncommercial quantities, as determined by regulation." (State Boards set regulations.) Does not restrict money sales of furs and furbearers.		Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in *Alexander* case) any claim that subsistence crossed into commercial.	Exchanges for cash within family and community networks.	See Section 3 of Resolution.	Current federal regulatory definitions but excluding references to state regulations and allowing for court interpretation.	Allows sales for cash. Does not require that such fish or game be harvested primarily for personal or family consumption; does not draw line where amount sold or dollar value violates subsistence. Courts must decide (as in *Alexander* case) any claim that subsistence crossed into commercial.
D **When the priority is invoked**	Federal Lands: As in ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage). State, Private Lands: Priority for subsistence over other uses is in force at all times. However, Tier II priority may not be based on local residency.	No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).	In times of harvests below community requirements.		No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).	No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).		At all times.	No change from ANILCA: Requires subsistence regulations at any time there is an identified subsistence use. Tier I or II priority invoked at any time takings must be restricted (e.g. shortage).

Subsistence Proposal Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
E **Standard of protection for subsistence harvests**	Federal Lands: Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (*Bobby* case). Must provide maximum opportunity, though not guaranteed harvest. State, Private Lands: Reasonable opportunity For subsistence taking and use; requires regulations providing normally diligent person reasonable expectation of success. Not a guaranteed harvest.	Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (*Bobby* case). Must provide maximum opportunity, though not guaranteed harvest.	Below the level required by a Native community to meet its demonstrated subsistence requirements.		Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (*Bobby* case). Must provide maximum opportunity, though not guaranteed harvest.	Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (*Bobby* case). Must provide maximum opportunity, though not guaranteed harvest.	See Section 3(c) of Resolution.	Least adverse impact.	Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (*Bobby* case). Must provide maximum opportunity, though not guaranteed harvest.
F **Subsistence opportunities for urban Natives:** • **historically rural Native communities/areas now defined as urban;** • **individual Natives who moved to urban communities/areas**	Federal Lands: No ANILCA provisions for urban Natives, either: 1) Historically rural Native communities/areas now defined as urban, or 2) Individual Natives who moved to urban communities/areas. State, Private Lands: State has issued some Subsistence educational permits to historically rural Native communities/areas now defined as urban (e.g., Kenaitze).	Federal priority should be strengthened (e.g., by Native or Native-plus priority, or better definition of "rural") to guarantee adequate subsistence protections for Native residents of historically rural Native communities/areas now defined as urban. (Note: Native or Native-plus priority would protect both categories of urban Natives.)	Alaska Natives, including urban Natives, protected for hunting or fishing in their customary and traditional locations.		Individual Natives, as members of federally recognized tribes, would be eligible for priority within their customary and traditional use areas, regardless of where they now reside. Tribal priority would protect both categories of urban Natives.	Urban Natives would be able to participate in subsistence uses in their customary and traditional use areas.	Need to strengthen the "reasonable opportunity" standard. Need to provide a maximum opportunity, although not a guaranteed harvest. See Section 3(c) of Resolution.	Urban Natives who are members of federally recognized tribes would be eligible for priority within their customary and traditional use areas, regardless of where they now reside. Tribal priority would protect both categories of urban Natives.	Alaska Natives, and descendants of, including urban residents for hunting or fishing in their customary and traditional locations.

Subsistence Proposa Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
G **What uses are protected (human consumption, nutrition, etc.)?**	Federal Lands: All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. State, Private Lands: All C&T uses, as listed above, plus potlatches.	All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption.	All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. Plus: Clarification to include religious and ceremonial uses.		All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. Plus: Clarification to include religious and ceremonial uses.	All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption.	See Section 3 (d) of Resolution.	All C&T uses currently provided for in ANILCA as defined and practiced by the tribal community. Including the taking of, use of, and customary trade, barter and sharing.	All C&T takings and uses for: • direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools); • handicraft production/sale; • barter; • customary trade for cash; • sharing for personal or family consumption. Plus: Clarification to include religious and ceremonial uses.
H **What is the geographical extent of the priority (on which lands and waters)?**	Federal Lands: All rural federal public lands (including reserved waters). State, Private Lands: All State lands outside non-subsistence use areas, all private lands outside non-subsistence use areas (including ANCSA), and State or ANCSA selected/unconveyed lands + unreserved navigable waters.	All rural lands and waters. Note: definition of "rural" in Row A above.	Federal public lands (including reserved waters); Native lands (ANCSA and allotments); and possibly State lands in vicinity of any Native community seeking a permit.		All lands and waters in Alaska.	All rural lands and waters. Note: definition of "rural" in Row A above.	Statewide. See Section 3 (e) and Section 6 of Resolution.	Statewide: All lands (including all waters).	Statewide: All lands (including all waters).

Subsistence Pro posal Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
I **Are management reforms included?**	Federal Lands: Fed agencies have ability to enter into cooperative management agreements. 10 fed regional advisory councils operate. State, Private Lands: State agencies have ability to enter into cooperative management agreements. No State regional advisory council system.	Yes. Mandatory and basic reforms of state systems: • board structure and processes; • regional advisory councils to generate subsistence regulations; • co-management contracting and delegation of management powers and functions to Native communities and organizations.	Federal board and federal regional councils to monitor Native subsistence harvests and to provide opportunities by permit for Native communities when insufficient harvests occur. Actions are initiated by regional councils, which are entitled to deference from Federal Subsistence Board.		Yes. Mandatory and basic reforms of State systems. Local subsistence needs and uses would be identified and provided for through a Regional Council System that ensures a co-management role for tribal governments on all issues affecting subsistence management; the State Board system would also be reformed so that subsistence decisions are made by a board composed of subsistence users nominated by Regional Subsistence Councils.	Yes. Mandatory and basic reforms of state systems: • board structure and processes; • regional advisory councils to generate subsistence regulations; • co-management contracting and delegation of management powers and functions to Native communities and organizations.	See Section 4 of Resolution.	Yes, we support a federal takeover. The Federal government should exercise its existing authority to regulate and protect subsistence on state and private lands to protect subsistence on federally reserved lands & waters.	Yes. Local subsistence needs and uses would be identified and provided for through a Regional Council System that ensures a co-management role for tribal governments on all issues affecting subsistence management; the State Board system would also be reformed so that subsistence decisions are made by a board composed of subsistence users nominated by Regional Subsistence Councils.
J **Does it contain the principle of co-management?** **(Note: concept of "co-management" is defined differently by proposals listed to the right.)**	Federal Lands: Section 809 authorizes, but does not mandate, cooperative agreements. State, Private Lands: No specific requirement in State law or regulations.	Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.	Requires co-management between Secretary and Native groups. "Co-management" is not defined.		Yes. Maximum possible involvement of tribes in co-management. "Co-management" is not defined. If state opts not to participate, there would still be co-management between tribes and the federal government.	Any proposals by Alaska Native Community for changes in subsistence management shall include a provision for co-management by Tribes as equal partners with other governmental entities; convening a SE Technical Conference on co-management led by SE Tribes and organizations to explore and define co-management; and each Native community define co-management parameters itself within its traditional usage area and that each community activate Tribal members, especially elders and youth, to the opportunities of co-management.	See Sections 4 and 7 of Resolution. Co-management through contacts and cooperative agreements needs to be authorized. The Alaska Eskimo Whaling Commission provides a successful model. Local subsistence users role in Regional Councils and Advisory Boards needs to be strengthened..	Yes, maximum involvement of tribes and landowners in co-management at the federal and state levels.	Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.

Subsistence Proposal Comparisons

Issue:	Present Situation Dual Management	AFN No Net Loss	3) TCC Proposal	4) AVCP/Calista Proposal	5) AITC/RurAL CAP Proposal	6) Southeast Proposal	7) North Slope Proposal	8) Northwest Proposal	9) Kodiak Proposal
K **Extent of federal jurisdiction when the State is out of compliance**	Federal Lands: All federal public lands (including adjacent reserved waters). State, Private Lands: All State lands, private lands (including ANCSA), and State or ANCSA selected/unconveyed lands + unreserved navigable waters.	• All public lands (including broadest possible definition of "reserved waters"); • all State and ANCSA selected / unconveyed lands (including over-selections); • maximum extraterritorial reach off public lands.	State would always be in compliance. State would have authority on all state, federal, and private lands.		Expands federal jurisdiction to all public lands and the broadest definition of reserved waters (including navigable waters outside federal parks and reserves); all selected and unconveyed lands; and provides for maximum extra-territorial reach of tribes in co-management.	• All public lands (including broadest possible definition of "reserved waters"); • all State and ANCSA selected / unconveyed lands (including over-selections); • maximum extraterritorial reach off public lands.	See Resolution.	Expands federal jurisdiction to all public lands, including the broadest definition of reserved waters; all selected and unconveyed lands; and provides for maximum reach off public lands.	• All public lands (including broadest possible definition of "reserved waters"); • all State and ANCSA selected / unconveyed lands (including over-selections); maximum extraterritorial reach off public lands.
L **Federal Court Oversight**	Federal Lands: Private right of action in federal court against State or federal regulations that are inconsistent with federal law. State, Private Lands: None.	No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law.	Federal court oversight of Federal Subsistence Board decisions only.		No change from ANILCA: federal court oversight would continue and there would continue to be a private right of action in federal court against State or federal regulations that are inconsistent with federal law.	No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law.	See Section 8 (b) of Resolution. Limiting Federal Court review should be reconsidered. Also an administrative appeal process to provide a fair hearing to reconsider allocation decisions which adversely impact individuals, communities, or Tribal groups should be considered for the State Boards and regional Councils.	No change from ANILCA: private rights of action on federal court against state regulations that are inconsistent with federal law.	No change from ANILCA: private right of action in federal court against State or federal regulations that are inconsistent with federal law.
M **Nature of the State Constitutional Amendment**	Not applicable.	No official AFN position taken since 1990 – because no constitutional amendment seriously considered by the Legislature in seven years.	None required.		Recognition in the Alaska Constitution of the "political" status of Alaska Natives.	No official position.	The language to "permit" rather than to require a subsistence priority merits review.	We do not support a State Constitutional amendment. Such actions give too much power to a hostile legislature to enact hunting and fishing laws adverse to the subsistence way of life.	None required.
N **Amendments to Title VIII**	Not applicable on either federal or State/private lands. (No ANILCA amendments have been enacted by Congress.)	No Title VIII amendments, unless they strengthen federal protections. Solution should include Native or Native-plus priority, or better definition of "rural" – for Native communities that could drop out of current "rural" definition.	All amendments would be made through ANILCA.		Yes, but only to provide for a Native or "tribal" subsistence priority and a tribal role in the management of subsistence resources.	No Title VIII amendments, unless they strengthen federal protections. Solution should include Native or Native-plus priority, or better definition of "rural" – for Native communities that could drop out of current "rural" definition.		No Title VIII amendments including appropriation riders.	Keep Title VIII closed.

Subsistence Proposal Comparisons

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O Is there a subsistence defense against criminal prosecutions?	Federal Lands: Yes. State, Private Lands: No.	Yes.			Yes.				

TESTIMONY OF MS. JULIE KITKA, PRESIDENT OF THE ALASKA FEDERATION OF NATIVES

FOR THE RECORD, MY NAME IS JULIE KITKA, AND I AM TESTIFYING TODAY ON BEHALF OF THE ALASKA FEDERATION OF NATIVES.

AT THE OUTSET OF MY REMARKS, I WANT TO URGE BOTH HOUSES OF THE LEGISLATURE TO ALLOW TELECONFERENCED PUBLIC TESTIMONY DURING THIS SPECIAL SESSION. GIVEN THE GRAVITY OF THE ISSUE, THE PEOPLE DESERVE TO BE HEARD.

MR. CHAIRMAN, THE STATE OF ALASKA NOW STANDS AT THE CROSSROADS OF HISTORY. THE CONFLICT BETWEEN STATE AND FEDERAL SUBSISTENCE LAWS HAS DIVIDED ALASKANS FOR MORE THAN EIGHT YEARS; AND THESE DIVISIONS WILL INEVITABLY WORSEN IF THE LEGISLATURE FAILS TO RESOLVE THE IMPASSE NOW. THE WAY IN WHICH SUBSISTENCE IS DEALT WITH IN 1998 WILL HAVE A GREATER IMPACT ON THE FUTURE OF ALASKA THAN ANY OTHER ISSUE IN STATE POLITICS.

BECAUSE SO MUCH OF THIS DEBATE HAS FOCUSED ON TITLE VIII OF ANILCA, LET'S KEEP IN MIND WHY THAT LEGISLATION WAS ENACTED IN THE FIRST PLACE. IN 1971, CONGRESS HAD PASSED THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, THE PRIMARY PURPOSE OF WHICH

WAS TO CLARIFY LAND OWNERSHIP. BUT SUBSISTENCE HAD ALSO PERVADED THE ANCSA PROCESS. CONGRESSIONAL FINDINGS IN THE FINAL SENATE BILL EMPHASIZED PROTECTION OF "...NATIVE SUBSISTENCE HUNTING, FISHING, TRAPPING AND GATHERING RIGHTS..." IF ENACTED, THAT BILL WOULD HAVE REQUIRED THE SECRETARY OF THE INTERIOR TO DESIGNATE PUBLIC LANDS AROUND NATIVE VILLAGES AS SUBSISTENCE USE AREAS - AND, UNDER CERTAIN CIRCUMSTANCES, TO CLOSE THEM TO NON-SUBSISTENCE USES.

WHY DID THE ANCSA CONFERENCE COMMITTEE DROP THE SUBSISTENCE PROVISIONS FROM THE FINAL ACT? BECAUSE CONGRESS WAS UNWILLING TO DELAY THE LAND SETTLEMENT AND CONSTRUCTION OF THE PIPELINE IN ORDER TO WORK OUT SUCH A COMPLEX RESOURCE ISSUE. ACCORDINGLY, SECTION 4 (B) OF ANCSA EXTINGUISHED NATIVES' ABORIGINAL HUNTING AND FISHING RIGHTS, AS WELL AS THEIR ABORIGINAL TITLE TO THE LAND. BUT THE CONFERENCE REPORT ARTICULATED THE UNITED STATES GOVERNMENT'S CONCERN FOR NATIVE SUBSISTENCE IN THE ABSENCE OF THE ABORIGINAL RIGHTS. AND IT MANDATED RESPONSIBILITY: "THE CONFERENCE COMMITTEE EXPECTS BOTH THE SECRETARY AND THE STATE TO TAKE ANY ACTION NECESSARY TO PROTECT THE SUBSISTENCE NEEDS OF THE NATIVES."

BUT CONGRESSIONAL EXPECTATION OF STATE COOPERATION WENT

UNFULFILLED DURING THE 1970'S. THE PIPELINE BOOM PRODUCED AN ENORMOUS NON-NATIVE MIGRATION INTO ALASKA AND A 36% POPULATION INCREASE IN NINE YEARS, CREATING FIERCE COMPETITION AMONG USER GROUPS FOR LIMITED FISH AND GAME RESOURCES. HOW DID THE STATE GOVERNMENT REACT TO THAT?

1. THE 1972 MARINE MAMMAL PROTECTION ACT PROTECTED NATIVE HUNTING - A POLICY THAT WORKS EFFECTIVELY TO THE PRESENT DAY. THE STATE DID NOTHING ABOUT MARINE MAMMALS IN THE 1970'S, EXCEPT TO OPPOSE THAT FEDERAL ACTION.

2. IN 1976, THE NORTHWEST ARCTIC CARIBOU HERD CRASHED. THE GOVERNOR DECLARED A DISASTER AREA, AND FOOD WAS FLOWN IN TO KEEP PEOPLE ALIVE. BUT WHEN THE BOARD OF GAME TRIED TO PROVIDE FOR A VERY LIMITED HARVEST BY LOCAL RESIDENTS, A GROUP OF FAIRBANKS HUNTERS SUED, CLAIMING THAT THEIR RIGHTS HAD BEEN VIOLATED. AND THEY WON IN STATE COURT.

3. IN 1978, THE STATE ARRESTED THREE AGED ATHABASKAN ELDERS FOR OPERATING SUBSISTENCE FISHWHEELS DURING AN OPENING FOR SPORT DIPNETTING.

4. ALSO IN 1978, THE STATE ENACTED A STATUTORY PREFERENCE FOR SUBSISTENCE OVER COMPETING <u>USES</u> BUT FAILED TO DISTINGUISH AMONG COMPETING <u>USERS</u> - WHICH WAS ALWAYS THE REAL QUESTION.

THE 1970'S - A DECADE OF NEGLECT AND OBSTRUCTIONISM - LED DIRECTLY TO ENACTMENT OF TITLE VIII OF ANILCA. BY 1980, CONGRESS RELUCTANTLY CONCLUDED THAT IT HAD NO CHOICE BUT TO PROTECT SUBSISTENCE BY FEDERAL LAW, PURSUANT TO ITS PLENARY AUTHORITY TO REGULATE INDIAN AFFAIRS.

BUT EVEN THEN, CONGRESS MADE EVERY ATTEMPT TO ACCOMMODATE THE STATE'S NEEDS. ANILCA'S SUBSISTENCE PREFERENCE WAS BASED ON THE DIFFERING SOCIOECONOMIC CIRCUMSTANCES OF RURAL AND URBAN ALASKA, NOT ON RACE OR ETHNICITY. THE STATE OBJECTED TO A NATIVE PREFERENCE BECAUSE IT WANTED A STANDARD THAT IT COULD ENFORCE UNDER ITS CONSTITUTION. ALL PARTIES ASSUMED THAT "RURAL" WOULD WORK, AND THE NATIVE COMMUNITY ACCEPTED THAT COMPROMISE IN ORDER TO GET A PREFERENCE THAT THE STATE COULD IMPLEMENT.

MOREOVER, TITLE VIII OFFERED THE STATE THE OPTION OF CONTINUING TO REGULATE SUBSISTENCE ON FEDERAL PUBLIC LANDS AND WATERS (IN ADDITION TO ITS OWN JURISDICTION OVER STATE AND PRIVATE LANDS) - IF THE LEGISLATURE WOULD ENACT A STATE LAW GIVING THE SAME RURAL PREFERENCE STATEWIDE. THIS WAS NOT AN EXAMPLE OF "FEDERAL COMPULSION," AS SOME HAVE ARGUED. ON THE CONTRARY, THE UNITED STATES COULD HAVE PROCEEDED TO ENFORCE THE RURAL PREFERENCE SOLELY WITHIN ITS OWN DOMAIN, CREATING A PERMANENT SYSTEM OF DUAL MANAGEMENT. INSTEAD, IT MADE A GOOD-FAITH OFFER TO CREATE COOPERATIVE, UNITARY MANAGEMENT OF HIGHLY MOBILE SPECIES ON A CHECKERBOARD OF STATE, PRIVATE AND FEDERAL LANDS. THIS WAS UNPRECEDENTED IN THE GENERAL HISTORY OF FEDERAL LAND LAW.

IN THE DECADE FOLLOWING ANILCA, RURAL RESIDENTS DID THEIR BEST TO MAKE THE ANILCA SYSTEM WORK. THE STATE OF ALASKA DID NOT. ITS REGULATORY BODIES FRUSTRATED IMPLEMENTATION OF THE PREFERENCE AND REFUSED TO REGULATE CONSISTENT WITH CUSTOMARY AND TRADITIONAL SUBSISTENCE PRACTICES. IT NEVER FULLY FUNDED OR EMPOWERED REGIONAL ADVISORY COUNCILS. MORE THAN ONCE, RURAL RESIDENTS FOUND IT NECESSARY TO GO TO COURT TO ENFORCE THE LAW ON A STATE THAT WAS DETERMINED TO SIDESTEP IT.

BUT THE BEHAVIOR OF THE STATE BOARDS WAS VERY DIFFERENT FROM WHAT THE PEOPLE OF ALASKA THOUGHT. IN THE 1982 GENERAL ELECTION, A BALLOT INITIATIVE TO REMOVE THE RURAL PREFERENCE FROM STATE LAW WAS SOUNDLY DEFEATED - 58.4% AGAINST AND 41.6% FOR. THAT RESULT BECAME THE REAL REASON WHY LEGISLATIVE MAJORITIES HAVE REFUSED EVER TO TRUST THE VOTERS WITH THIS ISSUE AGAIN. THEY KNOW PERFECTLY WELL WHAT THE PEOPLE WILL DO, IF THEY EVER GET THE CHANCE. IF LEGISLATIVE MAJORITIES DURING THIS PERIOD HAD HAD ANY EXPECTATION THAT T HE ELECTORATE WOULD VOTE IT DOWN, THEY WOULD HAVE PUT A CONSTITUTIONAL AMENDMENT ON THE BALLOT YEARS AGO. HAVING FAILED WITH THE VOTERS, THE 1982 INITIATIVE'S SPONSORS THEN TURNED TO THE STATE JUDICIARY; AND IN 1989, THE ALASKA

SUPREME COURT THREW THE RURAL PREFERENCE OUT OF STATE LAW. SINCE THEN, FOR EIGHT AND A HALF YEARS, LEGISLATIVE MAJORITIES HAVE REFUSED TO ALLOW THEIR OWN VOTERS TO CONSIDER A CONSTITUTIONAL AMENDMENT.

THIS SAD CHRONOLOGY LIES AT THE HEART OF THE DISTRUST THAT SO MANY RURAL PEOPLE FEEL FOR THE STATE OF ALASKA - AND HAS BEEN A PRIME CAUSE OF THE GROWTH OF THE TRIBAL MOVEMENT AMONG NATIVES, AS A PROTECTION AGAINST A PERMANENTLY HOSTILE STATE GOVERNMENT. NOTHING HAS DONE MORE DAMAGE TO STATE AUTHORITY AND TO THE SOCIAL FABRIC OF ALASKA THAN THE AGONY OF SUBSISTENCE. AND THE ULTIMATE IRONY IS THAT IT WAS ALL SELF-INFLICTED. THE CAUSE WASN'T THE FEDS; IT WASN'T THE LIBERALS; AND IT WASN'T THE NATIVES. THE STATE GOVERNMENT HAS NO ONE TO BLAME FOR THIS BUT ITSELF.

FACED WITH THIS HISTORICAL CRISIS, WE WOULD DO WELL TO CUT THROUGH A FEW MYTHS THAT HAVE ACCUMULATED OVER THE YEARS. THE FIRST IS THE ASSUMPTION THAT WHAT THIS IS REALLY ABOUT IS "WHO MANAGES." THAT'S NOT TRUE. THE CORE QUESTION HAS ALWAYS BEEN WHETHER THE RURAL SUBSISTENCE PREFERENCE ITSELF IS A PROPER POLICY FOR ALASKA, REGARDLESS OF THE UNIFORM WORN BY THE IMPLEMENTING MANAGER. BUT ANTI-SUBSISTENCE FORCES HAVE AVOIDED THAT DEBATE - BECAUSE IT IS

SO HARD TO ARGUE AGAINST LETTING PEOPLE EAT IN TIMES OF SHORTAGE. SO, THE PRINCIPLE OF STATES' RIGHTS AGAINST THE FEDERAL GOVERNMENT HAS BECOME THE EVASION OF CHOICE - AS IF ALL THIS WERE SOMEHOW A CLASH BETWEEN ALASKA AND THE UNITED STATES, INSTEAD OF BETWEEN TWO ALASKAS.

REMEMBER: STATE'S RIGHTS IS THE BEDROCK OF AMERICAN FEDERALISM, AND WE IGNORE THAT PRINCIPLE AT OUR PERIL. BUT IT IS ALSO TRUE THAT, THROUGHOUT THE NATION'S HISTORY, STATES' RIGHTS HAVE BEEN USED AS MEANS TO ADVANCE PURPOSES THAT ARE TRULY DESTRUCTIVE. THERE WAS A TIME WHEN STATES' RIGHTS WAS A DEFENSE OF RACIAL SEGREGATION.

FURTHER, I SUBMIT TO YOU THAT, IF FEDERAL LAW WERE OPPOSED TO A RURAL PREFERENCE, AND STATE LAW REQUIRED IT, INSTEAD OF THE OTHER WAY AROUND, ANTI-SUBSISTENCE INTERESTS WOULD TURN THEIR BACKS ON THE STATE OF ALASKA IN A HEARTBEAT. THEY MOUTH THE RHETORIC OF STATES' RIGHTS TO THE EXTENT THAT THEY CAN GET SOMETHING OUT OF IT - IN THIS CASE, SOMEONE ELSE'S FOOD. BUT A PRINCIPLE IS SOMETHING YOU DEFEND BECAUSE IT IS RIGHT, NOT BECAUSE YOU GET PAID FOR IT. THE AMERICAN FEDERAL SYSTEM DESERVES BETTER THAN TO BE TROTTED OUT AS A DEFENSE OF EVERY LOCAL EXPLOITATION, AND IT SHOULD NOT BE USED IN

MODERN ALASKA TO DISTRACT US FROM THE REAL POLICY QUESTION.

ANOTHER MYTH IS THAT ANILCA'S RURAL PREFERENCE IS IN FORCE AT ALL TIMES, RATHER THAN ONLY IN TIMES OF SHORTAGE. THAT IS NOT TRUE. THE PREFERENCE OVER OTHER USES AND USERS THAT IS GRANTED TO RURAL RESIDENTS WHO HAVE ESTABLISHED CUSTOMARY AND TRADITIONAL USES OF SPECIFIC FISH STOCKS AND GAME POPULATIONS TAKES EFFECT ONLY IN A TIER I OR TIER II SHORTAGE. TITLE VIII ALSO MANDATES THAT THE BOARDS MAY NOT MANIPULATE SUCH THINGS AS SEASONS, BAG LIMITS, METHODS AND MEANS SO AS TO DISRUPT C&T SUBSISTENCE PATTERNS, EVEN IN TIMES OF PLENTY. THIS IS NOT UNLIKE COMMERCIAL AND SPORT FISHING REGULATIONS, IN WHICH A SYSTEM OF SEASONS, GEAR, BAG LIMITS, ETC. MUST BE IN PLACE, WHETHER THERE IS A SHORTAGE OR NOT. BOTH THE PREFERENCE IN TIMES OF SHORTAGE AND THE GENERAL C&T PROTECTIONS AT ALL TIMES ARE PROVISIONS OF A FEDERAL STATUTE WHOSE PURPOSE IS TO ENSURE THAT REGULATORY MECHANISMS DO NOT HARM SUBSISTENCE IN ORDER TO SATISFY OTHER DEMANDS.

A THIRD MYTH TO BE DEBUNKED IS THAT THIS IS ALL ABOUT "EQUALITY" VERSUS "DISCRIMINATION." HERE'S AN HONEST QUESTION: DOES TITLE VIII OF ANILCA MAKE A DISCRIMINATION BETWEEN CLASSES OF CITIZENS IN ALASKA? HERE'S AN HONEST ANSWER: OF COURSE IT DOES; THAT IS WHY IT IS IN THE FEDERAL STATUTE. AND IN THAT,

ANILCA IS NO DIFFERENT FROM ANY OTHER LAW EVER PASSED.

ALL LAWS DISTINGUISH BETWEEN CLASSES OF CITIZENS. SHOW ME ANY ACT OR APPROPRIATION BY THE UNITED STATES CONGRESS, THE ALASKA LEGISLATURE, THE MUNICIPALITY OF ANCHORAGE, OR THE BRITISH HOUSE OF COMMONS - AND I WILL SHOW YOU A MEASURE THAT HANDS TO ONE GROUP OF CITIZENS SOME BENEFIT THAT IT WITHHOLDS FROM THE OTHERS. MEDICARE, FOR OLDER PERSONS? MEDICAID, FOR POOR PEOPLE? THE ORIGINAL ISSUANCE OF LIMITED ENTRY PERMITS? PERMANENT FUND DIVIDENDS? THE OLD LONGEVITY BONUS PROGRAM? VETERANS' BENEFITS? THE ENTIRE FY 1999 BUDGET, JUST PASSED BY THIS LEGISLATURE? EVEN VOTING RIGHTS? DOES ANY OF THESE POLICIES TREAT EVERY ALASKAN THE SAME? NO. THAT IS IMPOSSIBLE. THE GREAT QUESTION IN DEMOCRACIES HAS NEVER BEEN WHETHER LAWS TREAT ALL PEOPLE IDENTICALLY. IT HAS ALWAYS BEEN WHETHER THE DISTINCTIONS THAT ANY LAW OBVIOUSLY MAKES ARE REASONABLE, WHETHER THEY ADVANCE A VALID POLICY GOAL - IN SHORT, WHETHER THE PEOPLE BELIEVE THEM TO BE FAIR.

AS YOU KNOW, A CLEAR MAJORITY OF ALASKANS BELIEVES THAT A STATE LAW CONTAINING A RURAL SUBSISTENCE PREFERENCE IS A FAIR AND JUSTIFIABLE SOCIAL POLICY. THEY SEE IT AS MORALLY

RIGHT BECAUSE THE WHOLE BASIS OF LIFE IN ALASKA'S VILLAGES IS NOW THREATENED, AND BECAUSE IT IS UTTERLY PERVERSE TO WIPE OUT HUMAN COMMUNITIES FOR NO REASON OTHER THAN A FALSE DREAM OF EQUALITY. THEY SEE IT AS HISTORICALLY SMART BECAUSE, IF THE ECONOMIES AND CULTURES OF BUSH VILLAGES ARE DISMANTLED BY DISTANT POLICY DECISIONS, EVERY ALASKAN WILL SUFFER THE CONSEQUENCES; AND OUR CHILDREN, WHO WILL PAY THAT PRICE MORE THAN WE CAN IMAGINE, WILL NEVER FORGIVE US FOR WHAT OUR GENERATION DID TO THIS BEAUTIFUL PLACE AT THE END OF THE 20TH CENTURY.

TO DATE, THE BEST THAT THE 20TH ALASKA LEGISLATURE HAS BEEN ABLE TO DO IS H.B. 406. THAT LEGISLATION IS DIAMETRICALLY OPPOSED TO TITLE VIII OF ANILCA. IN ORDER FOR THE STATE TO REGAIN MANAGEMENT, IT REQUIRES MASSIVE AMENDMENTS OF THE FEDERAL LAW IN ORDER TO REPLACE THE RURAL PREFERENCE WITH AN INDIVIDUALIZED, NEED-BASED SYSTEM.

H.B. 406 ALLOWS THE BOARDS TO CREATE NONSUBSISTENCE AREAS THAT COULD DENY SUBSISTENCE REGULATIONS TO EVERY ALASKA COMMUNITY OTHER THAN CHALKYITSK AND LIME VILLAGE. IT PROVIDES COMPLEX REGULATIONS FAVORING NONSUBSISTENCE USES AND NON-LOCAL USERS AT EVERY LEVEL OF SHORTAGE. IT ELIMINATES BOTH "RURAL RESIDENCY" AND "CUSTOMARY AND

TRADITIONAL PATTERNS OF HARVEST AND USE," AS THE STANDARDS OF ELIGIBILITY FOR THE PREFERENCE.

H.B. 406 INDIVIDUALIZES THE SUBSISTENCE PREFERENCE, BASED ON DEPENDENCE, AS DEFINED BY SIX CRITERIA WHICH CANNOT BE PROVED OR DISPROVED BUT WHICH ARE INTRUSIVE AND BURDENSOME TO ALL APPLICANTS. IT PROVIDES NO MECHANISM FOR THE DESCENDANTS OF CURRENTLY ELIGIBLE SUBSISTENCE USERS TO ESTABLISH THEIR OWN PATTERNS OF DEPENDENCE - AND COULD ELIMINATE SUBSISTENCE BEYOND THE CURRENT GENERATION.

IT CREATES A BUREAUCRATIC NIGHTMARE OF ELIGIBILITY ADJUDICATIONS. ADF&G PREDICTS APPROXIMATELY 122,000 ANNUAL APPLICATIONS (FROM THOSE WITHOUT THE PRESUMPTION WHO APPLY AND FROM THOSE WITH THE PRESUMPTION WHO HAVE BEEN CHALLENGED), THE DEPARTMENT CONSERVATIVELY ESTIMATES AN ANNUAL COST OF $4 MILLION. COMPARE THAT WITH THE LIMITED ENTRY COMMISSION, WHICH HANDLES 15,000 PERMITS ON A BUDGET OF $2.7 MILLION. THE BILL THEN TURNS AROUND AND ADDS LEGAL PRESUMPTIONS OF INDIVIDUAL ELIGIBILITY WITHIN WHOLE AREAS AND COMMUNITIES - THEREBY VIOLATING THE ALASKA CONSTITUTION.

H.B. 406 TRIES TO OVERTURN THE *BOBBY* CASE, WHICH PROHIBITS THE BOARDS FROM MANIPULATING SEASONS, BAG LIMITS, METHODS AND

MEANS SO AS TO INTERFERE WITH C&T PATTERNS OF TAKING AND USE AT ALL TIMES. IT ADULTERATES THE MEMBERSHIP AND DUTIES OF REGIONAL ADVISORY BODIES. THE BROAD, SUBJECTIVE GROUNDS ON WHICH THE STATE BOARDS MAY DISREGARD REGIONAL RECOMMENDATIONS RENDER THE LATTER MEANINGLESS IN THE REGULATORY PROCESS. FINALLY, THE BILL IS FULL OF VAGUE AND INAPPROPRIATE DEFINITIONS THAT CONFUSE, RATHER THAN CLARIFY, THE PREFERENCE.

THE SUBSISTENCE POSITION OF THE ALASKA FEDERATION OF NATIVES, MOST RECENTLY CONFIRMED IN FEBRUARY, HAS BEEN CLEAR AND CONSISTENT FOR EIGHT YEARS. WE SEEK A RETURN TO A RELIABLE RURAL PREFERENCE IN BOTH STATE AND FEDERAL LAWS, ACCOMPANIED BY FOUR MUCH-NEEDED IMPROVEMENTS OF THE PRE-*MCDOWELL* SYSTEM.

WE THEREFORE URGE THIS LEGISLATURE TO DO ITS PART BY ENACTING A STATUTE THAT COMPLIES WITH TITLE VIII AS IT WAS WRITTEN IN 1980. ONE WAY OF ACCOMPLISHING THIS IS TO ADD AN "INTENT" SENTENCE TO THE CONSTITUTIONAL AMENDMENT TELLING

THE PUBLIC AND THE STATE COURTS THAT THE PURPOSE OF THE AMENDMENT IS TO ALLOW THE STATE TO HAVE A LAW WITH A RURAL PREFERENCE - OR TO ALLOW THE STATE TO COMPLY WITH TITLE VIII - OR TO RE-INSTATE THE 1986 STATE LAW. THAT LAST OPTION WOULD STILL LEAVE US WITH THE PROBLEM OF RECONCILING STATE AND FEDERAL DEFINITIONS OF "RURAL" - A TASK IN WHICH WE WOULD GLADLY COOPERATE. ANOTHER WAY OF DOING THE SAME THING IS TO RE-ENACT THE 1986 LAW NOW AND ACCOMPANY IT WITH A CONSTITUTIONAL AMENDMENT.

THE FOUR SYSTEMIC IMPROVEMENTS NEEDED BY RURAL ALASKANS ARE:

--MANDATORY FEDERAL-STATE-TRIBAL CO-MANAGEMENT ARRANGEMENTS - TO GIVE THE PEOPLE MOST AFFECTED A REAL ROLE IN THE SUBSISTENCE REGULATORY SYSTEM;

--BETTER PROTECTIONS OF "FORMERLY RURAL" NATIVE GROUPS AND COMMUNITIES THAT HAVE BEEN SURROUNDED BY NON-NATIVE SETTLEMENT ENTRY AND TAKEN OUT OF THE PREFERENCE THROUGH NO FAULT OF THEIR OWN;

--REFORM AND RESTRUCTURING OF THE STATE BOARD SYSTEM - TO ENSURE THAT WE ARE NOT SIMPLY RETURNING TO A POLITICAL ENVIRONMENT PERMANENTLY RIGGED AGAINST SUBSISTENCE AND NATIVES; AND

--THE ABILITY OF ANY SUBSISTENCE USER TO EMPLOY A SUBSISTENCE DEFENSE IN COURT.

IF THESE IMPROVEMENTS ARE COMBINED WITH REINSTATEMENT OF THE STATE LAW THAT WORKED PERFECTLY WELL BEFORE *MCDOWELL*,

THE CONCERNS ARTICULATED BY THE NATIVE SUMMIT AND THE AFN CONVENTION WILL HAVE BEEN SATISFIED.

NOW, I AM CERTAIN, MR. CHAIRMAN, THAT SOMEONE FROM THE OTHER SIDE OF THE ISSUE WILL TRY TO EXPLOIT THE DIFFERENCES BETWEEN THE TASK FORCE'S PACKAGE AND THE AFN POSITION. WE CAN EXPECT AN EXERCISE IN DOUBLETHINK - CLAIMING, FOR EXAMPLE, THAT THE AFN POSITION SHOULD BE IGNORED BECAUSE IT IS SOMEHOW UNREASONABLE AND THAT THE GOVERNOR'S PROPOSAL SHOULD BE IGNORED BECAUSE IT ISN'T SUPPORTED BY THE NATIVES.

SUCH ARGUMENTS CONVENIENTLY IGNORE THE FACT THAT BOTH PROPOSALS REQUIRE A CONSTITUTIONAL AMENDMENT FOR A RURAL PREFERENCE AND A STATE LAW COMPLYING WITH ANILCA. THE ONLY DIFFERENCES BETWEEN THEM ARE: 1) NATIVES WANT ADDITIONAL IMPROVEMENTS IN ANILCA; 2) NATIVES DO NOT SUPPORT THE ANILCA AMENDMENTS OF LAST SEPTEMBER, AND 3) NATIVES WANT A CONSTITUTIONAL AMENDMENT WHICH IS MANDATORY AND ENSURES THAT THE STATUTE CANNOT BE OVERTURNED BY OTHER PROVISIONS OF THE CONSTITUTION. (IF YOU WANT A GOOD EXAMPLE OF HOW TO TIGHTEN THE CONSTITUTIONAL AMENDMENT LANGUAGE TO ENSURE THAT LAST GOAL, PLEASE LOOK AT SJR 2 FROM THE PAST REGULAR SESSION.)

BUT THIS BODY HAS PERSISTENTLY REMAINED SO FAR FROM THE AFN POSITION AND THE TASK FORCE'S PACKAGE THAT IT HASN'T EVERN BEEN ABLE TO CONSIDER THE DIFFERENCES BETWEEN THEM. ONLY WHEN IT TAKES THE CRUCIAL STEP OF ALLOWING THE RURAL PREFERENCE BACK INTO STATE LAW CAN THE LEGISLATURE MAKE CHOICES ABOUT WHICH POLICY MODEL TO FOLLOW. AS I HAVE SAID REPEATEDLY IN THIS TESTIMONY, THE REAL ISSUE HAS ALWAYS BEEN THE RURAL PREFERENCE ITSELF. THAT IS WHY WE WHY WE ARE IN JUNEAU TODAY. IT IS ALSO WHY I URGE THIS LEGISLATURE TO DO, AT LONG LAST, THAT WHICH IS ETHICALLY RIGHT AND POLITICALLY RESPONSIBLE TO THE NEEDS OF ALL OUR CHILDREN IN THE 21ST CENTURY.

THIS CONCLUDES MY PREPARED REMARKS, MR. CHAIRMAN, AND I WOULD BE HAPPY TO RESPOND TO ANY QUESTIONS OR COMMENTS. THANK YOU.

AUGUST 28, 1997

NATIVE SUBSISTENCE SUMMIT

RESOLUTION 97-01

Concerning the subsistence rights of the Alaska Native People.

Whereas, representatives of the Alaska Native peoples and their tribal governments, corporations, and other organizations from throughout the State of Alaska assembled at the Native Subsistence Summit co-sponsored by the Alaska Federation of Natives, the Alaska Inter-Tribal Council and the RurAL Community Action Program in Anchorage, Alaska, on August 26-28, 1997, to consider proposals to amend state and federal laws relating to subsistence hunting, trapping, gathering and fishing; and

Whereas, the delegates to the Native Subsistence Summit expressed their deep concern over the need to protect and promote the customary and traditional ways of taking fish and wildlife, and other subsistence activities in connection with any proposals to change subsistence laws, regulations and policies; and

Whereas, the delegates to the Native Subsistence Summit carefully reviewed, discussed and carefully considered numerous proposals to resolve the current subsistence impasse;

Now, therefore, be it resolved, by the representatives of the Alaska Native people assembled at the Native Subsistence Summit, that:

1.

(a) Appreciation is extended to the many Native delegates who came despite pressing unfinished subsistence work to demonstrate their deep commitment to the preservation of their customary and traditional subsistence lifestyle.

(b)The delegates to the Native Subsistence Summit express their appreciation for the hard work and dedication of Governor Knowles and the other members of the Governor's Task Force in developing its proposal and

for the attendance of the Governor and other members of the Task Force at the Native Subsistence Summit.

2. The delegates to the Native Subsistence Summit express their appreciation to the members of the Alaska Congressional delegation for their efforts to resolve the subsistence impasse and their support for a State Constitutional amendment which will allow the State of Alaska to comply with the provisions of Title VIII of the Alaska National Interest Lands Conservation Act.

3. The delegates to the Native Subsistence Summit express the willingness of the Alaska Native community to work for the development of a consensus on a package to address subsistence.

4. In order to ensure an acceptable resolution of the current impasse on the subsistence issue, the delegates to the Native Subsistence Summit demand that the development of any further proposal to resolve this issue of crucial importance to the future of the Alaska Native people be accomplished only with the full participation and endorsement by representatives of the Alaska Native people chosen by the Alaska Native people themselves and with the consent of Alaska Native tribes.

5. In order to effectuate the recommendations set forth in this resolution, the delegates to the Native Subsistence Summit authorize and direct the leadership of the Alaska Federation of Natives, the Alaska Inter-Tribal Council and the RurAL Community Action Program:

a) To continue the work of the Native Subsistence Summit to resolve the subsistence impasse; and

b) To work with Governor Knowles, the members of the Governor's Task Force, the members of the Alaska Legislature, the members of the Alaska Congressional Delegation and other interested parties to develop a resolution to the subsistence impasse consistent with the guiding principles adopted by the delegates to the Native Subsistence Summit.

6. Any resolution negotiated by the representatives must be ratified through the full and informed consent of the Alaska native tribes and other organizations.

7. The delegates to the Native Subsistence Summit call upon the Governor, the members of the Alaska Legislature, the members of the Alaska Congressional Delegation and other interested parties to work with the representatives of the Alaska Native people to reach consensus to resolve the current subsistence impasse.

GUIDING PRINCIPLES

Establishment of a legal system based upon principles which achieve:

1. Full participation and consent of the Alaska Native Community, including hearings in villages in each region;

2. A subsistence priority based on Alaska Native, community, religious/spiritual, nutritional, medicinal and cultural practices rather than an individualized or a needs based system;

3. Only amendments which enhance subsistence rights and maintain federal oversight to at least its current level;

4. Co-management including state, federal and tribal co-equal involvement;

5. Full recognition of customary and traditional uses including religious/spiritual and ceremonial;

6. Effective comprehensive reform of the State management system:

7. Recognition that subsistence is a basic human right.

ALASKA FEDERATION OF NATIVES, INC.
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Alaska Federation of Natives
Position on Subsistence
Drafted February 11, 1998

The Alaska Federation of Natives Board of Directors urges the Alaska Legislature to adopt a resolution authorizing a public vote at the next general election allowing the Alaska Legislature to enact a priority for the taking of subsistence resources that complies with the original intent of Title VIII of ANILCA as adopted in 1980 and the promises made in ANCSA to protect the subsistence way of life.

The Alaska Federation of Natives Board of Directors further urges the Alaska Legislature to withdraw its lawsuit (*Alaska Legislative Council v. Babbitt)* as a show of good faith toward favorably resolving the subsistence dilemma without creating more conflict and delay.

1997
SJR 2

SJR 2

SENATE JOINT RESOLUTION NO. 2
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY SENATORS ADAMS AND HOFFMAN, Lincoln

Introduced: 1/13/97
Referred: Resources, Judiciary, Finance

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife by residents, and establishing an effective date for the amendment.

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

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

Section 19. Subsistence Uses of Fish and Wildlife. Consistent with the sustained yield principle, the legislature shall grant a preference to and among residents in the taking of fish and wildlife for subsistence uses on the basis of customary and traditional use, cultural tradition, direct dependence, local residence, or the availability of alternative resources.

* **Sec. 2.** Article XV, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 29. Effective Date of Subsistence Amendment. Section 19 of Article VIII, regarding subsistence uses of fish and wildlife, takes effect immediately upon certification of the election returns by the lieutenant governor.

* **Sec. 3.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

Subsistence In Alaska: 1998 Update

Division of Subsistence, Alaska Department of Fish and Game
Box 25526, Juneau, Alaska, 99802 (907) 465-4147
March 1, 1998

Introduction

Subsistence fishing and hunting are important for the economies and cultures of many families and communities in Alaska. Subsistence exists alongside other important uses of fish and game in Alaska, including commercial fishing, sport fishing, personal use fishing, and general hunting. This report provides an update on subsistence in Alaska, including its interaction with other types of fishing and hunting.

What is Subsistence?

State and federal law define subsistence as the "customary and traditional uses" of wild resources for food, clothing, fuel, transportation, construction, art, crafts, sharing, and customary trade. Subsistence uses are central to the customs and traditions of many cultural groups in Alaska, including Aleut, Athabaskan, Alutiiq, Euroamerican, Haida, Inupiat, Tlingit, Tsimshian, and Yup'ik. Subsistence fishing and hunting are important sources of employment and nutrition in almost all rural communities.

Commercial fishing differs from subsistence fishing, as it is fishing for sale on commercial markets. Subsistence fish and game cannot be commercially sold. Personal use fishing is similar to subsistence fishing, except that it is fishing with nets for food in areas generally closed to subsistence, particularly by residents of urbanized areas. Sport fishing and hunting differ from subsistence in that, although food is one product, they are conducted primarily for recreational values, following principles of "fair chase". While subsistence is productive economic activity which is part of a normal routine of work in rural areas, sport fishing and hunting usually are scheduled as recreational breaks from a normal work routine.

Who Qualifies for Subsistence?

Federal and state laws currently differ in who qualifies for subsistence. Rural Alaska residents qualify for subsistence under federal law. About 20% of Alaska's population (124,367 people in 270 communities) lived in rural areas in 1995 (see Fig. 1). Of the rural population, 61,320 (49.3%) were Alaska Native and 63,047 (50.7%) were not Alaska Native. Of Alaska's urban population (491,533 people), about 33,782 (6.9%) were Alaska Native and 457,751 (93.1%) were not Alaska Native. Under state law, rural residents qualified for subsistence from 1978-1989. Since 1989, all state residents have qualified under state law.

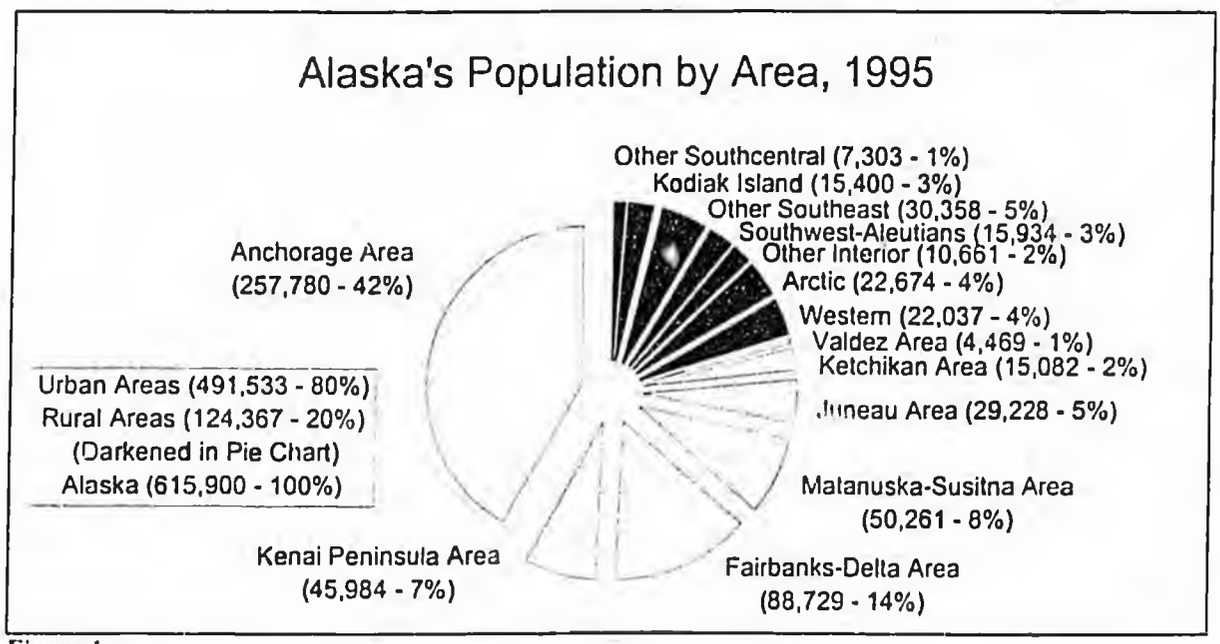

Figure 1

Percent of Households Participating in Subsistence Activities in Rural Areas

Area	Harvesting Game	Using Game	Harvesting Fish	Using Fish
Arctic	63%	92%	78%	96%
Interior	69%	88%	75%	92%
Southcentral	55%	79%	80%	94%
Southeast	48%	79%	80%	95%
Southwest	65%	90%	86%	94%
Western	70%	90%	98%	100%
Total Rural	60%	86%	83%	95%

Figure 2

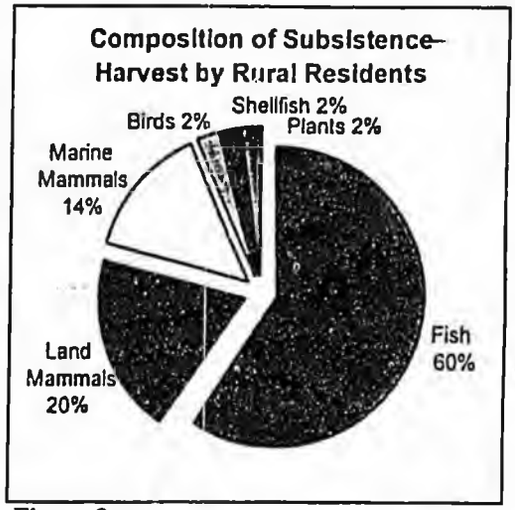

Figure 3

Who Participates in Subsistence?

Most rural families in Alaska depend on subsistence fishing and hunting. A substantial proportion of rural households harvest and use wild foods (see Fig. 2). For surveyed communities in different rural areas, from 92%-100% of sampled households used fish, 79%-92% used wildlife, 75%-98% harvested fish, and 48%-70% harvested wildlife. Because subsistence foods are widely shared, most residents of rural communities make use of subsistence foods during the course of the year.

What is the Rural Food Harvest?

Most of the wild food harvested by rural families is composed of fish (about 60% by weight), along with land mammals (20%), marine mammals (14%), birds (2%), shellfish (2%), and plants (2%) (see Fig. 3). Fish varieties include salmon, halibut, herring, and whitefish. Seals, sea lion, walrus, beluga, and bowhead whale comprise the marine mammal harvest. Moose, caribou, deer, bear, Dall sheep, mountain goat, and beaver are commonly used land mammals, depending on the community and area.

How Large is the Subsistence Harvest?

The subsistence food harvest in rural areas represents about 2% of the fish and game harvested annually in Alaska (see Fig. 4). Commercial fisheries harvest about 97% of the statewide harvest (about 2.0 billion lbs annually), while sport fishing and hunting take about 1% (18.0 million lbs).

Though relatively small in the statewide picture, subsistence fishing and hunting provide a major part of the food supply of rural Alaska (see Figs. 5 and 6). Our best estimate is about 43.7 million lbs (usable weight) of wild foods are harvested annually by residents of rural areas of the state, and 9.8 million lbs by urban residents (see Fig. 6). On a per person basis, the annual wild food harvest is about 375 lbs per person per year for residents of rural areas (about a pound a day per person), and 22 lbs per person per year for urban areas (see Fig. 5).

Figure 4

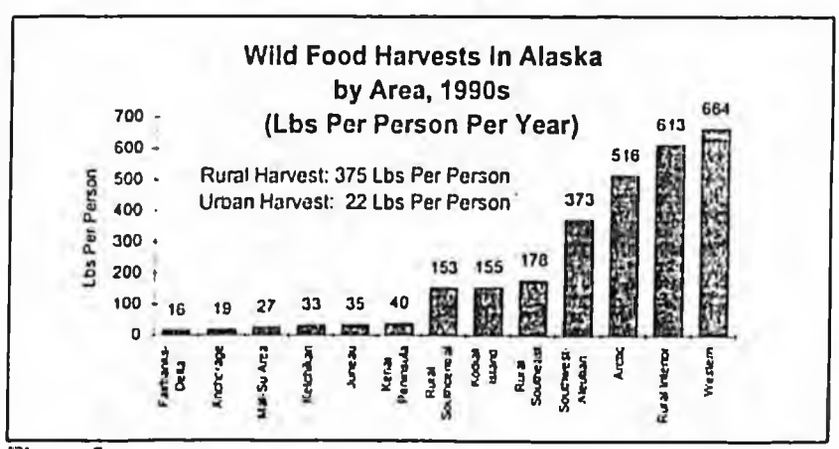

Figure 5

Nutritional Value of Subsistence

The subsistence food harvest provides a major part of the nutritional requirements of Alaska's population. The annual rural harvest of 375 lbs per person contains 242% of the protein requirements of the rural population (that is, it contains about 118 grams of protein per person per day; about 49 grams is the mean daily requirement) (see Fig. 6). The subsistence harvest contains 35% of the caloric requirements of the rural population (that is, it contains about 840 Kcal daily, assuming a 2,400 Kcal/day mean daily requirement). The urban wild food harvests contain 15% of the protein requirements and 2% of the caloric requirements of the urban population (see Fig. 6).

Wild Food Harvests in Alaska: Nutritional and Replacement Values

	Annual Wild Food Harvest (Lbs Per Person)	Annual Wild Food Harvest (Total Lbs)	Percent of Population's Required Protein (49 g/day)	Percent of Population's Required Calories (2400 C/day)	Estimated Wild Food Replacement Value @ $3/lb	Estimated Wild Food Replacement Value @ $5/lb
Rural Areas						
Southcentral	153	1,688,467	99%	14%	$5,065,401	$8,442,335
Kodiak Island	155	2,061,607	100%	14%	$6,184,821	$10,308,035
Southeast	178	5,064,509	115%	17%	$15,193,527	$25,322,545
Southwest-Aleutian	373	5,114,522	241%	35%	$15,343,566	$25,572,610
Interior	613	6,359,597	396%	57%	$19,078,791	$31,797,985
Arctic	516	10,507,255	333%	48%	$31,521,765	$52,536,275
Western	664	12,918,649	429%	62%	$38,755,947	$64,593,245
Total Rural	375	43,714,606	242%	35%	$131,143,818	$218,573,030
Urban Areas						
Ketchikan Area	33	461,855	22%	3%	$1,385,566	$2,309,276
Juneau Area	35	922,910	22%	3%	$2,768,729	$4,614,548
Matsu Area	27	1,056,322	17%	2%	$3,168,966	$5,281,610
Fairbanks-Delta	16	1,307,648	10%	1%	$3,922,944	$6,538,240
Kenai Peninsula	40	1,600,320	26%	4%	$4,800,960	$8,001,600
Anchorage Area	19	4,390,957	13%	2%	$13,172,872	$21,954,786
Total Urban	23	9,740,012	15%	2%	$29,220,036	$48,700,060
Alaska Total	100	53,454,618	65%	9%	$160,363,854	$267,273,090

Figure 6

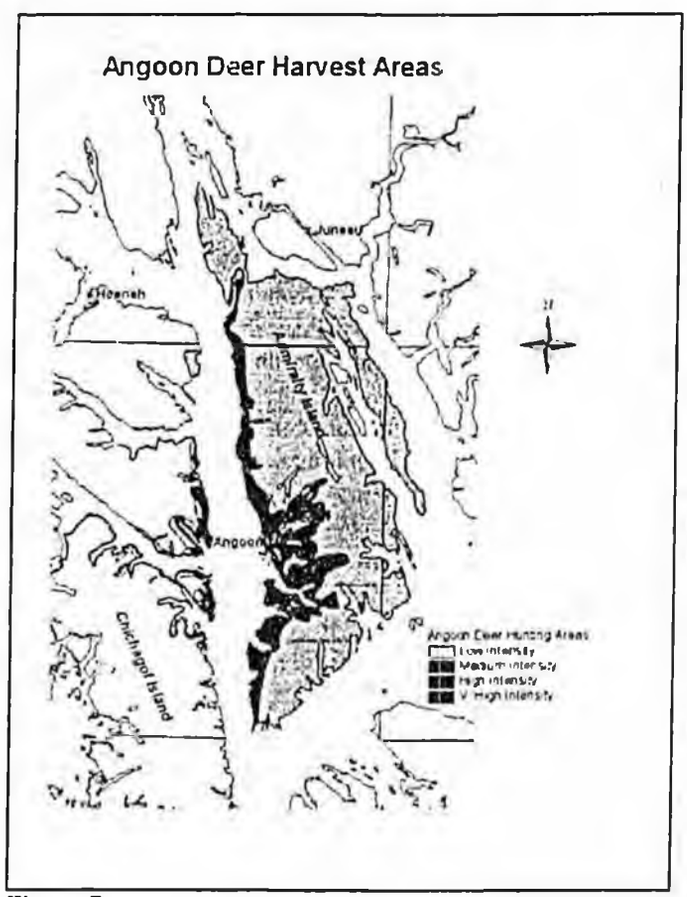

Figure 7

Traditional Harvest Areas

Studies show that subsistence users tend to harvest in traditional use areas surrounding their communities. Subsistence harvest areas are accessible from the community, although seasonal camps are used to access some species. Subsistence harvest areas for communities are definable and relatively predictable. Subsistence users generally do not harvest outside their community's traditional use areas (see Fig. 7).

The Monetary Value of Subsistence Harvests

Subsistence fishing and hunting are important to the rural economy. Attaching a dollar value to wild food harvests is difficult, as subsistence products do not circulate in markets. However, if families did not have subsistence foods, substitutes would have to be purchased. If one assumes a replacement expense of $3 - $5 per pound, the simple "replacement value" of the wild food harvests in rural Alaska may be estimated at $131.1 - $218.6 million dollars annually (see Fig. 6).

Subsistence and Money

Subsistence is part of a rural economic system, called a "mixed, subsistence-market" economy. Families invest

money into small-scale, efficient technologies to harvest wild foods, such as fishwheels, gill nets, motorized skiffs, and snowmachines. Subsistence food production is directed toward meeting the self-limited needs of families and small communities, not market sale or accumulated profit as in commercial market production. Families follow a prudent economic strategy of using a portion of the household monetary earnings to capitalize in subsistence technologies for producing food. This combination of money from paid employment and subsistence food production is what characterizes the mixed, subsistence-market economies of rural areas. Successful families in rural areas combine jobs with subsistence activities and share wild food harvests with cash-poor households who cannot fish or hunt, such as elders, the disabled, and single mothers with small children.

Subsistence and Sport

Subsistence harvests in rural areas commonly occur alongside recreational fishing and hunting from urban neighbors. Most urban residents hunt and fish under general hunting and sport fishing regulations. In 1995, Anchorage had 22,148 licensed hunters (9% of Anchorage residents); Matanuska-Susitna area, 8,820 (18%); Fairbanks, 11,489 (13%); Kenai Peninsula, 8,670 (19%); Ketchikan, 2,569 (17%); and Juneau, 3,672 (13%). For sport fishing, Anchorage had 70,885 licensed anglers (27% of Anchorage residents); Matanuska-Susitna area, 15,985 (32%); Fairbanks, 22,581 (25%); Kenai Peninsula, 18,657 (41%); Ketchikan, 5,626 (37%); and Juneau, 9,743 (33%).

Urban residents primarily hunt in areas surrounding their home communities (see Fig. 8). About 80% of the wild meat harvested by urban hunters came from locally-accessible Game Management Units (1.6 million lbs of 2.0 million lbs annually). Many recreational hunters also hunt in more distant locations, so that hunting by urban residents touches all areas of Alaska. Recreational fishing by anglers follows a similar geographic pattern.

The Subsistence Priority

Subsistence uses are given a priority over commercial fishing and recreational fishing and hunting in state and federal law. By and large, urban fishers and hunters have not experienced major changes in harvest opportunity due to the subsistence priority. Personal use net fisheries provide for established food fisheries of urban residents in areas closed to subsistence fishing. General hunting and sport fishing regulations continue to provide opportunities for residents and non-residents.

For example, during the eleven-year period when the rural priority was being implemented under state management (1978-1989), general resident hunting seasons for caribou increased by 36% (from 5,505 days to 7,500 days), moose hunting days decreased by 10% (from 2,961 days to 2,671 days), and Dall sheep hunting days increased by 2% (from 1,855 days to 1,900 days) – comparing the 1978-79 resident season with the 1989-90 resident season. That is, during this period, hunting days by urban hunters for caribou, moose, and sheep were not significantly changed by the rural subsistence priority.

The greatest effect of state and federal subsistence laws has been to legally recognize customary and traditional harvest practices and uses in rural areas. Because of the law, the Boards of Fisheries and Game have created subsistence regulations designed to provide opportunity for the continued harvest of the rural food supply. While impacts on urban residents have been relatively small, the impacts on rural areas have been great. Rural residents now have a legally protected opportunity to fish and hunt to feed families following long-term customs and traditions.

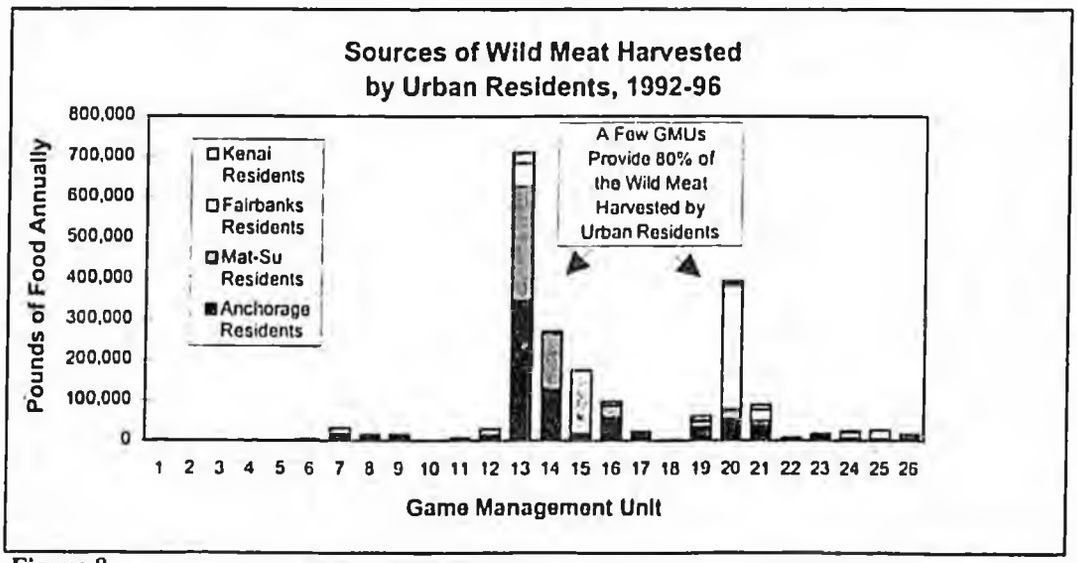

Figure 8

Legislative Research Report 98.075
May 22, 1998

Subsistence Hearings Sponsored by the Legislature or the Governor, 1990-1998

Legislative Research Services
Division of Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature

Prepared for Senator Tim Kelly
Prepared by Maria Gladziszewski, Manager

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SUMMARY

You asked about public hearings aimed at resolving the impact of the Alaska Supreme Court's December 1989 decision in *McDowell v. State*. In that decision, the Court held that the state's 1986 subsistence law violated the state constitution because it excluded urban residents from subsistence activities.

In attempts to resolve the issue since then, the legislature has met twice in special session (June 1990 and June 1992), and two governors have convened task forces (Governor Hickel's Subsistence Advisory Council in 1991-92 and Governor Knowles' Subsistence Task Force in 1997-98). Also, since the *McDowell* decision, the Legislature has held over 100 hearings on the issue, taking testimony from approximately 240 state and federal officials, and over 1,000 members of the public. Table 1 summarizes the statistics on legislative hearings; Tables 2 and 3 present more detail, including bill number and subject, committee, and hearing dates.

Table 1: Legislative Hearings on Subsistence, 1990-1998

LEGISLATURE	*HEARINGS*	*TESTIMONY FROM PUBLIC OFFICIALS*	*TESTIMONY FROM MEMBERS OF THE PUBLIC (including interest group representatives)*
16TH Legislature	25	78	152
17th Legislature	30	79	235
18th Legislature	0	0	0
19th Legislature	11	10	259
20th Legislature	37	72	482
TOTAL	**103**	**239**	**1,128**

NOTE: These numbers do NOT represent numbers of different individuals who testified; rather, they are the sum of the total number testifying at each hearing (il.e., many public officials and interest group representatives testified numerous times).

Governor Hickel's Subsistence Advisory Council, charged with proposing a statutory fix that did not include constitutional amendments, convened first in February 1991 but was reorganized in the fall. According to Advisory Council member Byron Mallott, the group met five or six times between November 1991 and February 1992, primarily in the governor's conference room in the Frontier Building in Anchorage. Mr. Mallott reports that while the meetings were open to the public and the press, and several individuals and representatives from stakeholder groups attended the meetings to express opinions, the meetings were informal and Advisory Council members did not open them to formal testimony.

TABLE 2
Hearings on Subsistence, 1990-1998, by Bill

Committee	Date	Heard Testimony From:
16th Legislature (1989-1990)		
HJR 74, 88, 90 -- Constitutional Amendments on Subsistence		
House Resources	March 7, 1990	5 state officials, 1 member of the public
House Resources	March 10, 1990	2 state officials, 51 members of the public
House Resources	March 21, 1990	1 state official, 28 members of the public
House Resources	April 5, 1990	2 state officials, 10 members of the public
House Resources	April 20, 1990	3 state officials, 5 members of the public
House Resources	April 21, 1990	2 state officials
House Judiciary	April 27, 1990	4 officials (3 state, 1 federal), 4 members of the public
House Judiciary	April 30, 1990	3 state officials, 3 members of the public
House Judiciary	May 1, 1990	3 state officials
House Judiciary	May 4, 1990	5 state officials
SJR 78, SB 305 -- Subsistence Uses of Fish and Wildlife		
Senate Resources	May 3, 1990	4 state officials
SJR 78 -- Subsistence Uses of Fish and Wildlife		
Senate Resources	May 4, 1990	4 state officials, 2 members of the public
Senate Resources	May 6, 1990	3 state officials
Senate Resources	May 7, 1990	1 state official, 6 members of the public
16th Legislature, First Special Session, 1990 (June 25-July 8)		
HB 599, HB 600, HB 601, HCR 68, HJR 97, SB 553, SJR 86, SJR 88 -- Various, on Subsistence		
SB 555 -- Commission on Subsistence Use of Fish & Game (became law -- Chapter 1 FSSLA 90)		
House Work Session	June 20, 1990	In Anchorage -- 2 state officials, 10 members of the public
House Resources	June 25, 1990	7 officials (incl. Cowper, Murkowski, Stevens, Young), 10 public
House Resources	June 26, 1990	4 state officials
House Resources	June 27, 1990	1 state official
House Resources	June 29, 1990	5 state officials
House Resources	June 29, 1990	5 state officials
SB 553, SCR 61, SJR 86, SJR 88 -- Various, on Subsistence		
SB 555 -- Commission on Subsistence Use of Fish & Game (became law -- Chapter 1 FSSLA 90)		
Senate Resources	June 26, 1990	17 members of the public
SCR 62 -- Subsistence Legal Challenge		
Senate Resources	June 27, 1990	5 state officials, 1 member of the public
Senate Finance	June 28, 1990	3 state officials, 1 member of the public
Senate Rules	June 29, 1990	No testimony; committee discussion only
HJR 99 -- Constitutional Amendment: Subsistence Preference		
House Rules	July 7, 1990	6 state officials, 3 members of the public

THE FOLLOWING BILLS RECEIVED NO HEARINGS:

HB 602-Subsistence Hunting and Fishing	SB 556-Subsistence Hunting and Fishing
HB 603-Subsistence Uses of Fish/Game	SCR 39-Joint Commission on Subsistence
HCR 70-Subsistence Regulations	SJR 87-Constitutional Amendment: Subsistence
HJR 98-Constitutional Amendment	SJR 89-Constitutional Amendment: Subsistence
HJR 100-Constitutional Amendment: Subsistence/Personal Use	
HR 16 -- Requesting Alaska Supreme Court to Extend Stay (became Legislative Resolve 10)	

TABLE 2
Hearings on Subsistence, 1990-1998, by Bill

Committee	Date	Heard Testimony From:
18th Legislature (1993-1994)		
THE FOLLOWING BILLS RECEIVED NO HEARINGS:		
HJR 23 / SJR 42 -- Constitutional Amendment: Subsistence Preference		
SJR 12 -- Constitutional Amendment on Subsistence Preference		
19th Legislature (1995-1996)		
HB 312 -- Extend Current Subsistence Law		
House Resources	April 25, 1995	3 state officials, 1 member of the public
House Resources	April 27, 1995	1 state offiical, 4 members of the public
HJR 33 -- Amendments to ANILCA		
House Judiciary	March 17, 1995	24 members of the public
House Judiciary	March 22, 1995	2 state officials, 80 members of the public
SCR 6 -- State v Babbitt Lawsuit Continuation (became Legislative Resolve 1)		
House Rules	January 27, 1995	No testimony; committee discussion only
SB 171 -- Extend Current Subsistence Law (became law -- Chapter 68 SLA 95)		
Senate Resources	April 28, 1995	1 state official, 3 members of the public
SJR 19 -- Ask Congress to Amend ANILCA (became Legislative Resolve 26)		
Senate Resources	March 29, 1995	In Fairbanks -- 1 state official, 69 members of the public
Senate Resources	April 8, 1995	In Soldotna -- 33 members of the public
Senate Resources	April 10, 1995	1 state official, 29 members of the public
Senate Rules	April 11, 1995	No testimony; committee discussion only
House Judiciary	May 1, 1995	1 state official, 16 members of the public
THE FOLLOWING BILLS RECEIVED NO HEARINGS:		
HCR 7 -- State v Babbitt Lawsuit Continuation		
HJR 14/SJR 2 -- Constitutional Amendment: Subsistence Preference		
20th Legislature 1997-1998		
HJR 21 -- Requesting that Congress Amend Title VIII of ANILCA		
House Resources	March 13, 1997	19 members of the public
House Resources	March 20, 1997	1 state official, 14 members of the public
House Resources	March 27, 1997	No testimony; committee discussion, then bill moved out
House State Affairs	April 10, 1997	1 state official, 15 members of the public
House State Affairs	April 15, 1997	23 members of the public
House State Affairs	May 3, 1997	No testimony; committee discussion, then bill moved out
HB 243 -- Extend Current Subsistence Law (became law -- Chapter 109 SLA 97)		
House Resources	May 1, 1997	2 state officials, 1 member of the public
Senate Resources	May 8, 1997	1 state official
HB 255 -- Subsistence Hunting & Fishing		
House Resources	May 1, 1997	2 state officials, 7 members of the public

TABLE 3

Legislative Hearings on Subsistence, 1990-1998, by Date

Committee	Date	Heard Testimony From:
16th Legislature (1989-1990)		
House Resources	March 7, 1990	5 state officials, 1 member of the public
House Resources	March 10, 1990	2 state officials, 51 members of the public
House Resources	March 21, 1990	1 state official, 28 members of the public
House Resources	April 5, 1990	2 state officials, 10 members of the public
House Resources	April 20, 1990	3 state officials, 5 members of the public
House Resources	April 21, 1990	2 state officials
House Judiciary	April 27, 1990	4 officials (3 state, 1 federal), 4 members of the public
House Judiciary	April 30, 1990	3 state officials, 3 members of the public
House Judiciary	May 1, 1990	3 state officials
Senate Resources	May 3, 1990	4 state officials
House Judiciary	May 4, 1990	5 state officials
Senate Resources	May 4, 1990	4 state officials, 2 members of the public
Senate Resources	May 6, 1990	3 state officials
Senate Resources	May 7, 1990	1 state official, 6 members of the public
House Work Session	June 20, 1990	In Anchorage -- 2 state officials, 10 members of the public
House Resources	June 25, 1990	7 officials (incl. Cowper, Murkowski, Stevens, Young), 10 public
House Resources	June 26, 1990	4 state officials
Senate Resources	June 26, 1990	17 members of the public
House Resources	June 27, 1990	1 state official
Senate Resources	June 27, 1990	5 state officials, 1 member of the public
Senate Finance	June 28, 1990	3 state officials, 1 member of the public
House Resources	June 29, 1990	5 state officials
House Resources	June 29, 1990	5 state officials
Senate Rules	June 29, 1990	No testimony; committee discussion only
House Rules	July 7, 1990	6 state officials, 3 members of the public
17th Legislature (1991-1992)		
Senate Resources	April 5, 1991	1 state official
Senate Resources	March 5, 1992	4 state officials (including Governor Hickel)
Senate Resources	March 6, 1992	1 state official
Senate Resources	March 7, 1992	33 members of the public
Senate Resources	March 10, 1992	1 state official, 1 member of the public
Senate Resources	March 23, 1992	3 state officials
Senate Resources	March 27, 1992	1 state official
House Resources	April 1, 1992	2 state officials (including Governor Hickel)
Senate Judiciary	April 7, 1992	4 state officials, 2 members of the public
Senate Judiciary	April 9, 1992	2 state officials
House Resources	May 5, 1992	1 state official, 1 member of the public
House Resources	May 11, 1992	1 state official, 3 members of the public
House Resources	May 11, 1992	4 members of the public
Conference Committee	May 21-22, 1992	6 state officials, 1 member of the public
House Judiciary	June 10, 1992	3 state officials, 44 members of the public
S Comm of the Whole	June 15, 1992	2 state officials, 8 members of the public
House Resources	June 15, 1992	3 state officials
H State Affairs/Judiciary	June 16, 1992	3 state officials, 5 members of the public
S Comm of the Whole	June 16, 1992	4 state officials, 17 members of the public
House Resources	June 16, 1992	1 former state official

TABLE B

Hamdaston Subsistence [illegible]

Committee	Date	Heard Testimony From:
House Judiciary	March 9, 1998	2 state officials
House Judiciary	March 11, 1998	4 state officials, 23 members of the public
House Judiciary	March 18, 1998	2 state officials, 10 members of the public
House Judiciary	March 20, 1998	3 members of the public
Senate Resources	March 25, 1998	2 state officials, 1 member of the public
House Judiciary	March 25, 1998	No testimony; committee discussion only
House Judiciary	March 27, 1998	3 state officials, 1 member of the public
House Judiciary	March 28, 1998	6 members of the public
House Judiciary	March 30, 1998	1 state official, 22 members of the public
House Judiciary	April 3, 1998	2 state officials
House Judiciary	April 6, 1998	3 state officials, 1 members of the public
House Finance	April 9, 1998	4 state officials
Senate Judiciary	April 25, 1998	9 members of the public
Senate Judiciary	May 1, 1998	1 member of the public
Senate Judiciary	May 5, 1998	1 state official, 4 members of the public
Senate Judiciary	May 6, 1998	No testimony or discussion, moved bill out

NOTE:
We compiled this information by first selecting major subsistence bills listed by subject in the *Final Status of Bills and Resolutions*, then searching through BASIS and FOLIO Views databases for meeting minutes. Because BASIS information is no longer available for the 16th and 17th Legislature, we also looked through committee records maintained in the Legislative Library.

SOURCES:
Final Status of Bills and Resolutions for each Legislature (published by the Legislative Affairs Agency); BASIS for the 18th, 19th, 20th Legislatures; FOLIO Views (committee minutes database); Committee records in the Legislative Library.

Essential Elements of a Subsistence Bill

Protects subsistence uses; provides opportunity for sport, commercial, personal use

			TASK FORCE APPROACH Designed to secure state management of hunting and fishing on all lands and waters; recognizes rural dependence on subsistence; makes minimal changes to current state statute
Who	Eligibility	⇒ Define a mechanism for determining who can participate in subsistence hunting and fishing.	• Residents of areas determined by the boards to be rural are eligible. • All Alaskans have opportunity to hunt and fish as long as there is a reasonable opportunity for subsistence • General hunting/sport fishing, commercial, personal use fishing, proxy subsistence permits and cultural/educational permits provide for urban residents' opportunity.
Where	Location	⇒ Identify portions of the state where hunting and fishing may occur under subsistence regulations.	• Rural areas are "places found by boards to be dependent on fish and wildlife for nutritional and other subsistence uses." All other places are non-rural (non-subsistence) areas.
How	Process	⇒ Identify the mechanism for developing subsistence regulations that implement the subsistence priority.	• State boards implement steps to provide subsistence priority: (1) joint boards identify rural areas; (2) fish or game board identifies c&t use of stock or population, amount needed for reasonable subsistence use opportunity. In times of shortage subsistence uses are last to be eliminated. • Regional Councils provide subsistence advice; boards give deference
What	Definitions	⇒ Clarify what use is being afforded a preference, and key terms used in statute to direct actions of the boards.	• Subsistence; reasonable opportunity; rural area; customary trade; customary and traditional use

PRESENTATION ON SUBSISTENCE ISSUES

May 26, 1998

Attorney General Bruce Botelho

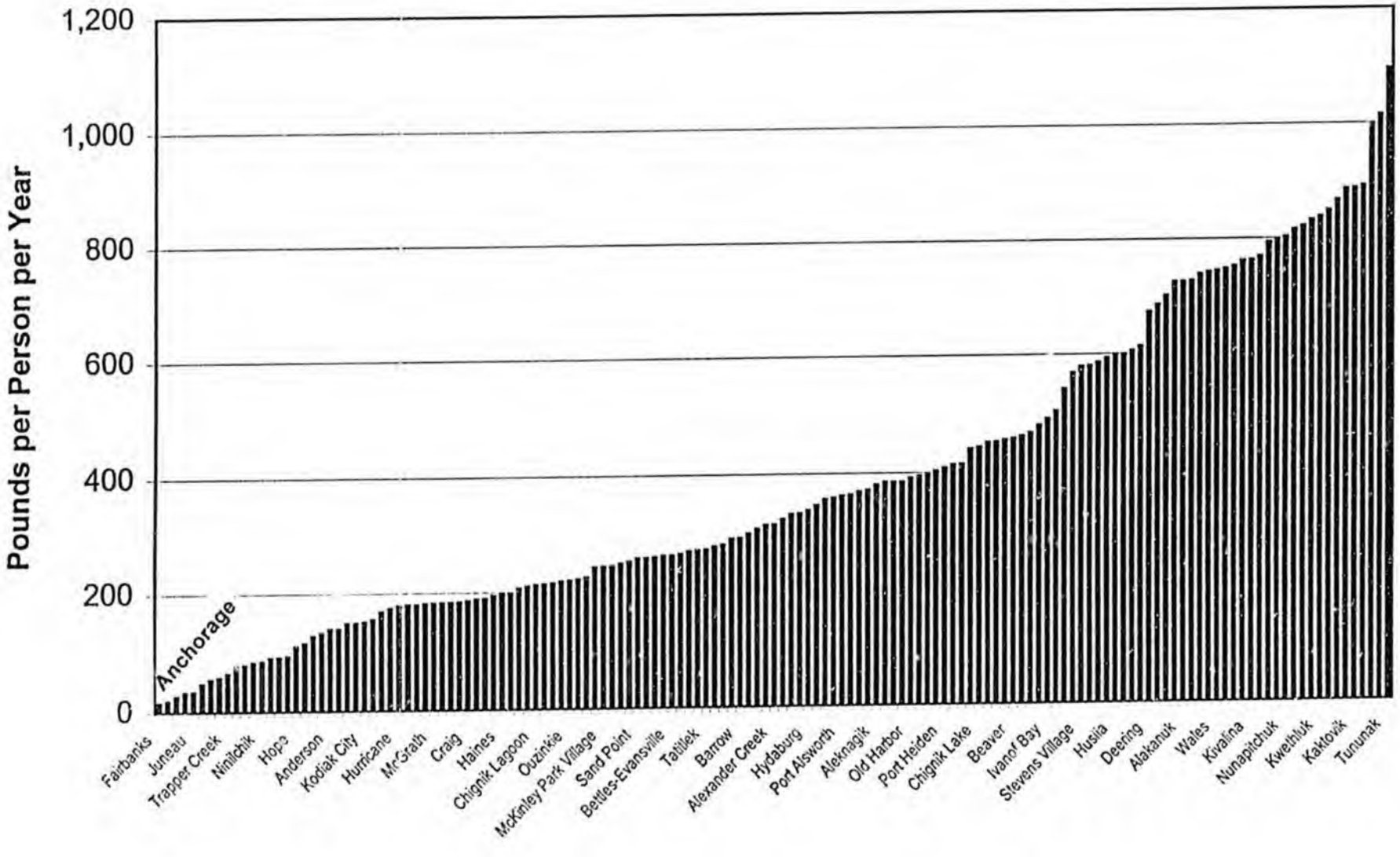
Former Attorney General Charlie Cole

Table 1 - Annual Harvest of Subsistence Foods, by Geographical Area

Geographical Area	Annual Harvest (Pounds/Person)
Anchorage/Juneau/Fairbanks/Mat-Su	30
Kenai Peninsula	96
Copper Basin	149
Southeast	212
Upper Tanana	218
Prince William Sound	256
Northern Cook Inlet	265
Alaska Peninsula	290
North Slope	364
Kodiak Island	426
Southwest	626
Western	732
Yukon-Koyukuk	839
Northwest Arctic	1,067

Source: Alaska Department of Fish and Game, 1987

Annual Wild Food Harvests by Alaska Community



"The conference committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives."

Conference Committee Report on ANCSA (1971)

"The legislature . . . determines that it is in the public interest to clearly establish subsistence use as a priority of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaskan residents."

1978 Session Laws

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT (1980)

Policy

Sec. 802(1). It is hereby declared to be the policy of Congress that-- consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resurces of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles . . . the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so.

Definitions

Sec. 803. As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural residents of wild renewable resources for direct personal or family consumption. . . .

Preference for Subsistence Uses
Sec. 804. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priorityover the taking on such lands of fish and wildlife for other purposes. . . .

Local and Regional Participation
Sec. 805(d). The Secretary shall not implement . . . this section if . . . the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in [the Act].

"We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15 and 17 of article VIII of the Alaska Constitution.

"The conclusion we have reached does not mean that everyone can engage in subsistence hunting or fishing. We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons. We hold only that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional.

McDowell v. State of Alaska (1989)

"Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population."

"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. Kenatize Indian Tribe (1995)

"By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters. . . .

"We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters."

Katie John v. U.S. **(9th Cir. 1995)**

"Because the Submerged Lands Act of 1953 specifically gives state authority over fish and animals in navigable waters and precludes the navigational servitude or reserved water rights from being used to erode that authority, because the navigational servitude and reserved waters rights are not interests to which title can be held, because of the clear statement doctrine, because the navigational servitude and reserved water rights are limited interests which do not give the federal government power over navigable or reserved waters unrelated to those interests, and for the other reasons discussed above, we hold that navigable waters are generally not "public lands" under ANILCA. Therefore, ANILCA does not curtail the State's authority to regulate hunting and fishing in navigable waters, and the State has criminal jurisdiction over Totemoff."

Totemoff v. State (1995)

Principles of the Bipartisan 1997 Task Force on Subsistence

1. To establish effective state authority, and eliminate federal authority, over fish and game management on all lands and waters of Alaska.

2. To recognize the paramount importance of the subsistence way of life to rural Alaskans and to those Alaskans who demonstrate a customary and traditional use or a direct dependence on fish and game resources.

3. To maintain neutrality on the issue of tribal sovereignty over lands within Alaska.

4. To make only those changes to the Alaska Constitution, ANILCA and state law that are absolutely necessary to accomplish those ends.

THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Art. VI, cl. 2

The Property Clause of the U.S. Constitution

Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

U.S. Const., Art. IV, sec 3, cl.2.

"And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public land thus entrusted to Congress is without limitations."

Kleppe v. New Mexico 426 U.S. 529, 539 (1976)

" In our view, the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."

Kleppe v. New Mexico 426 U.S. 529 (1976)

"With this guidance, we must decide the question left open in *Kleppe* -- the scope of Congress' property clause power as applied to activity occurring off federal land. Without defining the limits of the power, the Court in *Kleppe*, relying on its decision in *Camfield v. United States* . . . acknowledged that 'it is clear the regulations under the Property Clause may have some effect on private lands not otherwise under federal control.' . . .

"Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure

that these lands be protected against interference with their intended purposes."

State of Minnesota by Alexander v. Block. 660 F.2d 1240 (1981)

Joint Department of the Interior and the Department of Agriculture Budget Proposal for the Federal Subsistence Fishing Program in Alaska:

"Implementation of the Court's decision will result in the unprecedented expansion of Federal management of Alaska's fisheries in many areas of the State."

"For several areas, Federal managers may be called on to intervene in the management of commercial harvests to assure upstream delivery of salmon to subsistence users."

LOCAL AND REGIONAL PARTICIPATION

SEC. 805(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses....

JUDICIAL ENFORCEMENT

SEC. 807(a) Local residents and other persons and organizations aggrieved by a failure of the State of the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is

appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

JUDICIAL ENFORCEMENT

SEC. 807 (b) State agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. When reviewing any action within the specialized knowledge of a State agency, the court shall give the decision of the State agency the same deference it would give the same decision of a comparable Federal agency.

REGULATIONS

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

SELECTED 1997 AMENDMENTS TO ANILCA

Public Law 105-83

TITLE VIII-SUBSISTENCE MANAGEMENT AND USE

SEC. 801. FINDINGS

(b) The Congress finds and declares further that--

(1) subsequent to the enactment of this Act in 1980, the subsistence law of the State of Alaska (AS 16.05) accomplished the goals of Congress and requirements of this Act in providing subsistence use opportunities for rural residents of Alaska, both Native and non-Native;

(2) the Alaska subsistence law was challenged in Alaska courts, and the rural preference requirement in the law was found in 1989 by the Alaska Supreme Court in McDowell v. State of Alaska (785 P.2d 1, 1989) to violate the Alaska Constitution;

(3) since that time, repeated attempts to restore the validity of the State law through an amendment to the Alaska Constitution have failed, and the people of Alaska have not been given the opportunity to vote on such an amendment;

(4) in accordance with Title VIII of this Act, the Secretary of the Interior is required to manage fish and wildlife for subsistence uses on all public lands in Alaska because of the failure of State law to provide a rural preference;

(5) the Ninth Circuit Court of Appeals determined in 1995 in State of Alaska v. Babbitt (73 F.3d 698) that the subsistence priority required on public lands under section 804 of this Act applies to navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior;

(6) management of fish and wildlife resources by State governments has proven successful in all 50 states, including Alaska, and the State of Alaska should have the opportunity to continue to manage such resources on all lands, including public lands, in Alaska in accordance with this Act, as amended; and

(7) it is necessary to amend portions of this Act to restore the original intent of Congress to protect and provide for the continued opportunity for subsistence uses on public lands for Native and non-Native rural residents through the management of the State of Alaska.

DEFINITIONS

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

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

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

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

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

(3) "customary and traditional uses" means the noncommercial, long-term, and consistent taking of, use of, or reliance upon fish and wildlife in a specific area and the patterns and practices of taking or use of that fish and wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish or game;

(4) "customary trade" means, except for money sales of furs and furbearers, the limited, noncommercial exchange for money of fish and wildlife or their parts in minimal quantities; and

(5) "rural Alaska resident" means a resident of a rural community or rural area. A "rural community or area" means a community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses.

PREFERENCE FOR SUBSISTENCE USES

SEC. 804.

(b) The priority granted by this section is for a reasonable opportunity to take fish and wildlife. For the purposes of this subsection, the term "reasonable opportunity" means an opportunity,consistent with customary and traditional uses (as defined in section 803(3)), to participate in a subsistence hunt or fishery with a reasonable expectation of success, and does not mean a guarantee that fish and wildlife will be taken.