

SUBSISTENCE

INTERIM

HEARINGS

(FILE 2)



Official Business

ALASKA STATE LEGISLATURE

SENATE RESOURCES COMMITTEE

State Capitol
Juneau, AK 99801

Chairman: Senator Rick Halford
Vice Chair: Senator Lyda Green
Senator Loren Leman
Senator Bert Sharp
Senator Robin Taylor
Senator John Torgerson
Senator Georgianna Lincoln

RESOURCES COMMITTEE SCHEDULE

Interim hearings on Subsistence

Noticed: September 9, 1997

Wednesday, September 24, 1997: Fairbanks

Meeting time: 3:30 p.m. - 9:00 p.m.
Location: UA Regents' Conference Room
Butrovich Building, Room #109
910 Yukon Drive, UAF

Thursday, September 25, 1997: Mat-Su

Meeting time: 2:00 p.m. - 8:00 p.m.
Location: Wasilla City Council chambers
290 E. Hering Avenue, Wasilla

Friday, September 26, 1997: Kenai

Meeting time: 1:00 p.m. - 8:00 p.m.
Location: Kenai Borough Assembly chambers
144 North Binkley, Soldotna

Saturday, September 27, 1997: Anchorage

Meeting time: 1:00 p.m. - 8:00 p.m.
Location: Anchorage LIO
Second floor conference room
716 West 4th Avenue, Anchorage

SENATE RESOURCES COMMITTEE SUMMARY**GOVERNOR'S SUBSISTENCE TASK FORCE PROPOSAL**

9/22/97

1. **PRIORITY** - Residents of Alaska communities or areas that are classified as rural which is defined as "community or area substantially dependent on fish and wildlife for nutritional and other subsistence uses." Requires subsistence user to be "resident domiciled in the community or area."
2. **CUSTOMARY AND TRADITIONAL** - Defined as "Non-commercial, long term and consistent taking of, use of, and reliance upon fish or wildlife in a specific area and the use patterns of that fish or wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish or wildlife."
3. **CUSTOMARY TRADE** - Defined as "the limited noncommercial exchange for cash of fish or wildlife or their parts in minimal quantities."
4. **PRIORITY INVOKED** - Requires subsistence regulations at any time there is an identified subsistence use. Priority invoked at any time taking must be restricted.
5. **STANDARD OF PROTECTION** - Provides "reasonable opportunity" for subsistence uses. "Reasonable opportunity" described as "an opportunity consistent with customary and traditional uses, to participate in a subsistence hunt or fishery." No guarantee of success.
6. **NON-RURAL SUBSISTENCE** - Permit for taking fish or game for educational purposes. Authorizes proxy hunting by non-rural residents for family members living in subsistence areas.
7. **USES PROTECTED** - All customary and traditional taking and uses for food, shelter, transportation, fuel, clothing, handicraft items, barter, customary trade, and sharing. Only taking for food may be allowed at Tier II level. Human consumptive uses are highest priority subsistence use to be provided.
8. **NILCA PUBLIC LANDS DEFINITION** - No specific proposed change. Initial proposal by the Task Force indicated that "The definition of federal public lands will be clarified to ensure that it excludes all private and state lands."
9. **FEDERAL COURT OVERSIGHT** - Federal court oversight with limitations of federal court intervention to cases where state regulations are "arbitrary, capricious or abuse of discretion." Federal courts must give state agencies deference. Does not limit federal agencies use of reserved water rights and navigational servitude as preemption authority.

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10. **STATE CONSTITUTIONAL AMENDMENT** - Permissive authority to legislature to create subsistence priority for taking of fish and wildlife and other renewable resources based on residence. No linkage requiring ANILCA changes.
11. **ANILCA AMENDMENTS** - Required definitions such as "Customary and Traditional", "rural", "customary trade" and "reasonable opportunity." Limits federal court jurisdiction over state and federal lands. No proposed definitions clarifying that "public lands" excludes state and private lands and waters.
12. **RURAL IMPLEMENTATION** - All areas and communities outside of existing non-subsistence areas are considered "rural." Delegates authority to Boards of Fisheries and Game to decide which communities or areas are rural.

SENATE RESOURCES COMMITTEE SUBSISTENCE HEARINGS

KEY ELEMENTS AND OPTIONS IN SUBSISTENCE DEBATE

9/24/97

SUBSISTENCE PRIORITY

- PROTECTED IN STATE CONSTITUTION
- PROVIDED FOR IN LAW ONLY
- APPLICATION TO ALL RENEWABLE NATURAL RESOURCES
- APPLICATION TO ONLY FISH AND WILDLIFE
- COMMUNITY BASED
- INDIVIDUAL BASED

ELIGIBILITY

- RURAL PRIORITY
- BASED ON RACE
- ALL RESIDENTS
- BASED ON NEED
- BASED ON CULTURE
- BASED ON PAST USE
- BASED ON DEPENDENCY
- BASED ON LOCAL PRIORITY

USES PROTECTED

- FOOD
- CLOTHING
- TOOLS
- TRANSPORTATION
- CULTURE
- FUEL
- HANDICRAFT PRODUCTS
- BARTER
- TRADE
- COMMUNITY SHARING

CUSTOMARY TRADE

- LIMITED SALE OF SUBSISTENCE RESOURCES
- PROHIBITION AGAINST SALE OF SUBSISTENCE RESOURCES

CUSTOMARY AND TRADITIONAL

- LIMITED TO ONLY TRADITIONAL METHODS AND MEANS
- INCLUDES MODERN METHODS AND MEANS
- INCLUDES TRADITIONAL SEASONS AND BAG LIMITS
- PROXY HUNTING

WHEN PRIORITY IS INVOKED

- AT ALL TIMES
- WHENEVER ANY RESTRICTIONS ARE APPLIED TO SUBSISTENCE USES

STANDARD OF PROTECTION

- LEAST ADVERSE IMPACT SIMILAR TO ANILCA
- REASONABLE OPPORTUNITY TO HARVEST SIMILAR TO EXISTING STATE LAW

EXTENT OF FEDERAL JURISDICTION

- PREEMPTION AUTHORITY OVER STATE AND PRIVATE LANDS AND WATERS
- LIMITED TO ONLY FEDERAL PUBLIC LANDS AND WATERS

FEDERAL COURT OVERSIGHT

- UNRESTRICTED SPECIAL FEDERAL COURT OVERSIGHT OVER FEDERAL, STATE AND PRIVATE LANDS & WATERS WHEN STATE IS IN COMPLIANCE
- RESTRICTED SPECIAL FEDERAL COURT OVERSIGHT OVER FEDERAL, STATE AND PRIVATE LANDS & WATERS WHEN STATE IS IN COMPLIANCE
- SPECIAL FEDERAL COURT OVERSIGHT OVER JUST FEDERAL LANDS
- NO SPECIAL FEDERAL COURT OVERSIGHT

AMENDMENTS TO ANILCA

- DEFINITION OF CUSTOMARY AND TRADITIONAL
- DEFINITION OF RURAL
- ESTABLISHMENT AND DEFINITION OF REASONABLE OPPORTUNITY

STATE CONSTITUTIONAL AMENDMENT

- SUBSISTENCE PRIORITY OR PREFERENCE ENTITLEMENT IN STATE CONSTITUTION
- PERMISSIVE - ALLOW LEGISLATURE TO CREATE SUBSISTENCE PRIORITY OR PREFERENCE

MANAGEMENT OPTIONS

- REGIONAL SUBSISTENCE COUNCILS WITH DEFERENCE
- REGIONAL SUBSISTENCE COUNCILS WITH ADVISORY AUTHORITY ONLY
- ROLE OF TRIBAL GOVERNMENTS?
- CO-MANAGEMENT
- ROLE OF STATE ADVISORY COMMITTEES

Appendix . Subsistence Management Chronology

1925: Alaska Game Law. Believed to provide for most subsistence hunting during territorial days, the law stated that "...any Indian or Eskimo, prospector, or traveler [can] take animals, birds, or game fishes during the closed season when he is in the need of food."

1960: Statehood. The federal government transferred authority for management of fish and game in Alaska to the new state government. Both the federal and the state government recognized subsistence fisheries.

1971: ANCSA. The Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal hunting and fishing rights. No law was enacted that protected subsistence, but the conference report stated Native subsistence and subsistence lands would be protected by the State of Alaska and the Department of Interior.

1978: State's First Subsistence Law. The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary (Ch. 151 SLA 1978). The law defines subsistence as "customary and traditional uses" of fish and game for specific purposes such as food.

1980: ANILCA Passed. Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves, and wildlife refuges (P.L. 96-487, December 2, 1980 [94 Stat. 2371]). Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982: State Law's Consistency With ANILCA is Established. The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses (5 AAC 99.010), and the Department of Interior certifies the state's consistency with ANILCA.

1982: Repeal Initiative. A statewide effort to repeal the subsistence initiative fails by a large margin at the polls (58.4% of Alaskan voters in favor).

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

1985: Madison Decision. The Alaska Supreme Court, in the Madison decision, rules that state regulations limiting subsistence to rural residents (enacted by the Joint Boards in 1982) are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986: New Subsistence Law. The Alaska legislature enacts a new law limiting subsistence to rural residents (Ch. 52 SLA 1986; AS 16.05.90). Rural is defined as an area where the "...noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy..." In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian tribe also files a suit in federal court under ANILCA to protest the classification by the Boards of the Kenai Peninsula as an urban area (Kenaitze Indian Tribe vs. State of Alaska, No. A86-367).

1987: Kenaitzes Initially Denied. A federal court judge rules against the Kenaitze Tribe, saying the state's subsistence law's definition of rural agrees with use of the word "rural" in federal subsistence law.

1987: McDowell Initially Denied. The state superior court holds that the 1986 subsistence law is constitutional.

1988: Kenaitze Decision Reversed. The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA (Kenaitze Indian Tribe vs. State of Alaska, 860 F. 2nd 312, (9th Cir. 1988)). The court suggests that a definition of rural hinges on demographic characteristics. The U.S. Supreme court ultimately denies review.

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

1989: McDowell Decision. On December 22, 1989, ruling in McDowell v. State, the Alaska Supreme Court found that the 1986 state subsistence law was unconstitutional because it excluded urban residents from subsistence activities. On January 5, 1990, the Alaska Supreme Court granted the state a stay in the McDowell decision until July 1, 1990.

April, 1990: Federal Government Moves to Assume Subsistence Management. On April 13, 1990, a Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a federal program that minimizes change to the state program, consistent with the federal government's ANILCA responsibilities. Temporary regulation were published on June 8, 1990

May 1990: Legislature Debates Subsistence Options. Among options discussed by the legislature was a draft constitutional amendment submitted by Governor Cowper. After lengthy hearings in the final days of the session, the House amended the Governor's proposed amendment, then rejected it by a vote of 20-20 (27 votes needed). The amendment was never voted on by the Senate.

June 8, 1990: Governor Calls Special Session. Negotiations with several interest groups prior to the opening of the session failed to reach an agreement on a solution. On the opening day of the session, the Governor introduced a constitutional amendment that would have required, if approved by the voters at the next general election, a vote on the issue four years later. The amendment would have prevented federal management from occurring on July 1, and would have given groups time to either sue on the constitutionality of ANILCA Title VIII, or amend ANILCA. The governor's proposal was further amended by the Senate to require a vote in two years, and together with legislation creating a Subsistence Review Commission, passed the Senate in early July. However, on July 8, the House failed by one vote (26 in favor, 14 opposed) to obtain a 2/3 majority for a constitutional amendment.

June 1990: Cutler Decision on Severability. The Supreme Court remanded McDowell to the lower court for implementation of their order, and in an opinion dated June 20, with two subsequent clarifications, Judge Cutler found the unconstitutional portion of the state subsistence law to be severable from the rest of the law. This left the state with a subsistence priority law on the books, with its application to rural residents severed.

July 1, 1990: Federal Management Begins. The federal land management agencies initiated a program that assumed management of subsistence uses on federal public lands. This included creation of a five-member federal subsistence board, representing the BLM, NPS, BIA, USFS, and USFWS.

July 1990: New Subsistence Hunts. The Board of Game held an emergency meeting to promulgate hunting regulations for the 1990 fall hunts. Nonresidents were excluded from many hunts, and others were put on a Tier II, individual subsistence application basis.

October 1990: All Alaskans Eligible. At a joint Boards of Fisheries and Game, on October 26, 1990, the Department of Law reported to the Boards that, after the McDowell decision, all Alaskans must be considered potential subsistence users of the fish and game under state jurisdiction. The boards subsequently issued a policy statement that it was impossible, under the legal decisions, to identify subsistence users.

November 1990: New Subsistence Fisheries. The Board of Fisheries met and established new subsistence fisheries in both upper and lower Cook Inlet. A subsequent policy stated that subsistence fishing proposals, throughout the state, would be addressed only if subsistence needs were not being met, or if there was a conservation concern that was addressed by the proposal.

February 1991: Governor's Subsistence Advisory Council is Formed. Governor Hickel appointed an initial subsistence advisory group early in 1991 and reorganized it in November to add public members and remove the state commissioners; in all, the groups met for over a year. The ten-member group was charged with drafting a new subsistence statute that would comply with the state constitution.

Federal Subsistence Program Develops: 1991-92. Publication in the Spring of 1992 of an EIS on the Federal Subsistence Program in Alaska clarified the federal government's intent with regard to managing subsistence on federal lands (mandated by ANILCA). The federal subsistence board established a staff and regular meeting schedule and began accepting public proposals. Other elements of the program included federal regional subsistence advisory councils, and a process for identifying rural areas and customary and traditional uses. The program applied to wildlife and to fishing in non-navigable federal waters.

February 1992: Governor Introduces New Subsistence Legislation. Governor Hickel introduced a bill to the legislature that would establish a new subsistence statute. A key feature of the bill, which was based on the work of the subsistence advisory council, was a presumption that residents of small communities would automatically meet specified subsistence criteria, in mid-sized communities that presumption was "rebuttable", and urban residents must apply for subsistence qualification on an individual basis. Also, nonsubsistence areas were authorized, and implementation would require amending ANILCA. The legislature failed to take action on the bill. Other bills also were considered during the session, but not passed, including an AFN-sponsored bill that provided a rural preference and also a second-level preference for urban residents who could demonstrate community or individual dependence.

June 15-22 1992: Governor Convenes Special Session on Subsistence: 1992 Subsistence Law is Enacted. Governor Hickel presented the legislature with a version of the bill that had been introduced in the previous session. Other bills also are introduced, as are motions to place a constitutional amendment on the ballot. The legislature ultimately passed a subsistence bill that provided eligibility for all Alaskans, included a definition of "customary trade" and allowed the Boards to establish "nonsubsistence areas" in places where subsistence "is not part of the economy, culture, or way of life" of an area.

November 1992: Joint Boards of Fisheries and Game Establish Four Nonsubsistence Areas. Meeting jointly, the boards established nonsubsistence areas around Fairbanks, Anchorage-Matsu-Kenai, Juneau, and Ketchikan. These were areas where subsistence regulations would not be established. Subsistence regulations within these areas were repealed. They issued a call for proposals for other areas also. At a subsequent meeting the following March (1993), an area around Valdez also was designated as a nonsubsistence area. Eventual public proposals for additional areas included GMU 13, all roaded areas, and an area on the Upper Holitna Drainage.

Fall 1993: State Superior Court Finds Nonsubsistence Areas to be Unconstitutional. Judge Fabe, in State Superior Court, found in Kenaitze v. State that the nonsubsistence areas authorized by the 1992 state law were unconstitutional because they "effectively re-establish the rural/urban residency requirement struck down in McDowell" (Kenaitze Indian Tribe v. State of Alaska, 3AN-91-4560 Civil. Order, October 26, 1993). After the Alaska Supreme Court's subsequent denial of the state's motion for a stay, the Boards met in Spring 1994 and authorized the department to enact emergency regulations that would re-establish the previous subsistence regulations for the former nonsubsistence areas. The state also appealed the ruling to the State Supreme Court.

March 1994: U.S. District Court Validates Federal Subsistence Board Authority, Extends Federal Subsistence Management to Include Navigable Waters. Following preliminary rulings in Karv John, in late 1993, Judge Holland issued a final ruling that interpreted ANILCA as giving the federal government broad authority to manage subsistence on federal public lands, and extended jurisdiction to include navigable waters on

federal lands. A parallel ruling in the case of State v. Babbitt found that creation of the federal subsistence regulatory board did not exceed the authority granted by ANILCA. These rulings were immediately appealed to the Ninth Circuit Court of Appeals by both the state and federal governments.

May 1994: Secretary of Interior Declares Intent to Manage Subsistence Fisheries Throughout the State. In a letter to the Governor that urged the state to act to come into compliance with ANILCA, Secretary Babbitt stated his intention to begin management of subsistence fisheries, "pursuant to the direction of the federal courts," if the state doesn't pass a constitutional amendment. The federal subsistence board was told to prepare a subsistence fisheries management plan.

January 1995: State Drops Babbitt Lawsuit. Governor Knowled directed the Attorney General to drop the state's appeal of the Babbitt case.

May, 1995: State Supreme Court Upholds State Subsistence law. The Alaska State Supreme Court overturns the State Superior Court decision in State v. Kenaitze Indian Tribe. This validates use of nonsubsistence areas.

1995: Appropriation Language Prohibits Preemption Actions for FY 96. Alaska's congressional delegation inserts language in appropriations bill prohibiting expenditure of funds to preempt state management on some navigable waters. R

October, 1995: Totemoff Case. The Alaska Supreme Court ruled that the state had jurisdiction to prosecute Mr. Totemoff for spotlighting deer in state navigable waters. The court also ruled that the federal government has no jurisdiction in state navigable waters.

December, 1995: Ninth Circuit Court of Appeals in Katie John Case. The Ninth Circuit Court ruled that the Reserved Water Rights Doctrine provided authority for the federal agencies to extend their jurisdiction into some navigable waters.

April, 1996: Advance Notice of Proposed Rulemaking. The Departments of Interior and Agriculture published their advance notice of proposed rulemaking describing preemptive regulations to be adopted for state and private lands and waters.

May, 1996: Appeal of Katie John Case to Supreme Court. The U.S. Supreme Court denied the Petition for Writ of Certiorari in the Katie John case.

1996: Appropriations Language Prohibits Preemption Action for FY 97. Alaska's congressional delegation inserts language in appropriations bill for 1997 with expanded language prohibiting implementation of federal preemption regulations and state lands and waters.

1996: Line Item Veto Bill Passes. Congress passes line item veto bill which may provide mechanism for President to eliminate appropriations language protecting Alaska from preemption regulations.

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MEMORANDUM

September 23, 1997

SUBJECT: Summary of subsistence litigation (Work Order No. 20-LS1151)

TO: Senator Rick Halford

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum summarizes the holdings of significant litigation relating to subsistence uses of fish and game under the Alaska constitution and statutes and under the federal Alaska National Interest Lands Conservation Act (ANILCA).

I. STATE LAW**A. ALASKA CONSTITUTION****1. McDowell v. State, 785 P.2d 1 (Alaska 1989).**

Alaska residents who had previously engaged in subsistence hunting and fishing challenged the 1986 state subsistence law because they resided in areas classified as non-rural by the Boards of Fisheries and Game and thus were barred from participating in subsistence activities.

The Alaska Supreme Court found that the subsistence preference granted to rural residents by the 1986 state subsistence law violated the "open access" provisions (art. VIII, secs. 3, 15, and 17) of the Alaska Constitution. Limitations on access to fish and game user groups based on residence in the rural area of the state are not permitted under the Alaska Constitution.

2. State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995).

An Indian tribe challenged the constitutionality of nonsubsistence areas established by the 1992 state subsistence law and the eligibility criteria for Tier II subsistence activities based on a person's proximity to the resource.

The Alaska Supreme Court held that the "open access" provisions of the Alaska Constitution (art. VIII, secs. 3, 15, and 17) do not permit eligibility for participation in Tier II subsistence activities (AS 16.05.258(b)(4)(B)(ii)) to be based on, or to take into consideration, how far a person lives from a subsistence fish or game resource.

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The establishment of subsistence and nonsubsistence areas is consistent with the power of the legislature to provide for the sustained yield management of fish and game resources, provided that the establishment of the areas did not affect eligibility to participate in a user group. The nonsubsistence areas authorized by the 1992 state subsistence law (AS 16.05.258(c)) did not violate the "open access" provisions of the Alaska Constitution.

B. ALASKA STATUTES

1. 1978 Subsistence Law

a. Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985).

Persons who had formerly engaged in subsistence fishing challenged regulations of the Board of Fisheries limiting eligibility for subsistence fishing to residents of rural areas of the state.

The Alaska Supreme Court found that the Board of Fisheries could not restrict subsistence fishing to residents of rural areas, because the 1978 state subsistence statute did not restrict subsistence to rural areas or authorize the board to impose such a restriction. The board could not interpret the term "customary and traditional" in the statute defining subsistence fishing so as to limit access to the subsistence fishing user group. The term "customary and traditional" in the state subsistence statute did not have the same meaning that the term had under ANILCA and did not authorize the board to restrict subsistence fishing activities to rural residents of the state.

b. State v. Fluska, 724 P.2d 514 (Alaska 1986).

A person who had been arrested for unlawful hunting challenged the regulations under which he was charged because the Board of Game had failed to adopt separate regulations for subsistence hunting. The court of appeals accepted that argument and created the "subsistence defense" because the 1978 state subsistence statute required the Board of Game to adopt subsistence regulations.

The Alaska Supreme Court overruled the decision of the court of appeals. The supreme court found that the 1978 state subsistence statute did not create a personal right to take or possess game for subsistence use in the absence of regulations adopted by the Board of Game. A person may not assert a subsistence defense for taking game in the absence of a regulation authorizing the person to take game.

The failure of the board to adopt subsistence regulations did not excuse the unpermitted taking of game for subsistence. The establishment of the "subsistence defense" by the court of appeals spurred the legislature into enacting AS 16.05.259 which eliminated the "subsistence defense".

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2. 1986 Subsistence Law

a. Bobby v. State of Alaska, 718 F.Supp. 764 (D.Alaska 1989).

Subsistence hunters in a rural area of the state challenged state closed season, bag limit, village harvest quota, and management area restrictions as unlawfully denying them a subsistence priority required by ANILCA.

The federal District Court for Alaska found that state subsistence regulations could be set aside for failure to comply with ANILCA if the regulations were arbitrary, capricious, or an abuse of discretion. The court accepted that the 1986 state subsistence law expressly authorized seasonal and bag limit restrictions on subsistence hunting. If the Board of Game performed the analysis required under the state subsistence law, and there was a record to support the board's decision, the board could adopt valid restrictions on subsistence hunting. In adopting subsistence regulations under the state subsistence law, the board

may not consider the availability of a game or fish population as a factor in restricting or reducing the demonstrated customary and traditional use of another game or fish population; an established use of moose may not be reduced solely because fish are available;

may impose bag limits and seasons on subsistence hunting if the restrictions are consistent with customary and traditional uses of fish and game; the level of need for subsistence use of game is not a permissible standard for setting bag limits and seasons; bag limits and seasons must be based on customary and traditional levels of use of game;

must first eliminate other consumptive uses before restricting the customary and traditional uses of game for subsistence purposes;

must accommodate rural traditions of sharing game in setting bag limits.

The court found that under the 1986 state subsistence law an established subsistence use of a particular game population may be curtailed only as a last resort. The limiting or restricting of all consumptive uses of game including subsistence uses in equal or roughly equal fashion is unlawful.

AS 16.05.259 (no subsistence defense) does not preclude a person from challenging the validity of a hunting regulation as a defense to a criminal prosecution. AS 16.05.259 was intended to preclude a defendant from claiming a subsistence right other than that conferred by statute or regulation.

b. State v. Morry, 836 P.2d 358 (Alaska 1992).

A subsistence hunter who was charged with violating brown bear hunting regulations challenged the applicability of the certain tag and sealing requirements to subsistence hunting.

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The Alaska Supreme Court found that under the 1986 state subsistence law and the McDowell decision, the opportunity to engage in subsistence activities (Tier I) is available to all Alaskans.

The Board of Fisheries and the Board of Game may take into consideration the traditional means used to harvest fish and game, but is not required to, in adopting subsistence regulations. Under the state subsistence law, the term "customary and traditional" relates to how fish and game are used not how they are taken for subsistence purposes.

The Board of Game is required to adopt regulations for subsistence hunting. The board cannot rely upon trophy hunting regulations to regulate subsistence hunting by default. The brown bear tag and sealing regulations that were the subject of this case were invalid as subsistence regulations because the board never determined that the regulations were consistent with the state subsistence law.

3. 1992 Subsistence Law

a. Toternoff v. State, 905 P.2d 954 (Alaska 1995); cert. den. 135 L.Ed.2d 190.

A subsistence hunter was charged with violating state hunting regulations for shooting a deer with the aid of a spotlight. The deer was killed on federal land but the hunter was shooting from a boat on navigable water. The hunter challenged the jurisdiction of the state to enforce its hunting regulations on federal land.

In addressing the state law issue in this case, the Alaska Supreme Court found that AS 16.05.259 (no subsistence defense) does not prohibit a person from challenging the validity of a subsistence regulation. (See below for discussion of federal law issues.)

b. Payton v. State, Alaska Supreme Court, Opinion No. 4831, June 13, 1997.

Residents of a rural area of the state challenged the decision of the Board of Fisheries not to allow a subsistence salmon fishery in the upper Yentna River. The board had denied the request for a subsistence fishery because the current uses of salmon in the upper Yentna River area were not sufficiently customary and traditional to qualify as subsistence uses.

The Alaska Supreme Court found that the Board of Fisheries erred when the board had required a familial relationship between current subsistence users and earlier generations. The requirement that subsistence uses be customary and traditional uses only requires that the uses in question have occurred consistently for an extended period of time not that they have been handed down from parent to child or relative to relative.

The court emphasized that the Board of Fisheries and Board of Game are separate entities acting under separate statutory authority and may reach different conclusions on subsistence issues based on the same facts. The Board of Fisheries did not have to permit subsistence

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fishing in an area just because the Board of Game had permitted subsistence hunting in the area. Exclusion of a community from a nonsubsistence area does not mean that the community is entitled to a subsistence preference. Areas excluded from "nonsubsistence areas" are not automatically "subsistence areas".

II. FEDERAL LAW -- ANILCA

A. Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (CA9 1988); cert. den. 491 U.S. 905, 105 L.Ed.2d 695.

Indian tribe challenged the definition of "rural" used in the 1986 state subsistence statute as being out of compliance with the ANILCA definition of "rural".

The Ninth Circuit Court of Appeals found that federal courts have the power to approve or disapprove the state's performance under ANILCA once the Secretary of the Interior has certified that the state's subsistence program is consistent with ANILCA.

The definition of "rural" adopted by the State of Alaska in the 1986 state subsistence law was not consistent with ANILCA and the state is out of compliance with ANILCA. "Rural" normally refers to areas of a certain population density. The state's interpretation of rural as an area in which the traditional use of fish and game was a principal characteristic of the area's economy materially changes the nature of the subsistence preference established by ANILCA.

B. Kwethluk IRA Council v. State of Alaska, 740 F.Supp. 765 (D.Alaska 1990). Kwethluk IRA Council sought an injunction to compel the State of Alaska to authorize the harvest of 50 to 70 animals from the Kilbuck caribou herd. The Kilbuck herd had been closed to hunting since 1985 because the herd had decreased to less than 100 animals. By 1990, the herd had increased to more than 1,400 animals. The Board of Game had denied a request from the Kwethluk IRA Council for a subsistence hunt. The council sought a preliminary injunction to compel the board to authorize a hunt.

The federal District Court for Alaska found that both the state subsistence law and ANILCA were founded on the perpetuation of subsistence game populations. The term "sustained yield" is broad enough to authorize the board to restrict subsistence to rebuild a damaged game population. However, the board must balance the minimum adverse impact on rural residents who depend on subsistence with scientific principles of game management. The court discounted the board's determination that the herd must remain closed to hunting to manage the herd on a sustained yield basis, because the board had not adopted a management plan for the Kilbuck herd and because the term "sustained yield" was not defined. The determination of the board thus was an *ad hoc* decision without an established policy on which to support the decision.

The court found that a subsistence caribou hunt would cause minimal damage to the herd, that the balance of hardships favored the council, and that public policy favored continuation

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of subsistence hunting. Thus the court ordered that 50 harvest permits be issued at Kwethluk for the Kilbuck caribou herd.

In terms of legal precedents this case offers little of value. This case involved a request for an injunction and never reached a complete review of the merits of the case. On the other hand, the case does illustrate that the federal courts may, under the authority of 16 U.S.C. 3117, become involved in the management and allocation of subsistence resources. The case also shows that the courts will not necessarily defer to the policy decisions made by the Board of Game.

C. United States v. Alexander, 938 F.2d 942 (CA9 1991).

Persons convicted of selling subsistence taken roe-on-kelp challenged their conviction.

The Ninth Circuit Court of Appeals found that ANILCA does not limit customary trade to transactions involving personal or family consumption. The sale of herring roe is customary trade. ANILCA allows rural Alaskans to engage in limited sales of herring roe so long as the sales are part of customary trade. State regulations cannot prohibit the sale of herring roe taken in subsistence fisheries because customary trade in fish and game is a subsistence use of fish.

The court remanded the case for a new trial. If the defendants were found at the new trial to have engaged in a sale of herring roe that was more than a limited cash sale then they could be convicted of unlawful selling of subsistence caught herring roe.

D. Native Village of Quinhagak v. United States, 35 F.3d 388 (CA9 1994).

Native villages in southwest Alaska challenged state regulations prohibiting subsistence fishing for rainbow trout and federal regulations defining "public lands" and sought a preliminary injunction allowing them to take rainbow trout for subsistence.

The Ninth Circuit Court of Appeals found that the villages had raised serious issues regarding the extent of federal subsistence jurisdiction in navigable waters under ANILCA. The court concluded that the villages were entitled to the requested injunction because the balance of hardships tipped sharply in their favor. The villages rely heavily upon subsistence fishing. Rainbow trout is a critical source of fat and protein, especially in winter when equivalent food sources are not available. The court also found that state and federal subsistence regulations regarding rainbow trout interfere with the village's way of life and cultural identity. Thus the villages were entitled to a preliminary injunction pending final resolution of the merits of the substantive challenges brought by the villages. The decisions of the court in regard to this preliminary injunction have little precedential value because they are so closely tied to the unique facts of this particular case.

Senator Rick Halford
September 23, 1997
Page 7

E. State of Alaska v. Babbitt, 72 F.3d 698 (CA9 1995).

This case consolidated several law suits relating to the extent of federal jurisdiction over subsistence activities in Alaska and the definition of "public lands" under ANILCA.

The Ninth Circuit Court of Appeals found that the navigational servitude is not a property interest in navigable water. The navigational servitude is not public land for purposes of ANILCA. However, the federal government has reserved vast areas of land in Alaska. In doing so the federal government has implicitly reserved appurtenant waters, including navigable waters, to the extent needed to accomplish the purposes of the reservations. Reserved water rights, including rights in navigable waters, are public lands subject to federal subsistence management under ANILCA.

F. Totemoff v. State, 905 P.2d 954 (Alaska 1995); cert. den. 135 L.Ed.2d 190.

A subsistence hunter was charged with violating state hunting regulations for shooting a deer with the aid of a spotlight. The deer was killed on federal land but the hunter was shooting from a boat on navigable water. The hunter challenged the jurisdiction of the state to enforce its hunting regulations on federal land.

The Alaska Supreme Court held that the state may enforce its civil and criminal laws on federal land unless the state consents to or cedes exclusive jurisdiction to the federal government or state law is preempted by federal law. ANILCA does not preempt state regulations that affect subsistence hunters on federal land so long as those regulations do not conflict with federal law. ANILCA does not create a general right to use traditional means and methods of taking game. The state may ban the use of spotlights to take deer.

ANILCA does not curtail the state's authority to regulate hunting and fishing in navigable waters. The Alaska Supreme Court disagreed with the State of Alaska v. Babbitt decision of the Ninth Circuit Court of Appeals and held that neither the navigational servitude nor the reserved water rights doctrine gives the federal government authority to manage fishing or hunting in navigable waters. The Alaska court found that navigable waters are generally not "public lands" under ANILCA.

GU:pl
97-212.plm

FRANK H. MURKOWSKI
ALASKA

COMMITTEES:

CHAIRMAN
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May 22, 1997

RECEIVED

MAY 02 1997

Ans'd.....

The Honorable Rick Halford
Senator
Alaska State Legislature
State Capitol
Juneau, AK 99801

Dear Rick:

By the time summer comes to a close in Alaska a Congressional moratorium will expire, and the Federal Government will implement regulations to take control of Alaska's fish and game resources. This will result in Washington having total control over fish, game and most land uses throughout Alaska, thereby nullifying the key powers conferred at Statehood. The effect of this will not only be felt by commercial, sport, and subsistence fishermen and hunters but all businesses and homeowners seeking to do most anything in the State. Therefore, if we do not act now, Alaska is heading in a direction that will result in us becoming the only state in the nation to lose the right to manage our fish and game resources.

It is within our capabilities to reverse this course. Therefore, as Chairmen of the Congressional committees with jurisdiction over this issue, we are putting forth our approach to solve it. This approach combines what we believe to be the best components of past ideas and unites them with some new ideas. While this proposal addresses the federal side of the equation, in order to realize the full benefits, there must be some action by the State to make changes to the Constitution as well. We believe this proposal, and any final resolve that should result from it, should return management of Alaska's fish and game resources to the State and be fair to all current and future Alaskans. We also believe that an inclusive process must be set in place to allow you, and all Alaskans, maximum participation in development of the final resolve.

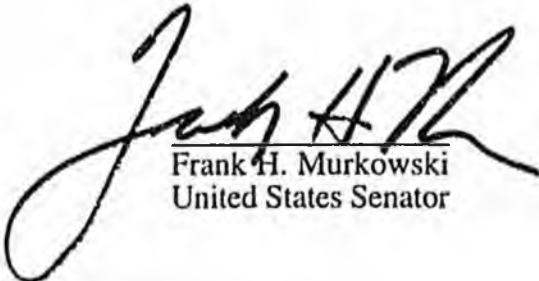
We are sending this proposal to you and other Alaskans in the hopes that you will take the time to understand and evaluate its implications and relay your thoughts to us. We would like your comments no later than July 7, 1997. Once we have received input, we will respond, either individually or collectively. It is our intent, after evaluating your input, to move forward with a legislative proposal. You should also anticipate that we will be seeking your participation as a bill moves through the legislative process here in Congress.

Our vision of Alaska in the 21st Century does not include a return to the failed federal management of Alaska's living resources. No Alaskan should agree to federal control. It usurps all of our sovereign authority and undermines the health and quality of the fish and wildlife resources. The time to put this problem behind us is now.

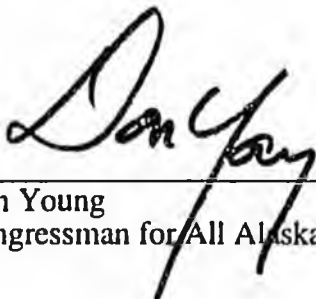
The Honorable Rick Halford
May 22, 1997
Page 2

We look forward to hearing your comments on this proposal and your participation in working toward a final resolve.

Sincerely,



Frank H. Murkowski
United States Senator



Don Young
Congressman for All Alaska

Enclosure

Discussion Draft of Proposed Amendments to ANILCA Title VIII

Summary

The purpose of these proposed changes to ANILCA Title VIII is to address difficulties experienced in the implementation of the law by the State of Alaska in order to make it easier for the State to take actions necessary to regain management authority over fish and game throughout Alaska. The proposed amendments emphasize local use of fish and game resources providing a priority to local users in times of shortage.

Section 803.

The definition section is amended to limit the subsistence priority to individuals who have a customary or direct dependence on subsistence uses of local fish and wildlife. Residents of remote villages, communities and areas of Alaska where direct personal or family consumption of wild, renewable resources constitute a significant share of the community economy or are a recognized aspect of the culture or traditions of the community are presumed to have the necessary customary or direct dependence on local fish and wildlife to qualify for the subsistence priority. This presumption can be rebutted where it is clear based on readily available facts that the individual does not have either a customary or direct dependence on the local fish and wildlife. This section is also amended to make it clear that fish and wildlife taken for subsistence uses can not be used for commercial purposes.

Section 804.

Where fish and game are plentiful all Alaskans should have opportunities to hunt and fish. The section addressing the priority for subsistence uses makes it clear that subsistence users have an absolute priority over all other users of fish and game. Subsistence users must be afforded a reasonable opportunity to meet their customary or direct dependence on local fish and wildlife. Their opportunity to meet their needs can not be jeopardized in order to protect the viability of a fish or wildlife population unless all other taking has first been eliminated. If the opportunity to hunt or fish for subsistence purposes must be limited to protect the viability of fish and wildlife populations, a priority is given to subsistence users who are closest to the fish or wildlife, rely on the resource as a mainstay of their livelihood and are far away from alternative resources. Amendments to this section also make it clear that subsistence users have a right to a reasonable opportunity to meet their customary or direct dependence on local fish and wildlife and not an entitlement to the resource itself.

Amendments also clarify the jurisdiction of the Federal government. Federal authority to enforce the subsistence priority does not extend to State or private lands or waters. This includes any Federal claim to reserved water rights or navigational interests.

Section 807.

The section granting review by the Federal courts of State implementation of the subsistence preference is amended to eliminate Federal court oversight if the State Constitution protects the priority for local subsistence users to have a reasonable opportunity to meet their needs. While constitutional authority for the State to implement the priority for subsistence users would allow the State to regain management of fish and game, constitutional protection for the priority itself would be required to eliminate Federal court oversight.

Discussion Draft of Proposed Amendments to ANILCA Title VIII

(New or Amended Language is Underlined)

DEFINITIONS

Section 803. As used in this Act, the term "subsistence uses" means the direct personal or family consumption by qualified residents of rural Alaska of wild, renewable resources for food, shelter, fuel, clothing, tools, transportation, or cultural enrichment: for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption: for non-commercial barter, or sharing for personal or family consumption; and for non-commercial customary trade. For 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) "non-commercial barter" means the exchange of fish or wildlife or their parts, taken for subsistence uses --

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

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

(C) "non-commercial customary trade" means the exchange of fish or wildlife or their parts, taken for subsistence purposes, for other food or for nonedible items if the exchange is of a very limited and noncommercial nature.

(3) "rural Alaska" means remote villages, communities and areas in Alaska where direct personal or family consumption of wild, renewable resources constitute a significant share of the community economy or are a recognized aspect of the culture or traditions of the community;

and

(4) "qualified residents of rural Alaska" means individual Alaska residents with a customary or direct dependence on subsistence uses of local fish and wildlife; individuals residing in rural Alaska are presumed to have customary or traditional dependence on subsistence resources although this presumption may be rebutted in cases in which readily available facts show that an individual does not have the requisite customary and direct dependence on such resources.

PREFERENCE FOR SUBSISTENCE USES

Section 804(a) Except as otherwise provided in this Act and other Federal laws, the reasonable opportunity to take fish and wildlife for nonwasteful subsistence uses on public lands by qualified residents of rural Alaska shall be accorded an absolute priority over the opportunity to take fish and wildlife for other purposes. Federal authority to enforce this priority shall not extend to and shall not affect the regulation of taking fish and wildlife or other wild, renewable resources on State or private lands, waters, including but not limited to any reserved waters, or interests therein. Federal jurisdictional interests and authorities, including but not limited to navigational servitudes, do not constitute public lands for the purposes of this Title.

(b) 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 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 or direct dependence upon the populations as the mainstay of livelihood:

(2) proximity for the subsistence use to the populations; and

(3) the availability and proximity of alternative resources.

Section 805. - (changes necessary to allow State reassumption)

Section 806. - (no change)

Section 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 for 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) 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 unless the State has

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constitutionally protected the priority. Where the priority of subsistence uses set forth in section 804 is protected by the State Constitution, the Federal Courts shall not have jurisdiction and the Federal judicial remedy created by this title shall not be available.

Sections 808 - 816. (no change)

Congress of the United States
Washington, DC 20515

July 23, 1997

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Knowles:

We write to provide our comments on the proposal prepared and distributed by the Governor's Task Force on Subsistence. Recent polling shows that over 80% of Alaskans support a solution to the subsistence policy dilemma that would return all management of fish and game to the State of Alaska by amending both federal law and the Alaska State Constitution. Clearly, you are on the right track. We have reviewed the details of your proposal, considered the views of commentators and received many comments from individuals and groups across Alaska, such as the Outdoor Council and the Tanana Chiefs Conference. On the basis of these inputs we make the following suggestions for changes to your proposal.

1. Your proposal provides a subsistence priority to rural Alaska residents. We propose you further limit the subsistence priority to those rural Alaska residents who need local fish and game resources for personal or family consumption or for customary and traditional uses. Further, the subsistence priority should not be enforced unless subsistence needs can not be met in a particular locality under the fish and game laws applying to all Alaskans. We believe these changes can be accomplished without creating an unreasonable burden on rural residents or the administration of the program.
2. Your proposal correctly provides for proxy hunting and fishing to meet the subsistence needs of aged and disabled rural Alaskans. We propose you tighten the proxy hunting provisions to insure against abuses.
3. Your proposal does not address federal jurisdiction over fish resources in Alaska recently established by the federal courts. Despite the opinion of the federal courts, it is clear to us that ANILCA Title VIII was never intended to reach so far as to undermine state fishery management. We believe you should consider changes to ANILCA which would preserve the state primacy over fishery management Alaska achieved through statehood. This could be done while allowing ANILCA Title VIII to appropriately protect subsistence uses of fish resources.

-2-

4. While you have provided in the state statute for customary trade to include exchange for cash of fish or game in minimal, noncommercial quantities, we believe a similar provision should be included in ANILCA.

5. We support your creation of regional subsistence councils and their relationship to the local fish and game advisory committees. However, we recommend you limit the closure authority of the advisory committees to covering only local areas and resources for which the appropriate regional subsistence council has been advised and the Alaska Department of Fish and Game has confirmed a shortage exists. In addition, we propose enfranchising local fish and game advisory committees, and through them local subsistence users, in local enforcement of the subsistence priority and in monitoring and making recommendations concerning the health of local fish and game populations.

6. We believe we must be clear in the federal law about when the state does and does not have authority to enforce the subsistence priority for fish and game in Alaska. We propose amending ANILCA to guarantee that at such time as the State of Alaska enacts and implements a law of general applicability which the Secretary of the Interior certifies provides for the subsistence priority contained in ANILCA Title VIII the State shall immediately assume fish and game management on all lands and waters in Alaska. The State could only be found not to be in compliance with ANILCA Title VIII if this state subsistence law was later repealed. The Secretary of the Interior would be required to annually certify to Congress only that the State of Alaska had in place a law of general applicability providing for the subsistence priority contained in ANILCA Title VIII.

7. We agree that federal court review of agency actions should be limited to a determination of whether such actions are arbitrary, capricious, or an abuse of discretion and that when reviewing State agency actions the federal courts should give deference to State agency determinations. In addition, in a civil action filed against the State, the federal court should not engage with the State agency in the re-writing of state regulations implementing the State subsistence law. The federal court should provide relief, other than preliminary relief, by specific order addressing the needs of the petitioner for subsistence resources.

Thank you for this opportunity to comment on the very good work you have done to date. We can not emphasize enough how important it is that your effort succeed. Success will of course be measured by adoption of changes to the state statute and ANILCA and the approval of an amendment to the Constitution by the voters in November of 1998. Unless we can quickly show substantial progress to achieving these results we will not be able to forestall implementation by the Department of the Interior of the federal court order requiring federal management of Alaska's fisheries and regulations asserting federal jurisdiction over fish and game on state and private lands. This would be a dramatic step backward for Alaska. We can not and should not let this occur.

-3-

Good luck at your next meeting. As always, we stand ready to assist in any way we can.

Sincerely,



Don Young



Frank H. Murkowski

- cc: Honorable Fran Ulmer
- Honorable Gail Phillips
- Honorable Miks Miller
- Honorable Jay Hammond
- Mr. Charlie Cole
- Mr. Byron Mallott

Rural Alaska Community Action Program, Inc.

September 15, 1997

Senator Rick Halford, Chairman
Senate Resources Committee
PO Box 670190
Chugiak, Alaska 99567

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Dear Senator Halford,

At the request of Senate President Mike Miller, I am sending you several documents for your information for the upcoming Senate Resources Committee hearing in Fairbanks, Alaska, September 24, 1997. It was not clear to me exactly which documents Mr. Miller wanted sent, but I assumed he wants guessed that the ones I submitted to the Governor's Task Force hearing.

On August 26, 27, and 28, the Native community did come together to develop a single united Native position. RurAL CAP, the Alaska Inter-Tribal Council and the Alaska Federation of Natives are working together on that. At this time, we have a resolution and a set of guiding principles. The current Native position on Subsistence is AFN's, "No Net Loss position." You will find that position on page 133 under Tab 5, "*Native Positions*," in the "Subsistence Roundtable" document enclosed.

The documents being forward to you are:

- RurAL CAP Subsistence Roundtable Information (February 1997)
- Subsistence Roundtable Executive Summary (February 1997)
- AFN Subsistence Summit Resolution/Guiding Principals (August)
- RurAL CAP's Analysis of the Governor's Proposal

If you need further information, please do not hesitate to call me.

Sincerely,



Jeanine Kennedy, Executive Director
Rural Alaska Community Action Program, Inc.

cc: Senator Mike Miller, President of the Senate

AFN POLICY CONCERNING RESOLVING THE SUBSISTENCE ISSUES

At its meeting of March 4, 1996, the AFN Board of Directors adopted the following POLICY PRINCIPLES according to which the Native community will conduct any discussions with the State of Alaska on resolving the subsistence impasse:

1. The overall management principle contemplated by ANILCA is that regulation of subsistence uses by state or federal authorities must be carried out in a manner that causes the "least adverse impact" on customary and traditional taking and use patterns of Alaskan communities. Restrictions, such as individual bag limits and seasons, may not be imposed if they are inconsistent with customary and traditional use patterns. This includes both the quantity of game, the traditional seasons and places for hunting or fishing, and restrictions on methods and means of harvest. It is a significantly higher standard than the "reasonable opportunity" language in existing state law.
2. The Native community will insist that the following conditions be part of any resolution of the current federal-state impasse:
 - a) there must be no net loss from the current level of federal subsistence protections, including, but not limited to the following points:
 - 1) The availability of one species of fish or game cannot be used as a basis for restricting opportunities to take another species in a customary and traditional manner;
 - 2) Regulations must provide opportunities to harvest each particular "stock" of fish and "population" of game that has been customarily and traditionally used;
 - 3) The Boards of Fish and Game cannot have unfettered discretion to place restrictions on harvests without a reasoned explanation of what "sustained yield" means and a reasoned determination of the number of fish or animals necessary to produce sustained yield;
 - 4) ANILCA's definition of "customary trade" includes sales for cash and does not require that fish or game used for customary trade be harvested only for personal or family consumption;

- 5) The word "rural" has a plain meaning, which includes at least part of the Kenai Peninsula and any attempt to limit the subsistence law's application through the use of a restrictive definition of rural is inconsistent with the plain meaning of the Act.
 - 6) ANILCA recognizes that subsistence is a group activity and a group way of life, as opposed to being an individual lifestyle; and
 - 7) The subsistence priority applies to *all* times, not just when there is a resource shortage. The Boards are required to provide fully for customary and traditional uses before any non-subsistence uses may be allowed.
- b) There must be basic reforms of state regulatory and management systems:
- 1) changes in Board structure and processes, to ensure fair treatment of subsistence uses;
 - 2) use of regional advisory councils, composed of subsistence users, whose proposals generate subsistence regulations, as in Federal Subsistence Board deliberations; and
 - 3) use of co-management contracting to delegate functions and powers to Native communities and organizations; and
- c) There must be no non-subsistence use areas in state law.
3. Resolution of the impasse should also include a strengthening of the federal preference (e.g., by changing to a Native or "Native-Plus" preference, or by defining "rural" so as to guarantee that Native communities that are historically surrounded by non-Native majorities will not be dropped from the preference).
 4. A subsistence amendment to the Alaska Constitution must be worded and placed so as to ensure that a state statute that complies with Title VIII cannot, on any grounds, be struck down by the Alaska Supreme Court. In addition, such an amendment should:
 - a) state that the subsistence preference may not violate the constitutional mandate to manage for sustained yield;

- b) require, rather than permit, the Legislature to enact a statute complying with federal law (e.g., "...the Legislature shall...", rather than "...the Legislature may...");
 - c) state that subsistence is the priority use of fish and game in Alaska;
 - d) include "culture" as a basis for differentiating among residents for application of the subsistence preference; and
 - e) be worded broadly enough to permit state law to comply with an improved federal preference in the future.
5. All discussions with the State of Alaska will be predicated on the fact that Title VIII of ANILCA is Indian Law, enacted under the plenary power of the Congress to regulate Indian affairs, derived from the Commerce Clause of the U.S. Constitution.
6. No resolution of the ANILCA impasse will be agreed to by AFN without approval by the larger Native community through a statewide subsistence summit or convention, with advance written explanations distributed to all communities and regions and with adequate lead time allowed for preparatory village and regional meetings.
7. During any period in which the state refuses to comply with federal law, the Native community supports full federal management:
- a) over all public lands (including the broadest possible definition of "reserved waters");
 - b) over all selected/unconveyed lands (specifically including state and ANCSA over-selections); and
 - c) providing for maximum extraterritorial reach off public lands.
8. On October 1, 1996, the state subsistence law adopted in 1992 will sunset unless extended by the Alaska State Legislature. If the 1992 law sunsets, the 1986 law will come back into force. AFN believes that the following changes would make marked improvements to the 1992 law:
- a) Basic reforms of the state regulatory and management systems to ensure that the subsistence priority is implemented fully:

- 1) re-establishment of regional subsistence advisory councils, composed of subsistence users, whose proposals generate subsistence regulations, as in Federal Subsistence Board deliberations;
 - 2) direction to the Alaska Department of Fish and Game to enter into co-management agreements that delegate functions and powers to Native communities and organizations; and
 - 3) involvement of the regional subsistence advisory councils in determinations of non-subsistence areas.
- b) Amend current state law definitions by ensuring that subsistence regulations provide the maximum (not guaranteed) opportunities for subsistence hunting and fishing and ensuring consistency with customary and traditional harvesting (timing, length of seasons, methods and means, etc.) and use patterns.
- c) Amend the criteria for determination of subsistence areas (those not included in non-subsistence areas) to include cultural criteria.
- d) Provide for an expanded "cultural" permit system for tribes located within non-subsistence areas that requires the Boards to allocate the amount of fish and wildlife necessary to satisfy the needs of the tribes.

AUGUST 28, 1997

NATIVE SUBSISTENCE SUMMIT

RESOLUTION 97-01

Concerning the subsistence rights of the Alaska Native People.

Whereas, representatives of the Alaska Native people 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 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 by a full and informed consent by the tribal organizations 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 at least to 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.



P.O. Box 20761, Juneau, Alaska 99802

Phone/FAX (907) 789-2399

September 22, 1997

Senator Rick Halford, Chairman
Senate Resources Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

and

Representative Scott Ogan, Co-chair
Representative Bill Hudson, Co-chair
House Resources Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Dear Senator Halford and Representatives Ogan and Hudson:

Both the Senate and House Resources Committees have scheduled hearings around the state to address the escalating "subsistence crisis." Although we were unable to testify at the Ketchikan hearing, the Territorial Sportsmen intend to testify at future public hearings on this issue.

The Territorial Sportsmen Board of Directors met September 16, 1997 to review our organization's position regarding solutions to the subsistence conflicts. Our major focus has been on the Governor's Subsistence Task Force proposal and the various positions being adopted by organizations on both sides of the debate.

We have attached for the information of your committees, our position sent to Governor Knowles concerning the Task Force's proposal. It is our understanding that there may have been some modifications to that proposal based on their stakeholders meeting on September 13, 1997. However, our Board has decided, at this time, to essentially maintain the position reflected in our July 18, 1997 transmittal.

As you can see from our position paper, our organization is dedicated to taking whatever steps necessary to develop a rational solution to this crisis. Although we have always

opposed a Constitutional Amendment discriminating against Alaskan residents, we have reluctantly agreed under some conditions, an Amendment to our Constitution may be crafted which does not completely dismantle the other equal protection and common use provisions of our Constitution.

The Territorial Sportsmen have consistently supported state management of our fish and wildlife resources and are strongly opposed to any provision which provides federal agency or federal court oversight over state management programs on state and private lands and waters. We concede that federal oversight over federal lands and waters is inevitable.

One of the major purposes of this transmittal is to encourage the legislative leadership and the Governor to immediately prepare a course in preparation for intense litigation. Our Board of Directors are convinced, after examining the positions of the Regional Native Subsistence Committees and the results of the recent Subsistence Summit that there is no conceivable possibility of an acceptable consensus position on this issue. Continued delays in hopes of finding a magic solution are only playing into the hands of those who are committed to complete preemption of state management.

We have in fact concluded, that the so called "middle ground" keeps moving farther and farther away from a position that we feel is in the best interests of everyone in our state. We also want to make it clear that we are not willing to accept "a solution at any cost." If a subsistence compromise cannot be developed which returns effective state management without federal oversight and provides a nondiscriminatory mechanism to meet the needs of "true subsistence users", then we fully support a massive litigation effort to protect the management rights of our state.

In light of the obvious stalemate and because of the grave consequences of federal management, the Territorial Sportsmen urge the Legislature and The Governor to immediately establish a "States Rights" litigation fund of at least \$25 million designed to protect the rights of every citizen of our state from federal preemptive regulations now set for adoption soon after October 1, 1997.

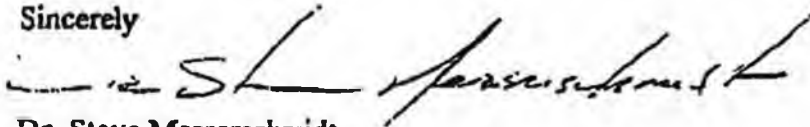
It is our opinion that the state has not exhausted its litigation options and in fact may have an excellent chance of succeeding in court once the federal regulations are in place. It is imperative that Alaska get its case before the U.S. Supreme Court. The Territorial Sportsmen still maintains that the Alaska Native Claim Settlement Act extinguished aboriginal claims, including hunting and fishing rights, and Congress provided no authority for federal preemption of state management on state and private lands and waters, including navigable waters.

We advocate aggressively pursuing a Supreme Court ruling on these issues and, if necessary, litigate federal violations of the State Compact and Statehood Act. To wait any longer in hopes that a possible solution could be crafted which is acceptable to all sides is irresponsible. Regardless of our personal feelings about the issue, the only

alternative available to the state is to protect its interests and the interests of all its citizens. We support doing whatever necessary to accomplish that task.

We all agree that the issue of state management of its fish and game resources was the motivation behind the statehood battle just under 40 years ago. It is time to defend that principle with every resource at our disposal.

Sincerely



Dr. Steve Messerschmidt
Secretary/Treasurer

Attachment

cc: Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young
Governor Tony Knowles
Senate President Mike Miller
House Speaker Gail Phillips



P.O. Box 20761, Juneau, Alaska 99802

Phone/FAX (907) 789-2399

July 18, 1997

Governor Knowles' Subsistence Task Force
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Knowles and the Subsistence Task Force:

These are the official comments of the Territorial Sportsmen Board of Directors concerning the proposed draft Subsistence Proposal.

Territorial Sportsmen, Incorporated is a Juneau based sportsmen/conservation organization dedicated to the principles of good conservation, wise use and equal treatment under our Constitution. We have always defended our Constitutional rights and strongly support state management of our fish and game resources. Our organization has existed for over 50 years and has a total membership of about 2,000.

First, we want to express our support for the development of a comprehensive solution to the existing subsistence crisis. We agree with the basic goal of the task force to return effective fish and wildlife management to the state. We also recognize the importance of subsistence in the lifestyles of many Alaskans and support providing a carefully crafted preference for true subsistence uses when taken for personal or family consumption..

The Territorial Sportsmen have always opposed amending the equal protection and common use provisions of our Constitution for any purpose. We have always opposed Constitutional amendments and laws which divide Alaskans along ethnic or other grounds which tend to pit Alaskans against each other. From our perspective, any modifications of our Constitution must be balanced with major concessions from Congress to remove federal oversight and preemption authorities and return effective management to the state.

This proposed package is patterned after LL Governor Ulmer's proposal with some major improvements. There are, however, some issues which must be addressed before the Territorial Sportsmen could actively support a Constitutional amendment coupled with statutory changes in both ANILCA and state statutes.

We have reviewed the Subsistence Proposal crafted by the Subsistence Task Force and have the following comments:

FEDERAL COURT OVERSIGHT

As we stated in our comments to Lt. Governor Ulmer, we cannot endorse any proposal which provides federal court oversight over all lands in Alaska. We reluctantly agree that federal court oversight of federal lands in Alaska is inevitable and that the basic subsistence priority thrust in ANILCA may not be radically changed for federal lands. In view of this, we recommend that all subsistence suits emanating from Alaska federal lands be required to be filed in the federal court system within Alaska.

It is our belief that Congress did not intend to preempt state management on state and private lands and waters and that is, from our standpoint, a bottom line position. We are adamant that the balance struck in ANILCA be maintained at all cost. Any compromise package must remove any federal court oversight over any private and state lands and waters.

STATE JURISDICTION

It is imperative from the standpoint of our organization that it be made abundantly clear that ANILCA did not intend to provide authority for federal preemption of state management on state and private lands and waters. As we mentioned to Lt. Governor Ulmer, the definition of "public lands" in ANILCA must be clarified to exclude any state or private lands and waters, including navigable waters.

In addition, we support the language in Senator Murkwoski's and Congressman Young's proposal which said:

"Federal authority to enforce this priority shall not extend to and shall not affect the regulation of taking fish and wildlife or other wild, renewable resources on State or private lands, waters, including but not limited to any reserved waters, or interests therein. Federal jurisdictional interests and authorities, including but not limited to navigational servitudes, do not constitute public lands for the purposes of this Title."

CONSTITUTIONAL AMENDMENT LINKAGE

If a Constitutional amendment must be considered then this proposal does not have adequate linkage language tied to the amendment. It is our opinion that any Constitutional amendment must be tied specifically to amendments to ANILCA. If the ANILCA amendments are not adopted or if adopted and later amended by Congress then the Constitutional amendment must be declared null and void.

RURAL QUALIFICATIONS

If it is the collective decision of our elected officials to craft a subsistence use solution using "rural" community qualifications rather than individual qualifications, then we recommend several modifications. It is not acceptable to assume that all communities residing outside existing non-subsistence areas be initially classified as "rural." We recognize that this is the direction taken by the federal subsistence regulators and some of the past Boards of Fisheries and Game but it is the source of much contention and social unrest in Alaska. If we are going to fix the subsistence conflicts then it is critical that we all bite the bullet and narrow the subsistence qualifications to the "true" subsistence users. Communities like Kodiak, Cordova, Sitka, Petersburg, Nome and Bethel should not qualify as rural subsistence communities. It is imperative that the final package clearly identify which communities are classed as "rural."

We recommend that the legislature either list each community that initially qualifies and eliminate those that the preponderance of the economy is other than subsistence-related, or establish a reasonable base from which to start, such as communities with a population under 1,000. It is recognized that the Boards of Fisheries and Game will be empowered to review these rural designations and restrict or add to the list under criteria established by the legislature. The political realities are that the proposal as drafted will limit the Boards to only deleting communities from subsistence use under the definition of rural. Clear legislative standards must be provided.

From the standpoint of our membership, this proposal can only lead to further restrictions for the residents of Juneau. As we mentioned to Lt. Governor Ulmer, everyone in southeast Alaska has a priority over residents of Juneau and Ketchikan. If king salmon, cohos, chum salmon, pink salmon, steelhead, halibut, ling cod and other species are declared as Customary and Traditional subsistence resources, then the priority use in this region will be extended to everyone except those living in Juneau and Ketchikan. We truly question whether our neighbors in Petersburg or Sitka have a greater need or dependency on the resources of our region than those living in Juneau. It also doesn't take much imagination to see the potential for increasing social strife—unfortunately spearheaded by a proposed Constitutional amendment to sections designed to guarantee equality.

DEFINITION OF "RURAL"

The criteria utilized to-date for determining "rural" eligibility are too vague. The proposed package improves on the definition of "rural" but we also propose that it be amended to say:

"rural community or area" is a community or area substantially dependent on fish and game for direct personal or family nutritional and other subsistence needs.

We also recommend that "substantial" be defined as follows:

"substantially dependent" means a community which at least 50% of the economy is dependent on subsistence resources.

In our opinion, this truly reflects where "true" subsistence needs exist and should be given a preference.

REGIONAL SUBSISTENCE COUNCILS

The proposed regulatory structure including the re-establishment of Regional Subsistence Councils appears to be a duplication or overlap of responsibilities with the existing advisory committees. The already overloaded Boards of Fisheries and Game are going to have their calendars extended even further than they are today. The regulatory process will, in our opinion, be almost unworkable due the complexity of the system and inherent problems with bureaucratic processes.

We do recognize the improvements made in this proposal from what exists with the current federal regional council and regulatory board processes. Some of the changes will certainly assist the state Boards in their deliberations. We are concerned, however, that the changes are not substantial enough to make the resulting structure workable.

This can be addressed in any legislative session, but possible changes to the existing advisory committee system should be considered to help streamline the regulatory process and simplify the public input process.

With this type of concession to the federal law we strongly recommend language which says that regional councils will only exist if the federal government pays for them.

SUBSISTENCE PRIORITY

This proposal changes the exiting state law providing a "preference" for subsistence to mirror the federal law which provides a "priority." We support the existing state law which recognizes a "preference" for subsistence uses. From the standpoint of our Board of Directors, a preference means additional benefits or special opportunities whereas a "priority" implies a higher degree of protection and an absolute guarantee.

CONCLUSION

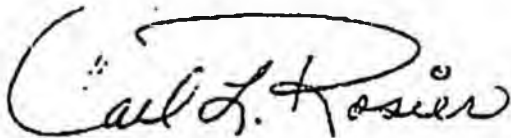
In conclusion, the Territorial Sportsmen Board of Directors have and will continue to participate in the negotiations regarding state management of our fish and wildlife resources. There are some major areas of the proposed subsistence solution which must be addressed before we recommend to our members that it be supported. We do support the efforts of our political leaders to bring about a permanent solution to this growing crisis. We are not, however, willing to accept a package, including a

Constitutional Amendment unless certain amendments and legal guarantees are included in the package.

The Territorial Sportsmen also recommend that any solution which is presented in final form to the public clearly spell out whether an individual or community is "in or out" as far as qualifying for the subsistence priority. To pass a vague package of amendments to the Constitution, state statutes and ANILCA without clearly identify qualifications for the public would be irresponsible. It is not satisfactory for us to leave it up to future politically appointed Boards or the federal court system to decide eligibility. History has shown the unpredictability of this issue and the public deserves a clear picture so that they can cast an enlightened vote.

Thank you for the opportunity to comment on this proposed subsistence package. We certainly applaud you and the working group for taking on the task of attempting to craft a long term solution to the subsistence issue.

Sincerely,



Board of Directors, Territorial Sportsmen
Carl L. Rosier, Vice President

**An Issue by Issue Comparison
Between the Governor's Task
Force Proposal on Subsistence
and the AFN Proposal**

	<i>Changes to Current Law</i>	<i>When is Priority Invoked?</i>	<i>Standard of Protection for Subsistence Harvests</i>	<i>Who is Eligible for Priority?</i>
TASK FORCE	<p>Constitutional amendment, ANILCA changes, and statutory changes "linked" together.</p> <p>Note: Linkage does not currently require all suggested changes to ANILCA prior to constitutional amendment</p>	At all times when there is a subsistence use	"Reasonable opportunity" to take subsistence resources	Constitutional amendment permits Legislature to authorize a preference for rural residents of Alaska
AFN	Mandatory rural preference in constitutional amendment plus few or no changes to ANILCA	At all times	"Least adverse impact" on customary and traditional subsistence uses	Constitutional amendment with mandatory rural preference plus a native preference
OTHER				

	<i>Subsistence Opportunities for Urban Natives</i>	<i>What Uses are Protected</i>	<i>Geographical Extent of Priority</i>	<i>Co-Management</i>
TASK FORCE	No urban natives qualify under general plan. May qualify under proxy program	Non-commercial, customary and traditional uses for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation and making/ selling handi-crafts.	All rural lands and waters	No
AFN	All non-rural natives qualify	Same as Task Force plus cultural and religious uses Also drop Tier II limitation to food	All rural lands and waters	Yes. State and tribes manage as equals Delegation and sharing of management functions and powers to native communities and organizations
OTHER				

	<i>Federal Court Oversight</i>	<i>ANILCA Amendments</i>	<i>Extent of Federal Jurisdiction When State is Out of Compliance</i>	<i>Subsistence Defense Against Criminal Prosecutions</i>
TASK FORCE	State agency decisions accorded deference by Federal Courts; not to be overturned unless arbitrary, capricious, or an abuse of discretion	Changes providing definitions and limitations on Federal Court oversight Designed to match state statutory scheme	"Federal lands" only, meaning not lands titled in the State of Alaska after 12/02/80, native lands or private lands	No
AFN	Maximum Federal Court oversight and no changes to ANILCA	Opposed to all proposed changes to ANILCA	All public lands including navigable waters; and all other lands when necessary to provide for subsistence uses	Yes
OTHER				

	<i>Definition of "Customary and Traditional"</i>	<i>"Customary Trade"</i>	<i>State Management Reforms</i>	<i>Definition of "Rural"</i>
TASK FORCE	"Non-commercial, long-term, consistent taking of, use of, or reliance upon fish or wildlife in a specific area and the patterns of taking or use of that fish or wildlife that have been established over a reasonable period of time, taking into consideration the availability of the fish or wildlife."	"The limited non-commercial exchange for cash of fish or wildlife or their parts in minimal quantities."	Boards of Fish and Game establish regional advisory committees which make recommendations re: all uses that directly affect subsistence; committee to receive deference if unanimous	An area that is substantially dependent on fish and wildlife for nutritional and other subsistence uses
AFN	No statutory definition; must mirror local customary and traditional patterns of use.	Allow trade to occur unless Federal Courts determine that it is abusive on a case-by-case basis.	Support Federal Regional Subsistence Councils Regional Councils would have full regulatory authority	Maintain current Federal Subsistence areas
OTHER				

	<i>Proxy Hunting</i>	<i>Where can priority be exercised?</i>	<i>Congressional certification that state is in compliance with Title VIII</i>	
TASK FORCE	Permitted by family member living in non-rural area or by another in the same rural area	Only in rural area where user is domiciled	Yes, Amendment contained in ANILCA	
AFN	Unnecessary because under this proposal all natives urban and rural qualify for priority	In any rural area	Not included	
OTHER				

	<i>Applicability to other issues</i>	<i>Which communities qualify as "rural"?</i>		
TASK FORCE	<p>ANILCA amendment making the proposal neutral on questions of Indian Country and sovereignty</p> <p>Proposal not to be construed as Indian Law</p>	<p>Maintain current state regulatory classifications until Boards of Fish and Game make community and area determinations based on new state definition of ""rural"</p>		
AFN	<p>Recognizes ANILCA as Indian Law by providing a native preference</p> <p>Recognition in Alaska Constitution of Alaskan natives as political institutions</p>	<p>Maintain Federal classifications of rural/non-rural areas</p>		
OTHER				



Alaska Outdoor Council

PO Box 73902

Fairbanks, AK 99707-3902

Tel./FAX: (907) 455-4AOC (4262)

e-mail: outdoor@polarnet.com

www2.polarnet.com/~outdoor

Statement on the Subsistence Issue

Accepted by Board of Directors on
September 4, 1997

The following general tenets are supported by the Alaska Outdoor Council relative to the subsistence issue.

- The Council supports the personal consumptive use of Alaska's fish and wildlife resources. The Council recognizes the enormous contribution of personal consumptive resource uses to Alaskans' lifestyles, livelihoods, standards of living and the overall economy.
- The Council supports management and consumptive uses of fish and wildlife on ANILCA created parks, monuments, preserves and refuges as stated therein: "Subsistence uses by local residents shall be allowed in national preserves and, where specifically permitted by this Act, in national monuments and parks." (emphasis added)
- The Council supports the Alaska State Constitution, which requires that fish and wildlife resources be managed for common use on the sustained yield principle, for the maximum benefit of all the people.
- The Council is opposed to any harvest preference based on group criteria such as residency, culture or ethnic background.
If "Subsistence is a basic human right" as proclaimed at the Native Subsistence Summit, then not one human should be denied that right simply because of his/her ZIPcode, culture or race.

In addition the Council strongly advocates that:

1. Any preferential use must go to only those Alaskans who rely principally on fish and game to meet nutritional needs;
2. Preferential harvests can not be sold in commercial markets;
3. Any preferential use must be based on individual, not group, criteria;
4. The federal demand, accepted in the Task Force proposal, that this priority applies to all renewable natural resources (timber, water, etc.) is unacceptable;
5. Any preferential use goes only to those who participate minimally in the cash economy;

6. If preferential use is established, all members of a community may be presumed to get the preference only if it is tied to a refutable or "rebuttable presumption". A rebuttable presumption means: any individual within the community may be legally challenged on the basis that he/she does not meet the established individual criteria to harvest under preferential regulations. This community allowance may only accommodate small, remote, long-established communities where few employment opportunities exist and there is minimal participation in the cash economy.
7. The Legislature must establish the individual criteria for defining who qualifies for a harvest preference -- and the criteria to identify communities where all residents are initially presumed to qualify. This is not a job for people who are appointed to make hunting and fishing regulations, i.e. the Boards of Fisheries and Game.
8. Proxy provisions must not be expanded beyond the generous provisions in Alaska law to accommodate people with physical limitations; these provisions have not yet been put to any real test.
9. The existing Fish and Game Advisory Committee system should be supported and strengthened; the proposed Regional Councils, biased by racial requirements, would be another inefficient and expensive layer of bureaucracy.
10. "Customary and traditional use" must not be the standard for priority harvest as it has been defined by federal law in the Bobby decision -- (essentially "no season, no bag limit").
11. Federal law and judicial oversight of fish and wildlife management must not apply on state navigable waters, other state waters, state lands or private lands and waters.
12. Any compromise must ensure that Alaska has the authority to manage fish and game. The State must not simply carry out federal mandates which are enforced by federal courts. No other state suffers this burden.
13. In contrast to the current Task Force proposal, the final proposal must assure that none of ANILCA argues for "Indian country". Any compromises will be reconsidered in the event that Venette wins in the Indian country case.

KETCHIKAN GATEWAY BOROUGH

RECEIVED

RESOLUTION NO. 1358

SEP 10 1997

A RESOLUTION OF THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH, ALASKA, SUPPORTING A SUBSISTENCE USE POLICY MANAGED BY ALASKA THAT TREATS ALL ALASKANS EQUAL; AND ESTABLISHING AN EFFECTIVE DATE.

RECITALS

A. The seafood industry constitutes nineteen percent (19%) of the basic sector employment in Ketchikan with an annual payroll of approximately twenty two million dollars (\$22,000,000).

B. The harvesting and processing of seafood products is an integral component in the economy of southern Southeast Alaska.

C. The sport, commercial and personal use of Alaska's fish and wildlife resources represents a unique and essential role in the lifestyle of Alaskans.

D. Title VIII of ANILCA requires the state to adopt a rural subsistence preference as a condition to retaining state management of fish stocks and game populations on federally owned land in Alaska and the State of Alaska has been unable to enact a policy that both conforms with ANILCA and satisfied the equal access clause, the non-exclusive privilege clause and common use clause in the state constitution.

E. The federal government is preparing to assume management authority over Alaska's fisheries effective October 1, 1997.

F. The Alaska Department of Fish and Game has an outstanding record of managing fish stocks and game populations that has allowed these renewable resources to evolve and grow at long term sustainable rates.

G. Under the Alaska Constitution and state statutes Alaska residents have been provided equal and adequate opportunities to have access to resources where need and tradition exists.

NOW, THEREFORE, IN CONSIDERATION OF THE ABOVE FACTS, IT IS RESOLVED BY THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH, ALASKA, as follows:

Section 1. The Ketchikan Gateway Borough recognizes the importance of the fisheries and wildlife resources in Southeast Alaska for all user groups including commercial, sport, subsistence, personal and all remaining uses.

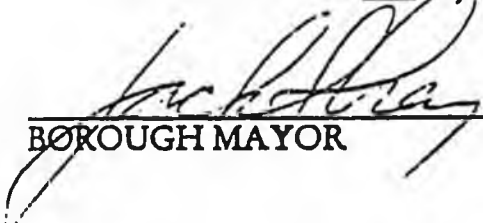
Section 2. The Ketchikan Gateway Borough supports a subsistence use policy managed by the State of Alaska that treats all Alaskans equally, provides equal opportunities for Alaskans to harvest fish and game to feed their families where need and tradition exist, and preempts the federal management of fish and game in Alaska.

Section 3. The Ketchikan Gateway Borough further requests the Alaska Congressional delegation, the Alaska Legislature and Governor Knowles to work cooperatively to reach a solution before October 1, 1997.

Section 4. The Borough Clerk is directed to send a copy of this resolution to the Alaska Congressional delegation, the Alaska Legislature and Governor Knowles.

Section 5. This resolution is effective upon adoption.

ADOPTED this 2nd day of September, 1997.


BOROUGH MAYOR

ATTEST:


BOROUGH CLERK

Approved as to form:


BOROUGH ATTORNEY

EFFECTIVE DATE: 9/02/97			
ROLL CALL	YES	NO	ABSENT
CONLEY	X		
COYNE	X		
ELKINS	X		
MARTIN	X		
MARSHALL	X		
TIPTON	X		
VAN HORN	X		
MAYOR (Tie Vote Only)			N/A
4 AFFIRMATIVE VOTES REQUIRED FOR PASSAGE			

SEPTEMBER 11, 1997

SENATE RESOURCE COMMITTEE
SENATOR RICK HALFORD, CHAIR
ALASKA STATE LEGISLATURE,
STATE CAPITOL (MS3100)
JUNEAU, AK. 99801

On the subsistence issue, we are opposed to any harvest preference based on group criteria, such as residence, culture or ethnic background and support the Alaska State Constitution which requires that fish and wild life resources be managed for common use on the sustained yield principle, for the maximum benefit of all the people.

Your efforts towards keeping the control of harvesting our resources within the State and maintaining our State Constitutional right that we are all considered equal when it comes to harvesting our fish and game.

Sincerely,

Charles L. Crawley
Charles L. Crawley

Joanne E. Crawley
Joanne E. Crawley

1117 Ivy Drive,
FAIRBANKS, AK. 99709-4743

September 17, 1997

Senator Rick Halford
Senate Resources Committee
PO Box 670190
Chugiak AK 99567-0190


RECEIVED
SEP 23 1997
A150.....

Re: Subsistence and Personal Use Permits

If you didn't use it, you are not losing it. Why not a limited entry permit system for system for subsistence and personal use permits? Those who have had permits in the past would be "grand-fathered" for these permits. The State has records of past permit users. Not everyone in the rural areas used permits in the first place. Personal use permits for people in larger populated areas (such as myself) would not lose permit use.

Let's drop the rural reference all together. All of Alaska is RURAL! The entire state's population is less than a small suburb of Los Angeles.

Limited entry subsistence and personal use permits could not be sold like the commercial permits, but only passed down within the immediate family of the original permit holder. Also, this immediate family member must qualify as a resident of the State of Alaska and also be a permanent dividend recipient. (This would clear up the resident factor). This could leave our system State managed as provided in the State Constitution, as were commercial fishing permits.


Ed Marksheffel
PO Box 9324
Ketchikan AK 99901
(Voter Registration #1397)

DATE: 9/10/97

TO: Senator Rick Halford, Chairman
Senate Resources Committee
Alaska State Legislature
907/694-0549 fax

FROM: Robert Robb
P.O. Box 1296 (mail); 1216 Mineral Creek Rd. (shipping)
Valdez, AK 99686
907/835-2078 (phone); 907/835-4738 (fax)

RE: Subsistence in Alaska

Dear Senator Halford,

I am writing today to express my concerns over the present debate on subsistence in Alaska, an issue about which I feel very deeply, as most Alaskans do.

I am an avid sport hunter, much more than most. I make my living writing about the subject for a variety of national hunting & fishing magazines, and have been doing so for 20 years now. That profession has given me a deep appreciation of the importance of hunting to millions of Americans, including Alaskans, who dream about their chance to experience spring and fall hunting and cherish the opportunity to put meat on the table for themselves and their families. For me, hunting seasons are dreamed about and planned for 365 days a year. I live and breath it. It is, in large measure, a definition of who I am. Many of these people, and my friends, are the same.

Those friends, like myself an "urban Alaskan," are strong supporters of the personal consumptive use of Alaska's fish and game resources. I also support the right of all *local* residents to be allowed to participate in consumptive fish and game use in the national parks, monuments, preserves and refuges created by ANILCA.

However, I have an insurmountable problem with the belief that any group, native or non-native, urban or rural, be granted a harvest preference based on group criteria like race, religion, culture, or ethnic background. To grant such a preference would create a divisive climate between the haves and have nots that will never be healed. I am a strong believer in the concept that all Americans, and all Alaskans, should be considered as equals in all things, including the opportunity for employment, education, and other state and federal benefits. To grant preference to one group over another in any of these things, including subsistence, is a violation of basic civil rights tenets.

In following the recent Alaska Federation of Natives summit in Anchorage through the information I was privy to in the newspapers, I saw that AFN declared that subsistence was/is a "basic human right." Yet in their thinking this "basic human right" should be

granted *only* to so-called native Alaskans. How can a governmental body agree that it is right to deny a basic human right to the vast majority of the population? To my way of thinking, a basic human right must be granted all state residents equally, regardless of where they live, who they are, or what their ethnic background might be. That is why I strongly support the Alaska State Constitution, which requires that fish and wildlife resources be managed for common use, on the sustained yield principal, for *all* the people. After all, how can one argue with a state compact that unequivocally grants equal rights in all things to all the state's peoples?

Regarding subsistence, I have no problem with the concept of allowing preferential use of fish and game resources to those Alaskans who truly and honestly rely on those resources to meet their nutritional needs, and whose participation in the cash economy of the state is so limited that they have a difficult time meeting these nutritional needs any other way. This preference must be based on individual, not group, criteria, including where someone lives, and again should not be based on race, culture, or ethnic background. The concept of "customary and traditional" use as currently used in Alaska is, to me, a divisive and inequitable measure of subsistence qualification. Also, game and fish resources harvested for personal use under subsistence laws must not be permitted to be sold or bartered, but only used to satisfy nutritional needs. To permit their sale is to, in effect, turn these resources into a welfare program.

Sir, the thought of federal control of our state fisheries, as the feds currently control hunting on federal lands, is abhorrent to me. However, to knuckle under to an arbitrary deadline and adopt a present governor's Task Force recommendations for subsistence simply to beat that deadline would be the wrong thing to do. More important is to resolve the subsistence issue in such a manner that all user groups are granted equal access to the resource, just as they should be granted equal access to all other rights and privileges of state residency. To do otherwise is to create a system of classes that can only, in turn, create unending distrust, envy, and dislike between those groups that have been given the resource, and those groups that would have their access to those same resources severely restricted. And in time, when state populations grow and rural and urban boundaries become muddled, and this growth intrudes upon the habitat needed to keep our game animal populations at current levels -- much as they have in the lower 48 states -- this will mean that some user groups will simply be eliminated from the picture. This can only further divide Alaskans, not bring them together, as we must do if we are to move toward making our state a fair and equitable place for all to live, work, and raise their families.

I thank you for your time in considering my views -- views which, I believe, reflect those of the majority of Alaskans -- when working to solve the subsistence problem. This is, without question, one of the most important decisions that will ever be made in Alaska, one that will affect Alaskans for many generations. I hope that you, and your committee, will strongly recommend that all Alaskans be granted equal access to all the state's resources, including our precious and treasured game and fish populations.

Sincerely,

Robert Robb

RECEIVED

9/12/97

SEP 15 1997

Good Afternoon, thank you for accepting my testimony,

Ans'd.....

First, Tribal Sovereignty and Subsistence are the same, both are a way of life to Alaska's indigenous Natives. If the controlling governments take one or both away, it can be considered a United Nations genocidal act.

Alaska Native Claims Settlement Act (ANCSA) is a treaty supported by the corporated back Alaska Federation of Natives and the governments. Alaska National Interest Lands Conservation Act (ANILCA) is the current bleeding band-aid covering ANCSA. At no time has the majority of aboriginal Natives in Alaska freely voted to except either treaty. This subsistence issue is moot until the indigenous people effected have voted and are fully informed on what they are giving up with Alaska's resources.

It's a proven fact that States are the worst enemies to their aboriginal inhabitants and this is the reason why the Federal government still needs a ruling law that protects the disadvantaged Natives in Alaska. The continued erosion using statues and policies are very destructive to these land based Natives. The powerful and numerous special interest groups are taking away the unique way of life that these orginal inhabitants have enjoyed since time-immoral.

All indigenous Natives rural and urban must be allowed to subsist into the 21st century. ANCSA with time is proving what it was intended for; the complete seperation of land and resources from its orginal inhabitants.

These Federally formed ANCSA corporations were created with the social, econmic and culture needs to be protected for ever.

My ANCSA corporation is Cook Inlet Region, Inc. (CIRI). CIRI for over twenty-six (26) years has not protected shareholders rights and culture. I have seen Fish creek, Kenai river, and Kasilof river change from subsistence to "personal use", subsistence caribou hunting change to the "Tier system". CIRI has not lived upto its responability to protect its shareholders because why else is a hunting and fishing camp located across from Kenai called "Silver Salmon Camp" which is owned and built and maintained with CIRI shareholder money. This ANCSA land is reserved only for Directors, Officers and close business associates. The continued disadvantaged shareholders of CIRI can only watch and wait year after year for these abuses to be corrected.

Inclosing, the voice of aboriginal people all over the world is to protect mother earth and its surrounding enviroment. The control of subsistence must be managed by the people that are mostly effected. Tribal inhabitants, Federal and State governments agreement to comanage Alaska's resources is possiably one small step into the right direction.

Than! You,


James Grotha

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Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
A The Priority: Who is eligible?	Residents of Alaska communities that are <u>rural</u> , defined as "community or area substantially dependent on fish and game for nutritional and other subsistence uses." No population categories. No criteria for deciding which places meet above definition. (State Boards will set criteria, subject to ANILCA.) Applies to communities and areas; no individual qualification.	Rural-remote villages, communities and areas. No direction as to what remote means (e.g., from Bethel, Anchorage, jet service, road system, etc.). Individual eligibility, with presumption that all residents in the eligible areas qualify. Presumption can be rebutted with readily available evidence. Raises constitutional questions as no new entrants are permitted in the system.
B Definition: "Customary & Traditional"	"...Non-commercial, long-term and consistent taking of, use of, and reliance upon fish or game in a specific area and the use 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." (Same as in current State law.)	C&T would no longer be a part of the subsistence system. Subsistence uses are based upon <u>direct personal or family consumption...of wild renewable resources</u> . No direction as to how subsistence regulations are to relate to customary and traditional uses.
C Definition: "Customary Trade"	"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.	Includes exchange of fish or game for other food or nonedible items if the exchange is of a very limited and noncommercial nature. Appears to eliminate trapping for money on federal lands and other exchanges for even limited amounts of money.
D When the priority is invoked	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.
E Standard of protection for subsistence harvests	"Reasonable Opportunity." Allows subsistence user to participate in hunt or fishery with reasonable expectation of success (not a guarantee of success). State Boards must "consider" C&T seasons; however, it is unclear whether State Boards must mirror local C&T practices.	Subsistence uses are to have a reasonable opportunity. "Reasonable opportunity" is not defined.

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
<p>F Subsistence opportunities for urban Natives:</p> <ul style="list-style-type: none"> historically rural Native communities/areas now defined as urban; individual Natives who moved to urban communities/areas 	<ul style="list-style-type: none"> <u>Historically rural Native communities/areas now defined as urban:</u> Native (or non-Native) resident may get permit for taking fish or game to teach and preserve historic or traditional uses and harvest practices. <u>Individual Natives who moved to urban communities/areas:</u> Native (or non-Native) resident of any urban community/area may act as a proxy hunter or fisher in a rural area for a family member living there. 	
<p>G What uses are protected (human consumption, nutrition, etc.)?</p>	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> 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. <p>At Tier II, State Boards must adopt regulations that eliminate C&T uses other than food.</p>	
<p>H What is the geographical extent of the priority (on which lands and waters)?</p>	<p>All rural lands and waters. Note: definition of "rural" in Row A above. (Excluded: places currently within State's non-subsistence use areas.)</p>	
<p>I Are management reforms included?</p>	<p>Yes. See reforms listed below in row J.</p>	

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
<p>J Does it contain the principle of co-management?</p> <p>(Note: concept of "co-management" is defined differently by proposals listed to the right.)</p>	<p>Yes. New State law requires State Boards to establish at least six 10-member regional advisory councils, appointed by the Governor [4 members from local tribal councils' lists; 6 members (3 of whom must be subsistence users) from local governments' and local advisory committees' lists.] State Board must give deference to unanimous regulatory recommendations of regional councils. Regional councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees.</p>	
<p>K Extent of federal jurisdiction when the State is out of compliance</p>	<p>Definition of "public lands" will be amended in an unknown way. Note: when State is in compliance, Secretarial regulatory authority and monitoring/reporting roles are eliminated.</p>	<p>Limits extent of federal jurisdiction to game on federal lands. No federal jurisdiction on State or private lands or waters or any federal claim to reserved water rights or navigational interests.</p>
<p>L Federal Court Oversight</p>	<p>ANILCA amendment adds judicial review standard: federal court can overturn State regulation only if "arbitrary, capricious or abuse of discretion." Federal court must give State Board same deference as federal agency.</p>	<p>Eliminates federal jurisdiction when the state has protected the subsistence priority through the State Constitution. Does not consider situation where there is a State Constitutional provision but no statutory provision providing for a meaningful subsistence priority.</p>
<p>M Nature of the State Constitutional Amendment</p>	<ul style="list-style-type: none"> • Permissive ("may"); • Consistent with sustained yield; • Rural priority. 	

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
N Amendments to Title VIII	102: Definition of public lands "should" be modified in an unknown way. 803: Definitions of C&T, rural, and customary trade. 804: Changes standard to "reasonable opportunity" and defines it. 805: Changes in management system. 806: Repeal Secretarial monitoring/reporting during state compliance. 807: Review criteria for federal courts. 813: Conforming changes. 814: No Secretarial regulatory authority during state compliance. 816: Disclaimer clause: Nothing in these ANILCA amendments affects Indian Country, tribal jurisdictions, or Title VIII's status as Indian legislation.	
O Is there a subsistence defense against criminal prosecutions?	No.	

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
A The Priority: Who is eligible?	Residents of Alaska communities that are <u>rural</u> , defined as "community or area substantially dependent on fish and game for nutritional and other subsistence uses." No population categories. No criteria for deciding which places meet above definition. (State Boards will set criteria, subject to ANILCA.) Applies to communities and areas: no individual qualification.	Rural-remote villages, communities and areas. No direction as to what remote means (e.g., from Bethel, Anchorage, jet service, road system, etc.). Individual eligibility, with presumption that all residents in the eligible areas qualify. Presumption can be rebutted with readily available evidence. Raises constitutional questions as no new entrants are permitted in the system.
B Definition: "Customary & Traditional"	"...Non-commercial, long-term and consistent taking of, use of, and reliance upon fish or game in a specific area and the use 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." (Same as in current State law.)	C&T would no longer be a part of the subsistence system. Subsistence uses are based upon <u>direct personal or family consumption...of wild renewable resources</u> . No direction as to how subsistence regulations are to relate to customary and traditional uses.
C Definition: "Customary Trade"	"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.	Includes exchange of fish or game for other food or nonedible items if the exchange is of a very limited and noncommercial nature. Appears to eliminate trapping for money on federal lands and other exchanges for even limited amounts of money.
D When the priority is invoked	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.
E Standard of protection for subsistence harvests	"Reasonable Opportunity." Allows subsistence user to participate in hunt or fishery with reasonable expectation of success (not a guarantee of success). State Boards must "consider" C&T seasons; however, it is unclear whether State Boards must mirror local C&T practices.	Subsistence uses are to have a reasonable opportunity. "Reasonable opportunity" is not defined.

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
<p>F Subsistence opportunities for urban Natives:</p> <ul style="list-style-type: none"> historically rural Native communities/areas now defined as urban; individual Natives who moved to urban communities/areas 	<ul style="list-style-type: none"> <u>Historically rural Native communities/areas now defined as urban:</u> Native (or non-Native) resident may get permit for taking fish or game to teach and preserve historic or traditional uses and harvest practices. <u>Individual Natives who moved to urban communities/areas:</u> Native (or non-Native) resident of any urban community/area may act as a proxy hunter or fisher in a rural area for a family member living there. 	
<p>G What uses are protected (human consumption, nutrition, etc.)?</p>	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> 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. <p>At Tier II, State Boards must adopt regulations that eliminate C&T uses other than food.</p>	
<p>H What is the geographical extent of the priority (on which lands and waters)?</p>	<p>All rural lands and waters. Note: definition of "rural" in Row A above. (Excluded: places currently within State's non-subsistence use areas.)</p>	
<p>I Are management reforms included?</p>	<p>Yes. See reforms listed below in row J.</p>	

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
<p>J Does it contain the principle of co-management?</p> <p>(Note: concept of "co-management" is defined differently by proposals listed to the right.)</p>	<p>Yes. New State law requires State Boards to establish at least six 10-member regional advisory councils, appointed by the Governor [4 members from local tribal councils' lists; 6 members (3 of whom must be subsistence users) from local governments' and local advisory committees' lists.] State Boards must give deference to unanimous regulatory recommendations of regional councils. Regional councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees.</p>	
<p>K Extent of federal jurisdiction when the State is out of compliance</p>	<p>Definition of "public lands" will be amended in an unknown way. Note: when State is <u>in</u> compliance, Secretarial regulatory authority and monitoring/reporting roles are eliminated.</p>	<p>Limits extent of federal jurisdiction to game on federal lands. No federal jurisdiction on State or private lands or waters or any federal claim to reserved water rights or navigational interests.</p>
<p>L Federal Court Oversight</p>	<p>ANILCA amendment adds judicial review standard: federal court can overturn State regulation only if "arbitrary, capricious or abuse of discretion." Federal court must give State Board same deference as federal agency.</p>	<p>Eliminates federal jurisdiction when the state has protected the subsistence priority through the State Constitution. Does not consider situation where there is a State Constitutional provision but no statutory provision providing for a meaningful subsistence priority.</p>
<p>M Nature of the State Constitutional Amendment</p>	<ul style="list-style-type: none"> • Permissive ("may"); • Consistent with sustained yield; • Rural priority. 	

Issue	1) Governor's Task Force Proposal	2) Murkowski/Young ANILCA Amendments
N Amendments to Title VIII	102: Definition of public lands "should" be modified in an unknown way. 803: Definitions of C&T, rural, and customary trade. 804: Changes standard to "reasonable opportunity" and defines it. 805: Changes in management system. 806: Repeal Secretarial monitoring/reporting during state compliance. 807: Review criteria for federal courts. 813: Conforming changes. 814: No Secretarial regulatory authority during state compliance. 816: Disclaimer clause: Nothing in these ANILCA amendments affects Indian Country, tribal jurisdictions, or Title VIII's status as Indian legislation.	
O Is there a subsistence defense against criminal prosecutions?	No.	

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
<p>A The Priority: Who is eligible?</p>	<p><u>Federal Lands:</u> Rural residents with C&T uses. "Rural defined by Federal Subsistence Board, based on population and rural characteristics of community/area.</p> <p><u>State, Private Lands:</u> All Alaska residents. Only priority is for subsistence use over other uses, not for any Alaska residents over other Alaskan residents.</p>	<p>Residents of Alaska communities that are rural (as defined in <i>Kenaitze</i> 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.</p>	<p>Alaska Natives only.</p>	<p>AVCP will provide information before the presentation.</p>	<p>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.</p>	<p>Rural, plus urban Natives; repeal Sec 4(b) of ANCSA.</p>	<p><u>SUPPORT GOVERNOR'S TASK FORCE PROPOSAL FOR STATE MANAGEMENT IF IT IS MODIFIED AND AMENDED AS SET FORTH BELOW</u>, 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.</p>	<p>Native preference is the best option, but a rural preference is acceptable.</p>	<p>Alaska Natives and their descendants, and those Alaska residents having a customary and traditional use.</p>
<p>B Definition: "Customary & Traditional"</p>	<p><u>Federal Lands:</u> 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."</p> <p><u>State, Private Lands:</u> "...Non-commercial, long term taking of, use of, and reliance upon fish or game in a specific area and the use 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."</p>	<p>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).</p>	<p>No statutory definition proposed.</p>	<p>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).</p>	<p>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).</p>	<p>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).</p>	<p>Add "trapping" to hunting and fishing. See Section 2 of Resolution.</p>	<p>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.</p>	<p>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.</p>

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"	<p><u>Federal Lands:</u> 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."</p> <p><u>State, Private Lands:</u> "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.</p>	<p>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 <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p>	<p><u>Federal Lands:</u> 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."</p> <p><u>State, Private Lands:</u> "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.</p>		<p>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 <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p>	<p>Exchanges for cash within family and community networks.</p>	<p>See Section 3 of Resolution.</p>	<p>Current federal regulatory definitions <u>but</u> excluding references to state regulations <u>and</u> allowing for court interpretation.</p>	<p>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 <i>Alexander</i> case) any claim that subsistence crossed into commercial.</p>
D When the priority is invoked	<p><u>Federal Lands:</u> 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).</p> <p><u>State, Private Lands:</u> Priority for subsistence over other uses is in force at all times. However, Tier II priority may not be based on local residency.</p>	<p>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).</p>	<p>In times of harvests below community requirements.</p>		<p>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).</p>	<p>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).</p>		<p>At all times.</p>	<p>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).</p>

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
<p>E Standard of protection for subsistence harvests</p>	<p><u>Federal Lands:</u> Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p> <p><u>State, Private Lands:</u> Reasonable opportunity for subsistence taking and use; requires regulations providing normally diligent person reasonable expectation of success. Not a guaranteed harvest.</p>	<p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p>	<p>Below the level required by a Native community to meet its demonstrated subsistence requirements.</p>		<p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p>	<p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p>	<p>See Section 3(c) of Resolution.</p>	<p>Least adverse impact.</p>	<p>Regulations must have "least adverse impact" on customary and traditional harvest and use patterns (<i>Bobby</i> case). Must provide maximum opportunity, though not guaranteed harvest.</p>
<p>F Subsistence opportunities for urban Natives:</p> <ul style="list-style-type: none"> • historically rural Native communities/areas now defined as urban; • individual Natives who moved to urban communities/areas 	<p><u>Federal Lands:</u> 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.</p> <p><u>State, Private Lands:</u> State has issued some Subsistence educational permits to historically rural Native communities/areas now defined as urban (e.g., Kenaitze).</p>	<p>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 <u>both</u> categories of urban Natives.)</p>	<p>Alaska Natives, including urban Natives, protected for hunting or fishing in their customary and traditional locations.</p>		<p>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 <u>both</u> categories of urban Natives.</p>	<p>Urban Natives would be able to participate in subsistence uses in their customary and traditional use areas.</p>	<p>Need to strengthen the "reasonable opportunity" standard. Need to provide a maximum opportunity, although not a guaranteed harvest. See Section 3(c) of Resolution.</p>	<p>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 <u>both</u> categories of urban Natives.</p>	<p>Alaska Natives, and descendants of, including urban residents for hunting or fishing in their customary and traditional locations.</p>

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
<p>G What uses are protected (human consumption, nutrition, etc.)?</p>	<p><u>Federal Lands:</u> All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. <p><u>State, Private Lands:</u> All C&T uses, as listed above, plus potlatches.</p>	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. 	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p>		<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p>	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. 	<p>See Section 3 (d) of Resolution.</p>	<p>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.</p>	<p>All C&T takings and uses for:</p> <ul style="list-style-type: none"> • 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. <p><u>Plus:</u> Clarification to include religious and ceremonial uses.</p>
<p>H What is the geographical extent of the priority (on which lands and waters)?</p>	<p><u>Federal Lands:</u> All rural federal public lands (including reserved waters).</p> <p><u>State, Private Lands:</u> 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.</p>	<p>All rural lands and waters. Note: definition of "rural" in Row A above.</p>	<p>Federal public lands (including reserved waters); Native lands (ANCSA and allotments); and possibly State lands in vicinity of any Native community seeking a permit.</p>		<p>All lands and waters in Alaska.</p>	<p>All rural lands and waters. Note: definition of "rural" in Row A above.</p>	<p>Statewide. See Section 3 (e) and Section 6 of Resolution.</p>	<p>Statewide: All lands (including all waters).</p>	<p>Statewide: All lands (including all waters).</p>

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
<p>I Are management reforms included?</p>	<p><u>Federal Lands:</u> Fed agencies have ability to enter into cooperative management agreements. 10 fed regional advisory councils operate.</p> <p><u>State, Private Lands:</u> State agencies have ability to enter into cooperative management agreements. No State regional advisory council system.</p>	<p>Yes. Mandatory and basic reforms of state systems:</p> <ul style="list-style-type: none"> • 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. 	<p>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.</p>		<p>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.</p>	<p>Yes. Mandatory and basic reforms of state systems:</p> <ul style="list-style-type: none"> • 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. 	<p>See Section 4 of Resolution.</p>	<p>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.</p>	<p>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.</p>
<p>J Does it contain the principle of co-management? (Note: concept of "co-management" is defined differently by proposals listed to the right.)</p>	<p><u>Federal Lands:</u> Section 809 authorizes, but does not mandate, cooperative agreements.</p> <p><u>State, Private Lands:</u> No specific requirement in State law or regulations.</p>	<p>Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.</p>	<p>Requires co-management between Secretary and Native groups. "Co-management" is not defined.</p>		<p>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.</p>	<p>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.</p>	<p>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..</p>	<p>Yes, maximum involvement of tribes and landowners in co-management at the federal and state levels.</p>	<p>Yes, as stated above: contracting and delegation of management functions and powers to Native communities and organizations.</p>

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	<p><u>Federal Lands:</u> All federal public lands (including adjacent reserved waters).</p> <p><u>State, Private Lands:</u> All State lands, private lands (including ANCSA), and State or ANCSA selected/unconveyed lands + unreserved navigable waters.</p>	<ul style="list-style-type: none"> 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.	<ul style="list-style-type: none"> 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.	<ul style="list-style-type: none"> 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	<p><u>Federal Lands:</u> Private right of action in federal court against State or federal regulations that are inconsistent with federal law.</p> <p><u>State, Private Lands:</u> None.</p>	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 <u>strengthen</u> 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 <u>strengthen</u> 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

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



COOK INLET SPORTFISHING CAUCUS
3620 PENLAND PARKWAY
ANCHORAGE, ALASKA 99508
(907) 276-2222 FAX (907) 278-0896

September 26, 1997

Senate Resources Committee

The impact of the federal management on subsistence fisheries will be traumatic to sport and commercial fishing. It will create a two tier management system. We asked Dan Coffey, Vice Chair of Board of Fisheries for his comments and this was his response:

Q. What would be the effect if the feds take over management of subsistence?

A. "It is impossible for any fishery to be managed by two different agencies. It would certainly be a nightmare, with a potential for disaster."

Q. What would be the effect if legislation and regulations were adopted as proposed by the Task Force?

A. "There would be no significant changes in the way our fisheries are managed for any user group nor in the way that people fish today."

We have reviewed the revised Task Force proposal as to how it would effect sportfishing in Alaska. Our analysis is as follows:

"If we replaced todays laws relating to sport fishing with the revised Task Force proposal, the result would be neutral to neutral-positive for sport fishing statewide; it would be equal to or better than todays laws for the 200,000 Alaskans who hold sport fishing licenses."

We urge the Legislature to proceed with a Constitutional Amendment as quickly as possible before the Feds get their program in place.

Don't let the Feds in.

Robert Penney

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
Ph: (907) 488-0862
Fax: (907) 488-4271



MIKE MILLER
President of the Senate

Whitcomb Terrace
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99801-1182
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Fax: (907) 465-3883

Senate District 0

September 15, 1997

Mr. Steve Ginnis
Chairman of the Board
Alaska Inter-Tribal Council
4201 Tudor Centre Drive, Suite 220
Anchorage, Alaska 99508

VIA FAX: (907) 563-9337

Dear Mr. Ginnis;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Alaska Inter-Tribal Council submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider the Alaska Inter-Tribal Council's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit the Council's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,


Senator Mike Miller
SENATE PRESIDENT

Alaska State Legislature

Mailing Address:
P.O. Box 55094
North Pole, Alaska 99705
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MIKE MILLER
President of the Senate

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State Capitol
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09801-1182
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Fax: (907) 465-3883
Senate District Q

September 15, 1997

Mr. Dewey Skan, President
Rural Alaska Community Action Program, Inc.
731 East 8th Avenue
Anchorage, Alaska 99501

VIA FAX: (907)278-2309

Dear Mr. Skan;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Rural Alaska Community Action Program, Inc. submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider RuralCAP's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit RuralCAP's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,

A handwritten signature in black ink that reads "Mike Miller". The signature is written in a cursive style and is positioned above the printed name and title.

Senator Mike Miller

SENATE PRESIDENT

Alaska State Legislature

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MIKE MILLER
President of the Senate

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Senate District Q

September 15, 1997

Ms. Julie Kitka, President
Alaska Federation of Natives, Inc.
1577 C Street, Suite 201
Anchorage, Alaska 99501

VIA FAX: (907)276-7989

Dear Ms. Kitka;

In preparation for upcoming Senate Resources Committee hearings on the Governor's proposal to reconcile differences between federal law (ANILCA) and Alaska's Constitution, I would like to request that the Alaska Federation of Natives, Inc. submit their proposal, so that it may be considered at the same time.

I have followed closely the actions taken at the three-day Native subsistence summit in Anchorage and am aware of the "guiding principals" approved by the delegates at the summit. In addition, I would like the Senate Resources Committee to consider AFN's official proposal to reconcile the differences between federal law (ANILCA) and Alaska's Constitution.

Please submit AFN's proposal to Senator Rick Halford, Chairman, Senate Resources Committee, PO Box 670190, Chugiak, Alaska 99567, as soon as possible, so that committee members will have time to review the proposal prior to the September 24, 1997 committee hearing in Fairbanks.
Thank you.

Sincerely,

Handwritten signature of Mike Miller in cursive script.
Senator Mike Miller
SENATE PRESIDENT



An Analysis of the Governor's Proposal for Subsistence

Analysis by - Carol Daniel for RurAL CAP
Comments and Suggestions Incorporated
From - Lare A. Aschenbrenner (NARF),
Sky Starkey and Bill Caldwell



Contents

- 1. A Summary of the Major
Defects of the Governor's
Subsistence Proposal**
- 2. Analysis by Topic**
- 3. Full Analysis of the Governor's
Subsistence Task Force Proposal**

Written by Carol Daniel, Comments and Suggestions from attorneys Lare Ashenbrenner (NARF), Sky Starkey, and Bill Caldwell (Ak Legal Services).
Distributed by the Rural Alaska Community Action Program, Inc., (RurAL CAP) Anchorage, Alaska August 27, 1997. Jeanine Kennedy, Executive Director.

SUMMARY OF MAJOR DEFECTS IN GOVERNOR'S SUBSISTENCE PROPOSAL

By Lare Aschebrenner, Carol Daniel, Sky Starkey and Bill Caldwell

The Governor's Subsistence Proposal Violates Both AFN's No-Net-Loss Policy and RuralCap/AITC's Subsistence Proclamation

- A. **The Subsistence Proposal of the Governor's Task Force Violates the No-Net Loss Policy in the Following Respects:**
1. The Governor's proposal would increase the number of "non-rural" areas, thereby removing them from the protection of the federal subsistence priority. Most of the Kenai Peninsula and Saxman, for example, which are "rural" under federal law would become "non-rural" under the Governor's plan. Although the proposal provides for educational permits, those permits are given no priority, and no protection in federal law.
 2. The Governor's proposal would eliminate the federal law requirement that subsistence regulations conform to traditional and customary subsistence practices both in terms of the geographic areas where subsistence activities take place, and in terms of the means and methods employed. For example, under federal law, location, seasons, bag limits, gear restrictions and proxy hunts must conform to local tribal practices. Under the Governor's proposal, the State Boards are only required to "consider" customary seasons, but are under *no obligation* to accommodate either customary seasons or other traditional practices. Federal law also recognizes that subsistence uses are "local" uses. The Governor's proposal, however, incorporates the State's current definition of "customary and traditional" ("C & T"), which does not recognize that subsistence uses are "local."
 3. Under the Governor's proposal, the Boards could deny rural residents the right to satisfy their subsistence needs as required under federal law. The Governor's proposal would incorporate into federal law the State's "reasonable opportunity" standard for determining whether subsistence needs have been satisfied. Contrary to current federal law, the State restrictively interprets "reasonable opportunity" to mean nothing more than a "sporting chance" to take fish and game.
 4. The Governor's proposal also substitutes a "reasonable opportunity" standard for one of the most important ANILCA protections—that any regulation of subsistence must be designed to have the least adverse impact possible on actual subsistence practices.
 5. The Governor's proposal restricts federal court oversight of the State's implementation of the federal subsistence priority. His proposal would raise the

standard for federal court intervention, *severely limit the remedies that might be imposed for State violations*, and eliminate the Secretary's duty to monitor State implementation of the subsistence priority.

6. The Governor's proposal calls into question ANILCA's status as federal Indian legislation, and by giving the State the principal role in interpreting ANILCA, effectively eliminates the Canon of Construction requiring that where Title VIII of ANILCA is ambiguous or silent it must be construed to protect the subsistence lifestyle of Alaska Natives.
7. The Governor's proposal would eliminate a rural resident's right, under existing federal law, to raise a subsistence defense to an alleged hunting or fishing violation.
8. The Governor's proposal makes it easier for the State Boards to reject recommendations of regional councils by expanding the grounds upon which such recommendations may be rejected.
9. The Governor's proposal would allow catch and release fishing for steelhead or non-anadromous resident fish, *even* if the harvestable surplus is not sufficient to satisfy subsistence needs.
10. The Governor's proposal could substantially delay future "C&T" subsistence species determinations because it lifts the Commissioner's present obligation to make "C&T" recommendations and makes such recommendations discretionary.
11. Under the Governor's proposal, the definition of customary trade is much more limited than what is allowed under current federal law.

B. The Governor's Task Force Proposal Conflicts With the RuralCap/AITC Subsistence Proclamation in the Following Respects:

The RuralCap/AITC subsistence proclamation provides:

"We the Alaska Native People assembled at the Subsistence Roundtable conference on the 17th of February, 1997, find and declare that the right to forever live the Native way of life; to govern ourselves; to determine our own destiny; and to maintain our cultural existence, are basic human rights.... In order to secure these basic human rights and transmit the blessings of our way of life to future generations, we declare and demand full recognition of our inherent hunting and fishing rights."

1. Under the proclamation, there are two fundamental pre-conditions for the state to recover management of subsistence resources: an express recognition of a "Native Tribal" subsistence priority under both State and Federal law; and an express

recognition that Native Tribes have a co-equal right to manage fish, wildlife and other renewable resources under both State and Federal law. The Governor's proposal violates both pre-conditions in that it fails to recognize either a "Native" subsistence priority or a Tribal right to co-management.

2. The proclamation also implicitly includes AFN's no-net-loss policy. Therefore, the Governor's proposal violates the proclamation for all of the same reasons listed in Part A above.
3. Under the proclamation, the subsistence priority includes all navigable waters in Alaska. However, the Governor's proposal contemplates an amendment to ANILCA's definition of Federal public lands that could restrict the fishing priority to navigable waters within federal parks, reserves, or other enclaves, thereby leaving thousands of river miles (and perhaps a majority of Native subsistence fishing grounds) totally unprotected. The Governor's proposal may also eliminate the extraterritorial reach of the Federal Subsistence Board's jurisdiction.
4. Under the proclamation, both urban and rural Natives would be covered by the federal subsistence priority and both the State and Federal Government would be barred from designating any area customarily used for Native subsistence as a "non-subsistence" area. Under the Governor's proposal, only "rural residents" are protected by the priority, and new "non-rural" areas could be added under broadened guidelines, largely at the discretion of the State Boards.
5. Under the proclamation, the State Boards must be reformed so that subsistence decisions are made by Boards comprised of subsistence users nominated by Regional Subsistence Councils. Although the Governor's proposal includes some involvement by tribes at the regional council level, it includes no reformation of the current Board system. While the Regional Subsistence Councils might limit, to some extent, what the Boards could do, Native subsistence uses would remain largely in the Board's control, subject to severely limited judicial review.

Analysis of the Governor's Subsistence Task Force Proposal

by Carol H. Daniel (August 16, 1997)

- A. The Priority, who is eligible? Those who live in areas and communities classified as rural. Rural is defined as "a community or area substantially dependent on fish and game for nutritional and other subsistence uses." (Every community or area outside of the State's nonsubsistence areas will be considered "rural," so, for example, all of the communities on the road system on the Kenai Peninsula, including those places now considered "rural" under the federal regulations and places like Saxman in S.E. Alaska, will not be eligible for the priority.) The Boards, acting jointly, will determine by regulation whether additional communities should be added or deleted from the rural classification. The Joint Boards will set the criteria. Arguably, the new definition of rural will make it more difficult for communities to be classified as rural and could result in some Regional Centers falling out of that category. Under the Governor's Task Force proposal, a community or area must show that it is "substantially dependent" on fish and game for nutritional and other subsistence uses," whereas under the previous definition they only had to demonstrate that subsistence was a principle characteristic of the economy of the area. In any event, there would be no individual qualifications.
- B. Definition of "Customary and Traditional". ANILCA has no definition of customary and traditional. The Governor's proposal defines it as the "noncommercial, long-term, and consistent taking of, use of, and reliance upon fish and game in a specific area and the use 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." This definition is identical to the 1992 State Subsistence Law. The 1986 State law did not have a definition of "customary and traditional," but the Joint Boards had adopted eight criteria to identify customary and traditional uses.
- C. Customary Trade. Defined as the "exchange for cash of fish or game in minimal, noncommercial quantities as determined by the appropriate board." Does not restrict money sales of furs and furbearers. The Boards will set by regulation what is considered "minimal, noncommercial quantities." This is essentially the same definition contained in the 1992 State Subsistence law. ANILCA does not contain a definition. Neither did the 1986 State Subsistence law. Current federal regulations allow some degree of commercial enterprise as "customary trade" if it is not "significant."
- D. When the priority is invoked? There would be no change from ANILCA in this respect. Subsistence regulations would be required at any time there is an identified subsistence use. Tier I and Tier II priority would be invoked at any time takings must be restricted, i.e., in times of shortage. However, at tier II, all customary and traditional subsistence uses would be eliminated except for human consumption.

- E. Standard for Protection of Subsistence Harvest. The Governor's Task Force proposal adopts the "reasonable opportunity" standard, defined as "an opportunity that allows a subsistence user to participate in a subsistence hunt or fishery with a reasonable expectation of success." In providing a reasonable opportunity, the board is required only to "consider" customary seasons, but not necessarily customary and traditional patterns of taking and use, i.e., means and methods, locations, bag limits, and proxy hunting and fishing. The statutory definition further provides that "reasonable opportunity shall not guarantee that any subsistence user will take fish or game."

Under ANILCA, as interpreted by the federal court in *Bobby*, subsistence regulations must closely mirror local customary and traditional harvest and use patterns. In fact, regulations that restrict subsistence uses must have the "least adverse impact" possible on customary and traditional taking and use patterns. The Alaska Supreme Court in *Morry* rejected the *Bobby* standard, and held that while the Boards could consider customary and traditional patterns of use, they were not required to do so, i.e., only "uses" had to be accommodated, not methods, means, seasons, and other local harvest practices.

- F. Subsistence Opportunities for urban Natives. For historically rural Native communities that would be defined as non-rural: The State statute would allow, but not require, the Commissioner to issue permits for the taking of fish or game "in order to teach and preserve historic or traditional uses and harvest practices." These permits would not be entitled to priority. The Regional Subsistence Councils would be authorized to recommend to the appropriate board the amount of fish or game to be made available under the permit, but there would be no guaranteed allocation. There would also be no protection in the federal law (or under the State constitution) for these permits.

For Individual Natives who move to Urban areas: The law would add a new provision to its proxy hunting and fishing regulations that would allow a family member of a rural resident (or another rural resident) to take fish and game as a proxy. There would be various limitations and reporting requirements applicable to these hunts, including limiting the proxy to hunting or fishing for one person at a time and the person who gives the proxy would be unable to participate in the hunt or fishery for which the proxy was given. No cash payment could be made in connection with such a proxy harvest.

- G. What Uses are protected (human consumption, nutrition, etc.). All customary and traditional uses for
- direct personal or family consumption (food, shelter, transportation, fuel, clothing, tools
 - handicrafts production /sale
 - barter

- customary trade (see paragraph C above)
- sharing, for personal or family consumption.

At Tier II, State Boards must adopt regulations that would eliminate customary and traditional uses other than food.

H. What is the geographic extent of the priority (on which lands and waters?): The Governor's Task Force proposal would apply to all lands and waters in Alaska within those areas designated as "rural."

I. Are Management Reforms Included? Yes, but there would be no reform in the Joint Board system and no co-management role for tribes. See specific management reforms listed below.

J. Does the proposal contain the principle of co-management? Yes (recognizing that there are many levels of co-management and the concept is defined differently by the various proposals). The Governor's proposal would include in State law the following reforms:

- The Boards would be required to establish at least 6, 10-member regional subsistence councils.
- Members would be appointed by the Governor (4 from local tribal councils' list; 6 members (3 of whom must be subsistence users and 3 sport or commercial users) from local governments and local advisory committees lists. The three sport and/or commercial users would not have to be residents of the region.
- State Boards are required to give deference to unanimous regulatory recommendations of the regional councils and the regional councils are to strive for consensus, but will decide by majority vote.
- Regional Councils must give deference to regulatory recommendations of tribes, municipalities, and local advisory committees which identify local subsistence uses and needs, including methods, means, seasons and other issues related to local subsistence management. The same requirement, however, is not placed on the Boards.
- Boards may reject Regional Council's recommendation if proposal violates sustained yield, is arbitrary and capricious, is detrimental to subsistence uses, involves unresolved statewide or inter-regional subsistence management uses, or is contrary to an overriding statewide fish and game management interest.

- The Boards are directed to “seek data from, consult with, and make use of the special knowledge of subsistence users” in implementing the Regional Council System. The Department is authorized to contract for services with subsistence users and local groups for this purpose.

Certain portions of this structure are inconsistent with ANILCA. For example, section 805 requires members of the Regional Council to be residents of the region. This proposal would allow sport and commercial users to be from anywhere in the State. Also, ANILCA imposes a more stringent standard for rejection of a regional council recommendation, i.e., the Board must follow the recommendation of the Regional Council unless it is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or is detrimental to the satisfaction of rural subsistence needs. The Governor’s proposal imposes a weaker standard (“arbitrary and capricious” and “detrimental to subsistence “uses”). It also adds two additional reasons to reject proposals from the Regional Councils.

- K. Extent of Federal Jurisdiction when the State is out of Compliance. It is unclear what the federal jurisdiction would be when the State is out of compliance under this proposal because the Governor’s proposal suggests that “the definition of “federal public lands” in section 102 of ANILCA will be clarified to ensure that it excludes all private and state lands.” The proposal at page 35 also states that it has not been determined exactly how these definitions (referring to “lands”, “federal lands,” and “public lands”) should be modified.” The proposal does not specify the nature of the amendments it has in mind. It is likely that the “clarification” would be directed at ensuring that the Federal Board does not have jurisdiction over selected but not conveyed lands or the authority to restrict hunting and fishing activities on state and private lands if necessary to provide for and protect subsistence uses on the public lands. The proposed federal regulations would give the federal board such jurisdiction. Also, it should be noted that when the State is in compliance, Secretarial regulatory authority and monitoring/reporting roles would be eliminated.
- L. Federal Court Oversight. Section 807 of ANILCA would be amended to change the judicial review standard available in federal court. It would allow the federal court to overturn State Boards actions only if they are “arbitrary, capricious, or an abuse of discretion.” That standard of review is arguably weaker than what ANILCA currently requires, although the matter is currently the subject of on-going litigation in federal court in *Ninilchik Traditional Council v. U.S.*, A96-31 Civ. (D. Alaska) (appeal pending). Section 807 provides an unqualified right to bring a ‘civil action’ which is usually read as intending such cases to receive plenary review, i.e., a trial *de novo*.

The second amendment to 807 would require the federal court to give the State Board decisions the same deference as it would give to a federal agency. This amendment is intended to give the State Boards the primary responsibility for interpreting ANILCA

and would overturn that part of the *Kenaitze* decision that held that the State's interpretation of ANILCA is due no deference by the federal courts. Generally speaking, federal courts may not substitute their own interpretation of a federal statute that is ambiguous or silent on a specific issue for a reasonable interpretation of a federal agency charged with enforcing the statute. The *Kenaitze* court held that the State is delegated no authority under ANILCA. In fact, ANILCA was passed as "remedial" legislation designed to reform the regulatory failures of the State. It would make no sense to have the courts defer to the interpretations of ANILCA by the very regulators whose wrongdoing made ANILCA necessary in the first place. Basically, under ANILCA the State is allowed to manage subsistence uses on federal lands only if it complies with the provisions of 805(d) of ANILCA and the Secretaries remain in charge of interpreting the federal law.

There is another reason the State regulators should not be given the same deference in their interpretation as the federal agencies. They do not have the necessary "national perspective" needed to enforce a federal statute. For example, the State regulators take the position that ANILCA is not "Indian" legislation. The federal courts (and the Secretary of the Interior) recognize that ANILCA is "Indian" legislation. If the statute is ambiguous or silent, the federal agencies and the federal courts are required to interpret the statute in favor of Alaska Natives' subsistence lifestyle. Since the State Boards and the State courts are unlikely to apply this Indian canon of construction to their interpretations of Title VIII of ANILCA, this particular amendment is especially dangerous and undesirable.

- M. Nature of the State Constitutional Amendment. It would authorize, but not compel, the State legislature to provide a priority for subsistence uses for "rural residents" (consistent with the sustained yield principle). Once ANILCA has been amended, and the State has regained management authority, there would be nothing to prevent a future State legislature from repealing the State Statute granting the priority. While this would likely entitle the federal government to step in and reassume management authority on federal lands in Alaska, it would be under a significantly different ANILCA – one that would contain many aspects of the current state subsistence law. The geographic scope of the Federal Subsistence Board's management authority could be more limited depending on how the Task Force "clarifies" the definition of "federal public lands." Also, the priority is limited to "rural" residents. While educational or cultural permits are included in the state statute, there is no guarantee that they would withstand a constitutional challenge. It would be preferable if the constitutional amendment included "culture" as a basis for differentiating among subsistence users in terms of allocating fish and game in order to provide a clear constitutional basis for such permits.

There may also be a problem in implementing the "proximity of the subsistence user to the stock or population" tier II provision of the proposed statute since the Alaska Supreme Court declared a similar "local residency" (tier II) provision of the 1992 State law unconstitutional in *State v. Kenaitze Indian Tribe*. While the proposed

Constitutional Amendment allows the legislature to provide a priority for subsistence uses to and among rural residents, that does not necessarily mean the priority could be restricted on the basis of the user's proximity to the stock or population. One way to avoid these problems (and leave the door open to a Native or Native plus priority), would be to require that subsistence uses be given a priority and authorize the legislature to differentiate among users on the basis of any one of a number of factors, including customary and traditional use, cultural tradition, direct dependence, local residency, or the availability of alternative resources.

N. Is a subsistence defense available in a criminal prosecution for a fish and game violation? Under the governor's proposal (and current state law), a person being prosecuted for a fish or game violation cannot defend by showing that the taking was done for subsistence uses. Under federal law, the person would be allowed to raise such a defense.

O. Amendments to Title VIII of ANILCA. The Governor's Proposal includes an extensive package of amendments to ANILCA. They include the following:

1. 102. Definition of "Federal Public Lands." The definition of "federal public" lands will be amended in unknown ways to "clarify" that it excludes all private and state lands.
2. 803. Subsistence Uses. Definitions of "customary and traditional", "customary trade" and "rural Alaska resident" will be added. The proposed definition of "customary and traditional" is the definition contained in current State law. It is possible that incorporation of this definition will carry with it the Alaska Supreme Court's interpretation of customary and traditional uses in the *Morry* case. There the court held that only customary and traditional "uses" had to be provided for, but not local methods of harvesting subsistence resources. Under current federal law (*Bobby* case), "customary and traditional subsistence uses" has been interpreted to mean "local" uses and to include harvest practices, i.e., seasons, locations, means, methods, bag limits and proxy hunting and fishing practices.

The definition of "rural" would tie and limit future determinations of "rural" to "substantial dependency on fish and game."

The definition of "customary trade" would place in federal law a clear prohibition against "commercial" enterprises of any size as with the exception of cash sales for furs and furbearers.

3. 804. Priority. This section would be amended to incorporate the State's "reasonable opportunity" standard for determining whether subsistence needs have been satisfied. The federal priority would become one for "a

reasonable opportunity to take fish and wildlife." The state definition of "reasonable opportunity" would also be added. As noted earlier, this standard has been used by the State Boards to limit subsistence uses. Under federal law, any regulation of subsistence uses must be designed to have the "least adverse impact" possible on actual local subsistence uses. The "reasonable opportunity" standard is a weaker standard.

4. 805. Management System; Requirements for State Compliance. This section sets up the Regional Councils, provides authority for annual reports to the Secretary, provides for the implementation of this system conditioned upon the State's compliance with sections 803, 804, and 805 (a)-(c) within one year, and reimbursement to the State for setting up and running the Regional Council System. The Governor's Task Force proposal offers no specific language, but notes that it may require amendments to accommodate the State management system.
5. 806. Federal Monitoring. This section would be repealed and replaced with a section that would automatically restore the State regulation of subsistence management on federal lands. It would have the effect of "deeming" the State in compliance with Section 805(d) of ANILCA. It would prohibit the federal agencies from implementing the federal scheme unless and until the State statute and the Constitutional Amendment are repealed or "a court of competent jurisdiction determines that the State has "substantially" failed to implement their provisions and that the State has failed or refused to cure the failure in a reasonable period of time following the court's determination." This change would make it more difficult for the federal government to reassume jurisdiction in the event the State fails to comply with ANILCA. It could also result in a considerable delay in terms of implementing a federal program in the event of state non-compliance. Finally, it would mean that the State statute could be amended in ways that do not rise to the level of "substantial" without serious risk of a federal takeover. For example, the State could probably repeal the educational and proxy hunting provisions of State law without risking a federal takeover since those permits are given no protection under federal law.
6. 807. Federal Court Enforcement. The Governor's proposal imposes restrictions on federal court oversight of the State's implementation of the federal subsistence priority. It raises the standard for federal court intervention, severely limits the remedies that might be imposed for State violations by requiring the federal courts to give deference to the Boards decisions, and gives the State the principal role in interpreting ANILCA.
7. 813. Periodic Reports. This section requires the Secretary to prepare periodic reports for Congress and the public on the State's Compliance

with Sections 803, 804 and 805 of ANILCA. The Governor's Task Force proposal states that this section will need conforming changes, but they are not outlined.

8. 814. Authority to Prescribe Regulations. The proposal would add a sentence prohibiting the Secretaries from making or enforcing regulations "concerning subsistence" during any time that the State is in compliance. This is so broadly worded that it could well encompass the Secretaries ability to enact or enforce regulations under other provisions of Title VIII, for example, Section 810 (effects of federal agency land use decisions on subsistence uses; Section 816 (closures of federal lands and waters); Section 808 (implementation of the subsistence priority within national parks and monuments); Section 811 (ensuring access to subsistence resources); or Section 812 (undertaking research on subsistence uses).
9. 816. Closures/Disclaimers. This section addresses closures of federal lands and waters to subsistence uses. Except for the potential effect of the Section 814 prohibition on making or enforcing regulations, the Secretaries' closure authority would not appear to be modified by the draft package.

The draft package, however, adds a new and unrelated paragraph which states that the draft package of ANILCA amendments and implementation of them shall not be construed to "validate or invalidate or in any way affect" an assertion that a Native organization has or does not have governmental authority or that Indian Country in Alaska exists or does not exist, or any assertion that ANILCA is Indian law.

As noted earlier, Title VIII of ANILCA has been construed by the federal courts to be "Indian legislation." The Department of Interior, in an opinion dated April 11, 1995, specifically rejected a narrow interpretation of Section 805(c) as contrary to the Indian canon of construction that legislation passed for the benefit of Native Americans be construed in their favor. Moreover, the legislative history of Title VIII of ANILCA confirms that Title VIII is Indian legislation. Placing language – even if neutral – in a disclaimer that implies that the issue is still one open to debate is dangerous. While the Indian country and jurisdictional issues may still be subject to debate, this issue is not and should not be called into question by implying that it is still an open question. For purposes of future 638 contracting and compacting, it is important that Title VIII's status as "Indian legislation" not be called into question.

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**Review and Analysis
of
Governor's Task Force on Subsistence Proposal
for a Subsistence Priority and
Return of Fish and Game Management to the State of Alaska**

The Governor's Task Force package consists of an amendment to the Alaska Constitution, linked to a number of amendments to ANILCA and changes to the State fish and game laws. Under this package, the amendments to ANILCA and the State's Subsistence law would become effective only upon passage of the constitutional amendment.¹ The package includes a "rural" priority and a "congressional" determination that the State, upon passage of the constitutional amendment and implementation of the revised statutes, is in compliance with ANILCA and may resume fish and game management on all lands and waters in Alaska.

I. Constitutional Amendment

Article VIII of the Constitution would be amended to add a new section that reads as follows:

Notwithstanding any other provision of this article, the legislature may, consistent with the sustained yield principle, provide a priority for subsistence uses to and among rural residents in the taking of fish and wildlife and other renewable natural resources.

The use of the term "may" instead of "shall" means that the legislature would be authorized, but not required, to provide a priority for subsistence uses. Once ANILCA has been amended, and the State has regained management authority on all lands in Alaska, a future State legislature could repeal the subsistence law. While this would likely entitle the federal government to step in and reassume management authority on federal lands in Alaska, the geographic scope of its management authority is likely to be more limited than it is today under *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1996), *cert. denied*, 116 S.Ct. 1672 (1996) (the *Katie John* decision). Also, the proposed amendment

¹ A 2/3 vote of both houses of the State legislature (at least 14 Senators and 27 Representatives) will be required to place a constitutional amendment on the ballot for the November, 1998, general election.

to Section 806 of ANILCA would preclude federal takeover unless and until the constitutional amendment and the State statute implementing the subsistence priority are both repealed or a court has determined that the State has "substantially failed" to implement their provisions and has failed or refused to cure the failure within a "reasonable" time. This could result in a significant delay between State non-compliance and a federal takeover. See discussion of ANILCA amendments below.

The proposed Constitutional Amendment also limits the subsistence priority to "subsistence uses to and among rural residents." It does not contain language that would authorize the legislature to differentiate among users based on customary and traditional use, cultural tradition, direct dependence, proximity of the user to the stock or population, or the availability of alternative resources.

With the exception of the special rule it made for funeral potlatches,² the Alaska Supreme Court has been hostile to using "cultural tradition" as a basis for fish and game allocations. Therefore, there is no guarantee that a provision in State law requiring the Boards of Fish and Game to adopt regulations allowing the commissioner to issue permits for the taking of fish and game in order to "teach and preserve historic or traditional uses and harvest practices" would withstand a constitutional challenge. It would be preferable if the constitutional amendment included "culture" as a basis for differentiating among subsistence users in order to provide a clear constitutional basis for such permits.

There may also be a problem in implementing the tier II provisions of the proposed State statute. The Alaska Supreme Court declared the "local residency" (tier II) provision of the 1992 State law unconstitutional in *State v. Kenaitze Indian Tribe*. The proposed State statute authorizes the appropriate board to distinguish among subsistence users when the harvestable portion of a stock or population is not sufficient to provide a reasonable opportunity for all subsistence uses, based on (1) "customary and direct dependence," (2) proximity of the subsistence user to the stock or population, i.e., "local residency"; and (3) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. While the proposed Constitutional Amendment allows the legislature to provide a priority for subsistence uses to and among rural residents, that does not necessarily mean the priority could be restricted on the basis of the user's proximity to the stock or population.

One way to avoid these problems (and leave the door open for a Native or "Native plus" priority), would be to require that subsistence uses be given a priority and authorize the legislature to differentiate among users on the basis of any one of a number of factors, including customary and traditional use, cultural tradition, direct dependence, local residency, or the availability of alternative resources.

² *Frank v. State*, 604 P.2d 1068 (Alaska 1979) ("utilization of moose meat at a funeral potlatch . . . is the equivalent of sacred symbols in other religions").

II. Section-by Section Comparison and Analysis of Proposed Amendments to State Fish and Game Statutes and to Title VIII of ANILCA

The 1992 State subsistence law is used as the framework for the State statute included in the Governor's Task Force package. Under the proposed state statutory amendments, the current law would be amended to grant a subsistence priority to rural residents. All areas not included in the current "nonsubsistence" areas would be classified as "rural." Communities or areas can be added or deleted under regulations to be developed by the State Boards. "Rural" would be re-defined as those areas or communities that are "substantially dependent on fish and game for nutritional and other subsistence uses."

The State statutes would also be amended to provide for educational hunting and fishing permits; to change the definition of "customary trade" and "reasonable opportunity," and to create Regional Subsistence Councils. The Boards of Fisheries and Game would continue to have the final authority for determining which species are customarily and traditionally used for subsistence, what the harvestable surplus is; how much of that surplus is reasonably necessary for subsistence; providing for a "reasonable opportunity" for subsistence hunting and fishing; and deciding whether Tier II restrictions must be imposed.

State Statutes 16.05.258 (a)

Current Law compared to proposed amendments

The current law requires the Boards to identify fish stocks and game populations customarily and traditionally taken for subsistence uses except in nonsubsistence areas and requires the commissioner to provide recommendations to the boards concerning the stock and population identifications; the Boards cannot make these determinations prior to the receipt of the Commissioner's recommendations.

The Governor's Task Force proposal makes the Commissioner's recommendations discretionary.

.258 (b)(1)-(3)

Under current state law, the Boards must determine whether a portion of a fish stock or game population can be harvested consistent with sustained yield and if so the amount of the harvestable surplus that is reasonably necessary for subsistence uses. If it is sufficient to provide for all uses, the Boards must adopt regulations that provide a reasonable opportunity for subsistence uses, subject to preferences among beneficial uses. If the harvestable surplus is not sufficient to provide for

subsistence and all other consumptive uses, the Boards are required to eliminate all other consumptive uses in order to "provide a reasonable opportunity" for subsistence uses.

The Governor's Task Force proposal makes no changes to these provisions of State law.

.258 (b)(4)

Under current state law, if the harvestable portion of a stock or game population is not sufficient to provide a reasonable opportunity for all subsistence uses, the appropriate board is required to adopt regulations eliminating all consumptive uses other than subsistence uses and to distinguish among subsistence users, through limitations based on customary and direct dependence, local residency, and the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

Under the Governor's Task Force proposal, tier II restrictions would come into play only after all subsistence uses other than "human consumptive subsistence uses" have been eliminated.

.258 (c)

This section currently authorizes the Boards to determine nonsubsistence areas. It would be replaced with a new section that declares all communities and areas outside the nonsubsistence areas (as of May 15, 1993) to be "rural" under the State law. The Joint Boards would then be authorized to determine by regulation whether additional communities or areas should be classified as rural or whether those currently classified as rural should no longer be classified as rural. The state statute would no longer contain the detailed list of socioeconomic factors for determining rural areas. Future determinations would be made on the basis of whether the area or community is "substantially dependent on fish and game for nutritional and other subsistence uses."

The proposed change would automatically make all of the Kenai Peninsula, including Ninilchik and places like Saxman non-rural, despite the fact that under federal law (*Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 315-16 (9th Cir. 1989), *cert. denied*, 491 U.S. 905 (1989)) at least part of the Kenai Peninsula is considered "rural", as is Saxman in S.E. Alaska.

.258(d) The Governor's Task Force proposal would simply add a sentence that states that the Boards may permit subsistence hunting and fishing only in rural areas or communities.

.258(e) This section would not be changed. It provides that takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods & means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations.

.258(f) This section currently defines "reasonable opportunity" to mean "an opportunity 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 of taking fish or game."

The Governor's Task Force proposal deletes the underlined language. In providing a reasonable opportunity, the Board is required only to "consider those times that fish and game have customarily and traditionally been harvested in the region for subsistence uses," i.e., customary seasons. There is no requirement that the Boards even "consider" customary and traditional patterns of taking and use (methods and means, locations, quotas, bag limits or harvest levels). The section further provides that "reasonable opportunity shall not guarantee that any subsistence user will take fish or game."

Under ANILCA, as interpreted by the federal court in *Bobby v. State of Alaska*, 718 F. Supp. 764 (D. Alaska 1989) subsistence regulations must closely follow customary and traditional harvest and use patterns, which would include more than just customary seasons. In fact, regulations that restrict subsistence uses must have the least adverse impact possible on customary and traditional taking and use patterns. The Alaska Supreme Court in *State v. Morry* (1992) rejected the *Bobby* standard, and held that the Boards were not compelled to consider customary and traditional patterns of use.

The "reasonable opportunity" standard has been used by

the Boards to severely restrict subsistence uses in order to continue other uses. For example, after the 1992 State law was enacted, the Board of Game refused to grant a tier II hunt in GMU 13. Instead, it imposed a spike/fork 50 inch antler restriction, a 7-day season (previously, there had been a 26 day fall hunt and a 24 day winter hunt) and a 1 moose per household bag limit.

16.05.258(g)

This is a new provision that would allow catch and release fishing for steelhead or non-andromous resident fish to continue as long as the Board of Fishery has made a finding that the mortality caused by such fishing does not jeopardize subsistence uses or the conservation of healthy stocks.

Rainbow trout and steelhead are important subsistence resources in some areas. Under § 804 of ANILCA, if the harvestable surplus is not sufficient to provide for subsistence uses, the Board is required to close the catch and release fishery since at that point any mortality caused by such fishing impacts subsistence uses.

16.05.259

This section currently provides that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence uses. This provision is retained in the Governor's proposal and is inconsistent with ANILCA, as interpreted by the federal court in *Bobby*.

16.05.260

This section currently provides for the establishment of advisory committees. The advisory committees will be retained under the Governor's Task Force Proposal, but their recommendations on subsistence uses will be sent to Regional Subsistence Councils for review and adoption before being forwarded to the Boards. If a Regional Subsistence Council does not adopt an Advisory Committee recommendation, it shall state its reasons. Subsection (d) would make the delegation of authority to advisory committees for emergency closures during established seasons discretionary.

16.05.261

This is a new section. Subsection (a) would require the Boards to adopt regulations establishing at least six (6) Regional Subsistence Councils.

Subsection (b) provides that each regional council will be composed of 10 members appointed by the Governor: 4 of the 10 would be selected from a list submitted by tribal councils in the region and 6 would be selected from names submitted by local governments and local advisory committees (3 local subsistence users and 3 sport or commercial users from anywhere in the State). The regional subsistence councils would have specifically enumerated authorities, including the authority to review, evaluate and make recommendations to the Boards on any matter relating to subsistence uses; to comment on sport, personal use and commercial proposals; and to make recommendations concerning the educational and proxy hunting and fishing permits.

The Boards are required to consider the reports and recommendations of subsistence councils and to give substantial deference to them if the council recommendation is unanimous. While the presumption is in favor of adoption by the Board, the Board may reject a proposal if it violates sustained yield, is arbitrary and capricious, is detrimental to subsistence uses, involves unresolved statewide or inter-regional subsistence management uses, or is contrary to an overriding statewide fish and game management interest. If not adopted, the Board must provide a written statement of the reasons and remand the proposal to the Regional Council for further consideration. The Regional Councils will strive for consensus, but can decide by majority vote. They are also authorized, but not required to adopt a mediation process.

Subsection (h) requires the Regional Subsistence Council to give deference to proposals from local governments, tribal councils and local advisory committees, which identify local subsistence uses and needs and methods, means, seasons and other issues related to local subsistence management.

Subsections (j) and (k) direct the Boards and the ADF&G to "seek data from, consult with, and make use of the special knowledge of subsistence users" in implementing the Regional Council System and authorizes the department to contract for services with subsistence users

and local groups for this purpose.

Certain portions of this structure of local and Regional advisory councils would be inconsistent with the current provisions of Section 805 of ANILCA. For example, section 805(a) requires each Regional Council to be composed of residents of the region, but this proposal would allow sport and commercial users to be residents from any part of the state. Section 805(d) requires that Regional Council recommendations be followed unless "not supported by substantial evidence," violates recognized principles of fish and wildlife conservation, or is detrimental to the satisfaction of rural subsistence "needs". The Governor's proposal imposes a weaker standard ("arbitrary and capricious" and detrimental to subsistence "uses"). It also adds two additional reasons for rejecting a Regional Council recommendation: (1) where "unresolved statewide or inter-regional subsistence management issues" are involved, or (2) when the proposal is contrary to an "overriding statewide fish or game management interest." The draft package notes that section 805 "may require amendments to accommodate the State management system," but the amendments are not specified.

16.05.330 (c)

This section permits the Boards to adopt regulations providing for the issuance of subsistence permits. It would be amended to impose the requirement that a person be a rural resident to receive a subsistence permit, or when no permit is required, in order to be eligible to take fish or game for subsistence uses.

16.05.330 (d)

Adds a new provision that would allow, but not require, the Commissioner to issue permits for the taking of fish and game "in order to teach and preserve historic or traditional uses and harvest practices." These permits would not entitle their holders to any priority. The Regional Councils would be authorized to recommend to the appropriate board the amount of fish or game to be made available under the permits.

Current ANILCA regulations allow the Federal Subsistence Board to issue similar permits to hunt or fish on federal lands and waters for educational and other

special purposes. See § 242.6(f)(3), (4); 50 CFR § 100(f)(3), (4).

16.05.405(g)

Adds a new provision to the State's proxy hunting and fishing regulations that would allow a family member of a rural resident (or another rural resident) to take fish and game as a proxy, regardless of the eligible resident's age or physical abilities. There would be various limitations and reporting requirements applicable to these hunts, including limiting the proxy to hunting or fishing for one person at a time and the person who gives the proxy can not participate in the hunt or fishery for which the proxy was given. No cash payment can be made in connection with such a proxy harvest.

Current federal regulations allow the Federal Subsistence Board to authorize similar proxy harvests on federal lands and waters. 36 C.F.R. § 242.6(f)(2); 50 C.F.R. § 100.6(f)(2).

Both the proxy hunting provision and the cultural (or educational) permit provision could be repealed by the State legislature without the State losing management authority under ANILCA. The federal regulations would be of no avail since the Federal Subsistence Board would no longer exist.

16.05.940

Subsection (8) amends the current state definition of "customary trade" to mean the "exchange for cash, for fish or game in minimal, noncommercial quantities as determined by the appropriate board," with the proviso that it does not restrict money sales of furs and furbearers. This definition is arguably more limited than what is currently allowed under federal law, although the limits of customary trade under ANILCA's "subsistence uses" definition is currently the subject of pending litigation in *Peratovich v. United States*, No. A92-0734-CV (D. Alaska).

Subsection (27) currently defines "rural community or area" as one in which the noncommercial customary and traditional use of fish or game for personal or family consumption is "a principle characteristic of the economy of the community or area." The Governor's Task Force

would amend the definition of "rural community or area" to mean a "community or area substantially dependent on fish and game for nutritional and other subsistence uses."

Requiring a community or area to show that it is "substantially dependent" on subsistence uses as opposed to demonstrating that subsistence is "a principle characteristic" of the economy of the community may be a more difficult standard, making it more difficult for some of the rural regional centers, like Bethel, to remain rural. The more stringent statutory standard, combined with the lack of specific criteria for making the determinations in the future give the State Boards greater power and discretion in determining which communities or areas should be added to or deleted from the "rural" classification.

Subsection (32) defines "subsistence uses." The current definition is basically identical to the definition of subsistence uses in 803 of ANILCA, except that the State statute adds the word "noncommercial" prior to the phrase "customary and traditional" in describing what kinds of uses qualify. State law also defines "customary and traditional uses" as "noncommercial uses." AS 16.05.940(8).

Finally, the draft package would delete the rural resident limitation from the definition of subsistence uses and in subsections (30) "subsistence fishing" and (31) "subsistence hunting"; however, since AS 16.05.330(c) would be changed to require a person to be a rural resident to be eligible to take fish and game for subsistence uses, these changes are not particularly significant.

ANILCA AMENDMENTS

Section 102 - "Public lands"

The priority under Title VIII (section 804) applies to the taking of fish and wildlife for subsistence uses on "public lands." Public lands are defined to include "federal lands, waters and interests therein." Under the *Katie John* decision, the priority extends to waters in Alaska in which the U.S. holds reserved water rights. The extent to which the federal priority will be applied to regulate fish and game harvests on various inland waters, state and

private lands and selected, but not conveyed lands remains the subject of federal agency proposed rulemaking and pending federal litigation. However, the advanced Notice of Proposed Rulemaking (61 Fed. Reg. 15014 (April 4, 1996)) proposes that the federal subsistence board maintain jurisdiction over selected but not conveyed lands and delegates to the Board the authority to exercise its jurisdiction to restrict hunting and fishing activities on state and private lands if necessary to provide for the priority on public lands.

The draft Task Force proposal will amend the definition of "federal public lands" in order to "clarify" that "it excludes all private and state lands." The proposal notes however, at p. 35 that "[i]t has not been determined exactly how these definitions (referring to the "land", "federal land" and "public lands" definitions in § 102 of ANILCA) should be modified." The draft package seems to envision a change in the definition of public lands that would eliminate any argument that the Federal Board can exercise its jurisdiction to restrict fish and wildlife harvests on State or privately owned lands. The changes contemplated might also include all navigable waters within the meaning of "state or privately owned lands."

Section 803 - "Subsistence Uses"

This section defines "subsistence uses", "family" and "barter". The Governor's Task Force proposal adds definitions of "customary and traditional", "customary trade", and "rural Alaska resident." These definitions would conform to those same terms in the State statute portion of the Task Force package. The proposed definition of "customary and traditional" is the definition contained in current state law. It is possible that incorporation of the State's definition of customary and traditional uses would limit the federal protections for subsistence uses since the Alaska Supreme Court has interpreted customary and traditional subsistence "uses" (which must be provided for) to exclude local methods of harvesting subsistence resources (which do not have to be provided for). Prior to 1992, there was no state statutory definition of customary and traditional. Instead, the Joint Boards adopted 8 criteria for identifying customary and traditional uses.

The addition of the above definitions would place in federal law a clear prohibition against "commercial" enterprises of any size as "customary trade" with the exception of cash sales of furs and furbearers. Current federal regulations allow some degree of commercial enterprise as "customary trade" if it is not "significant."

The definition of "rural" would tie and limit future determinations of "rural" to substantial dependency on fish and game for subsistence uses; current federal regulations do not.

Section 804: Priority

This section states the priority granted rural Alaska residents, and the criteria for the "tier II" priority among rural residents. The draft package adds a new paragraph to expressly state that the priority granted is for a "reasonable opportunity to take fish and wildlife." It then defines "reasonable opportunity" as it is defined under the State statute. *See* discussion of "reasonable opportunity" under the discussion of the State statute.

Section 805 - Management System; Requirements for State Compliance

This section of ANILCA sets up the Regional Councils, provides authority for annual reports to the Secretary, provides for the implementation of this system, conditioned upon the State's compliance with sections 803, 804, and 805 (a)-(c) within one year, and reimbursement to the State for setting up and running the Regional Council System. Again, the Governor's Task Force proposal offers no specific language changes to Section 805, but notes that the section may require amendments to accommodate the State management system. *See* discussion of State Management System under the analysis of the State statute.

Section 806 - Federal Monitoring

Section 806 requires the Secretary of Interior to monitor State implementation of the priority and report annually to Congress. The Draft package would repeal this monitoring section and replace it with a provision that would restore State regulation of subsistence management on federal, as well as state and private lands and waters throughout Alaska upon adoption of the draft package.

The replacement language would have the effect of automatically "deeming" the State in compliance with

Section 805(d) of ANILCA. It would prohibit the federal agencies from implementing the federal scheme in sections 805 (a) - (c) unless and until the State statute and the constitutional amendment are repealed or "a court of competent jurisdiction determines that the State has *substantially* failed to implement their provisions and that the State has failed or refused to cure that failure within a reasonable period following the court's determination."

This change would immediately bless the State program and allow the State to takeover management on all lands and waters in Alaska. It would also make it more difficult for the federal government to takeover management in the event of future non-compliance on the part of the State. In fact, under this provision, the State could amend or repeal the State statute or suspend implementation of it without invoking a federal takeover as long as the constitutional amendment remained in effect. Since the constitutional amendment only permits, but does not mandate implementation of a rural subsistence priority, this presents the potential for the State to forego implementation of the rural priority without the federal government being able to cure the deficiency until a court has decided that the State has "substantially" failed to implement the state statute within a "reasonable period." This could result in a considerable delay in terms of implementing the federal program in the event of state non-compliance.

Also, it appears that the State could modify its statute in ways that might be characterized as "refinements" or "clarifications" without serious threat of a federal takeover, as long as the State avoided changes that would rise to the level of a "substantial" failure to implement the original provisions of the State statute that relate to Sections 803, 804 and 805 of ANILCA. For example, the State could probably repeal the proxy and educational permit provisions of the State statute without regard to the requirements of this section. Section 805(d) only requires the State to enact 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 educational and proxy permit permits have no protection under ANILCA.

Section 807: Federal Court Enforcement

The Governor's draft proposal would amend section 807 of ANILCA to state that agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion." The proposed change appears to eliminate the "not otherwise in accordance with law" language of the APA review standard that would otherwise apply to agency action implementing a federal law. Although this was the standard the federal district court applied in the *Bobby* case, there is an argument that Section 807 authorizes an unqualified right to bring a "civil action" which is usually read as intending such cases to receive plenary review, i.e., a trial *de novo*.

The Governor's draft proposal would also amend section 807 to require the court in its review of the Boards' actions, to give the decisions of the State Boards the same deference the court would give to "the same decision of a comparable federal agency." This change is intended to overturn that part of the *Kenaitze* decision that says that the State's interpretation of ANILCA is due no deference. Generally speaking, federal courts may not substitute their own interpretation of a federal statute that is ambiguous or silent on a specific issue for a reasonable interpretation of a *federal* agency charged with enforcing the statute. The *Kenaitze* court held that the state is delegated no authority under ANILCA, and therefore due no deference. This interpretation is consistent with the remedial nature of Title VIII of ANILCA – it was passed to reform the regulatory failures of the State. It would make no sense to have the courts defer to the interpretation of ANILCA by the very regulators whose wrongdoing make ANILCA necessary in the first place.

Moreover, the State regulators take the position that ANILCA is not "Indian" legislation. The federal courts (and the Secretary of the Interior) recognize that ANILCA is "Indian" legislation. In cases where Title VIII is ambiguous or silent, the federal agencies and the federal courts must interpret the statute in favor of Alaska Natives' subsistence lifestyle. The State regulators will not be applying this standard to its interpretation of Title VIII of ANILCA.

Section 813: Periodic Reports

This section requires the Secretary to prepare periodic reports for Congress and the public (every 3 years) on the

State's compliance with Sections 803, 804 and 805 of ANILCA. The Task Force proposal states that Section 813 will require conforming changes, but those changes are not specified other than to say that subparagraph (1), which refers to Section 806, should be deleted.

Section 814: Authority to Prescribe Regulations

Section 814 requires the Secretaries of Interior and Agriculture to prescribe such regulations as are necessary to carry out their responsibilities under Title VIII. The Draft Package would add a sentence prohibiting the Secretaries from making or enforcing regulations "concerning subsistence" during any time "that the State has complied with Section 805(d)." The proposal suggests that this change is necessary to clarify the statement in Section 805(d) that the Secretary shall not implement the federal management schedule in sections 805 (a)-(c) if the State enacts and implements an adequate state law rural resident subsistence priority scheme.

This change may relate more closely to the section 806 amendments, which would bless the State program upon adoption of the state constitutional amendment and statutory changes. In any event, the language of this provision is so broad it could well encompass any regulations pertaining to the effects of federal agency land use decisions on subsistence uses (§810) or closures of federal lands and waters to subsistence harvest (§ 816), or the implementation of the subsistence priority within the national parks and monuments (§ 808), ensuring access to subsistence resources (§ 811) or undertaking research on subsistence uses (§ 812). One would assume that the Task Force intended only to preclude the Secretaries from promulgating regulations implementing § § 803, 804 and 805 (a) - (c); however, that is not clear.

**Section 816:
Closures/Disclaimers**

This section addresses closures of federal lands and waters to subsistence uses. Except for the potential effect of the § 814 prohibition on making or enforcing regulations described above, the Secretaries' closure authority would not appear to be modified by the draft package.

The draft package, however, does add a new and

unrelated paragraph which states that the draft package of ANILCA amendments and implementation of them shall not be construed to "validate or invalidate or in any way — affect" an assertion that a Native organization has or does not have governmental authority or that Indian Country in Alaska exists or does not exist, or any assertion that ANILCA is Indian law.

As noted earlier, Title VIII of ANILCA has been construed by the federal courts to be "Indian legislation." The Department of the Interior, in an opinion dated April 11, 1995, specifically rejected a narrow interpretation of Section 805(c) as contrary to the Indian canon of construction that legislation passed for the benefit of Native Americans be construed in their favor. Moreover, the legislative history of Title VIII of ANILCA confirms that Title VIII of ANILCA is Indian legislation. Placing language, even if neutral, in a disclaimer that implies that the issue is still open to debate is dangerous. While the Indian country and jurisdictional issues may be subject to debate, this issue is not and should not be called into question by implying that it is still an open question.



Final Task Force Plan for a Subsistence Priority and Returning Fish and Game Management to the State

Updated: 9/23/97

THE BASIC PACKAGE AND LINKAGE

There are two primary goals:

- To ensure effective state authority over fish and game management on all lands and waters of Alaska;
- To recognize the paramount importance of the subsistence way of life to Alaskans.

Alaskans may be reluctant to amend the Alaska Constitution without knowing what changes will be made in the Alaska National Interest Lands Conservation Act (ANILCA) and the state fish and game statutes. The solution is a linked package of amendments to ANILCA, the Alaska Constitution, and the Alaska statutes.

The effective date of the ANILCA amendments and the state statutory amendments will be the passage of the constitutional amendment. Voters will know exactly what is in the ANILCA amendments and the state statutory amendments when they vote on the constitutional amendment. The package will include a congressional determination that the state, upon passage of the constitutional amendment and implementation of the revised statutes, is in compliance with ANILCA and may resume fish and game management statewide.

The constitutional amendment cannot be voted on until the November 1998 general election.

THE STATE CONSTITUTIONAL AMENDMENT

The Alaska Constitution will be amended to permit, but not to require, the Alaska Legislature to grant a subsistence priority based on place of residence. Simultaneously, state statutes will be amended to create a rural subsistence priority and those statutes, and the ANILCA amendments, will become effective only if the constitutional amendment is passed.

THE STATE STATUTORY AMENDMENTS

The Alaska fish and game statutes will be amended to grant a subsistence priority to rural residents. Communities outside the current non-subsistence areas will be classified as rural on the day the state regains management. The Boards of Fisheries and Game acting jointly through regulation will have the power to change community classifications (add or delete) in the future as communities change.

The state statutes will also be amended to:

- a. improve the proxy hunting and fishing provisions;
- b. provide for educational hunting and fishing permits;
- c. clarify the definitions of "rural," "customary trade," and "customary and traditional;"
- d. make clear that the subsistence priority is a reasonable opportunity to take, not a guarantee of taking; and
- e. refine the subsistence management system, including adding a state Regional Subsistence Council system.

ANILCA AMENDMENTS

The amendments fall roughly into four categories.

- a. **Definitions** - The priority created by ANILCA is keyed to rural residency, but "rural" is not defined. ANILCA leaves the determination of what is rural to the administrative process subject to court review. In this subsistence package, a rural community or area has been carefully defined as "a community or area substantially dependent on fish and game for nutritional and other subsistence uses." In addition, "customary trade" will be defined so that subsistence taking of fish and game cannot become a commercial enterprise. "Customary and traditional," an operative but undefined term in ANILCA, will also be defined. Finally, the concept of "reasonable opportunity" will be defined to make clear that the priority is a reasonable opportunity to take, not a guarantee of taking, and that the boards must consider customary and traditional uses.
- b. **Court Oversight** - Section 807 will be amended to state the standard of review for actions of the fish and game boards ("arbitrary, capricious, or abuse of discretion") and to require the federal courts to give board decisions the same deference that would be given a federal agency decision. Adding these standards is not believed to be a change in current federal law, but the standards are not explicit in Title VIII.
- c. **State Management** - Title VIII will be amended to make it clear that the state manages subsistence on all lands and waters, whether federal, state, or private.
 - i. Section 814 will be amended so that the Secretary of the Interior cannot interfere with state regulations.
 - ii. The definition of "federal public lands" will be clarified to ensure that it excludes all private and state lands.

The collective purpose of these amendments is to make clear the state has full management authority while the state is in compliance with ANILCA.

- d. **Congressional Seal of Approval, Noncompliance, and Neutrality on Indian Country** - Section 805 will be amended (1) to declare the state in compliance with Section 805(d) when it passes the constitutional amendment and statutory amendments (see above) and (2) to make future noncompliance a court determination.

A new section will be added to declare that these ANILCA changes do not affect and cannot be used to argue Indian country and sovereignty issues.

This proposal was written by the Governor's Task Force on Subsistence. The members of the Task Force were: Governor Tony Knowles, Lieutenant Governor Fran Ulmer, Governor Jay Hammond, Senate President Mike Miller, House Speaker Gail Phillips, Alaska Permanent Fund Corporation Executive Director Byron Mallott, and Former Attorney General Charlie Cole.

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**PLAN FOR A SUBSISTENCE PRIORITY
AND RETURNING FISH AND WILDLIFE
MANAGEMENT TO THE STATE**

Report of the

Governor's Task Force on Subsistence

Governor Tony Knowles

Lt. Governor Fran Ulmer

Senate President Mike Miller

House Speaker Gail Phillips

Governor Jay Hammond

Charlie Cole

Byron Mallott

September 1997



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CONSTITUTIONAL AMENDMENT

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SPECIAL SESSION

BY

Introduced:
Referred:

A RESOLUTION

Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of renewable natural resources by rural residents.

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.

NOTE: There is a linkage between this constitutional amendment and changes to ANILCA and state statutes. Amendments to ANILCA and amendments to Alaska's fish and game statutes will be passed prior to voting on this constitutional amendment, but will not become effective unless the constitutional amendment passes.

*Sec. 3. The amendment proposed by this resolution shall be effective immediately upon certification that it has passed.

NO ANILCA
LINKAGE

ANILCA (TITLE VIII) AMENDMENTS

PUBLIC LAW 96-487—DEC. 2, 1980

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

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

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

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

43 USC 1601
note.

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

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

POLICY

16 USC 3112

Sec. 302. 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;

ANILCA p. 2377

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

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

DEFINITIONS

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

16 USC 3113.

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

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

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

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

"AND" IN STATUTE
BROADENS DEFINITION

This section shall be amended by adding the following definitions:

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

(4) "customary trade" means the limited noncommercial exchange for cash of fish or wildlife or their parts in minimal quantities. The terms of this paragraph do not restrict money sales of furs and furbearers.

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

PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114

Priority criteria.

- (1) customary and direct dependence upon the populations as the mainstay of livelihood;
- (2) local residency; and
- (3) the availability of alternative resources.

A new paragraph shall be added:

The priority granted by this section is for a reasonable opportunity to take fish and wildlife. "Reasonable opportunity" means an opportunity, consistent with customary and traditional use, to participate in a subsistence hunt or fishery with a reasonable expectation of success. Reasonable opportunity shall not guarantee the taking of fish or wildlife.

NOTE: These definitions apply to Title VIII but are in Title I (16 U.S.C. § 3102). They are reprinted here for convenience.

ANILCA LAND DEFINITIONS

§ 3102. Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], 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 December 2, 1980.~~

Proposed amendment to 16 USC 3102(2),

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 after December 2, 1980, Native lands, other private lands, or Native Corporation and State land selections defined in subsection (3)(A) and (B) below.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, 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 [43 U.S.C.A. § 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(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 13, 1971 (85 Stat. 683), as amended [43 U.S.C.A. § 1601 et seq.].

(6) The term "Native Corporation" means any Regional Corporation, any Village Corporation, any 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 [43 U.S.C.A. § 1602(g)].

(8) The term "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1602(j)].

(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 [43 U.S.C.A. § 1613(h) (3)].

(10) The term "Native Group" has the same meaning as such term has under sections 3(d) and 14(h) (2) of the Alaska Native Claims Settlement Act [43 U.S.C.A. §§ 1602(d) and 1613(h) (2)].

(11) The term "Native land" means land owned by a Native Corporation or any Native Group and includes land which, as of December 2, 1980, had been selected under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] 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 [43 U.S.C.A. § 1618(b)].

(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) [16 U.S.C.A. § 1131 et seq.].

(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", approved July 7, 1958 (72 Stat. 339), as amended.

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

Ch. 51 ALASKA NATIONAL INTEREST LANDS

16 § 3102

(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 [43 U.S.C.A. § 1602(b)].

(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 any such conduct.

(Pub.L. 96-487, Title I, § 102, Dec. 2, 1980, 94 Stat. 2375.)

NOTE: The state management system is discussed at pages 35-40.

SECTION 805 OF TITLE VII WITH AMENDMENT
TO MAKE THE SECTION CONSISTENT WITH
THE STATE STATUTORY AMENDMENTS

1 LOCAL AND REGIONAL PARTICIPATION

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

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

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

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

13 (2) The members of each regional advisory council shall be appointed by the
14 Governor of Alaska. Each council shall have ten members, four of whom shall be selected
15 from nominees who reside in the region submitted by tribal councils in the region, and six
16 of whom shall be selected from nominees submitted by local governments and local advisory
17 committees. Three of these six shall be subsistence users who reside in the region and three
18 shall be sport or commercial users. Sport and commercial representatives may be residents
19 of any subsistence resource region. The regulations shall provide for staggered terms of

1 council members. The maximum term shall be three years, with no limit on the number of
 2 terms served. A quorum shall be a majority of the members of a council. Each regional
 3 advisory council shall be composed of residents of the region and shall have the following
 4 authority:

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

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

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

14 (D) the preparation of an annual report to the Secretary which shall contain —
 15 (i) an identification of current and anticipated subsistence uses of fish
 16 and wildlife populations within the region;
 17 (ii) an evaluation of current and anticipated subsistence needs for fish
 18 and wildlife populations within the region;
 19 (iii) a recommended strategy for the management of fish and wildlife
 20 populations within the region to accommodate such subsistence uses and
 21 needs; and

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

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

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

21 (d) The Secretary shall not implement subsections (a), (b), and (c) of this section if
 22 ~~within one year from the date of enactment of this Act.~~ an amendment to Alaska's

1 Constitution has been adopted which allows for the preference specified in section 804, and
2 the State enacts and implements laws of general applicability which are consistent with, and
3 which provide for the definition, preference, and participation specified in section 803, 804,
4 and 805, ~~such~~, Such laws, unless and until repealed, shall supersede such sections insofar
5 as such sections govern State responsibility pursuant to this title for the taking of fish and
6 wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory
7 committees and regional advisory councils consistent with section 805 shall provide that the
8 State rulemaking authority shall consider the advice and recommendations of the regional
9 councils concerning the taking of fish and wildlife populations on public lands within their
10 respective regions for subsistence uses. The regional councils may present
11 recommendations, and the evidence upon which such recommendations are based, to the
12 State rulemaking authority during the course of the administrative proceedings of such
13 authority. The State rulemaking authority may choose not to follow any recommendation
14 which it determines is not supported by substantial evidence presented during the course of
15 its administrative proceedings, violates recognized principles of fish and wildlife conservation
16 or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation
17 is not adopted by the State rulemaking authority, such authority shall set forth the factual
18 basis and the reasons for its decision.

19 (e)(1) The Secretary shall reimburse the State, from funds appropriated to the
20 Department of the Interior for such purposes, for reasonable costs relating to the
21 establishment and operation of the regional advisory councils established by the State in
22 accordance with subsection (d) and the operation of the State fish and game advisory

1 committees so long as such committees are not superseded by the Secretary pursuant to
 2 paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such
 3 costs in any fiscal year. Such costs shall be verified in a statement which the Secretary
 4 determines to be adequate and accurate. Sums paid under this subsection shall be in
 5 addition to any grants, payments, or other sums to which the State is entitled from
 6 appropriations to the Department of the Interior.

7 (2) Total payments to the State under this subsection shall not exceed the sum of
 8 \$5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in
 9 every five years as to whether or not the maximum payments specified in this subsection are
 10 adequate to ensure the effectiveness of the program established by the State to provide the
 11 preference for subsistence uses of fish and wildlife set forth in section 804.

For reference, unamended section 805 is reproduced in its entirety.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115 Sec. 805. (a) Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 802, 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.

Implementation.

(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.

Reimbursement to States.

(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.

Report to Congress.

(a)

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.

Report to congressional committees.
16 USC 3116

Existing Section 806 shall become Section 806 (a) and a new subsection shall be added:

(b) At such time as the State of Alaska enacts into law and implements the [Subsistence Act of 1997 is the working title] and the people of Alaska approve the amendment to the Alaska Constitution which is incorporated into that Act by reference and which empowers the Alaska legislature to enact the Act, the State shall be deemed to have complied with section 805(d) and the State may immediately assume fish and game management as provided in section 805(d). Sections (a), (b), and (c) of section 805 shall not be implemented by the Secretary unless and until the Act or the constitutional amendment is repealed or a court of competent jurisdiction determines that the State has substantially failed to implement their provisions and that the State has failed or refused to cure that failure within a reasonable period following the court's determination.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

Hearing.

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

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

Two new sentences shall be inserted in Section 807:

Agency actions may be declared invalid by the court only if they are arbitrary, capricious, or an abuse of discretion. 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 decision of a comparable federal agency.

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

Subsistence
hunting pro-
gram.

Sec. E08. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of the Interior, information submitted by, and after consultation with the appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

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

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

Program and
recommendation
implementation.

COOPERATIVE AGREEMENTS

Sec. 809. The Secretary may enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of this title. 16 USC 3119

SUBSISTENCE AND LAND USE DECISIONS

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

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

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

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

Notice and hearings.
42 USC 4332

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

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

(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

16 USC 3121.

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

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

RESEARCH

16 USC 3122

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

PERIODIC REPORTS

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

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

- (1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;
- (2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;
- (3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;
- (4) the role of subsistence uses in the economy and culture of rural Alaska;
- (5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 805, and other appropriate persons and organizations;
- (6) a description of those actions taken, or which may need to be taken in the future, to permit the opportunity for continuation of activities relating to subsistence uses on the public lands; and
- (7) such other recommendations the Secretary deems appropriate.

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

Publication in Federal Register.

or the State at any time the State has complied with section 805(d)

REGULATIONS

Sec. 814. The Secretary shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title. 16 USC 3121

A new sentence shall be added:

During any time that the State has complied with Section 805(d), the Secretary shall not make or enforce regulations implementing sections 805(a), (b), or (c).

NOTE: This change is necessary to clarify the "Secretary shall not implement" language in Section 805(d).

LIMITATIONS, SAVINGS CLAUSES

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

16 USC 1125

(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.

16 USC 1131
note

16 USC
665-665d

Publ. p 3300

16 USC 3126

SEC. 316. (a) All national parks and park monuments in Alaska shall be closed to the taking of wildlife except for subsistence uses to the extent specifically permitted by this Act. Subsistence uses and sport fishing shall be authorized in such areas by the Secretary and carried out in accordance with the requirements of this title and other applicable laws of the United States and the State of Alaska.

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

Publication in
Federal Register.

A new paragraph shall be added:

(c) No provision of this Act (the Alaska National Interest Lands Conservation Act Amendments of 1997), exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act shall be construed to validate or 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 (48 Stat. 1987), as amended) [section 461 *et seq.* of Title 25, Indians] 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, or

(2) any assertion that Indian country (as defined by 18 U.S.C. § 1151 [section 1151 of Title 18, Crimes and Criminal Procedure] or any other authority) exists or does not exist within the boundaries of the State of Alaska, or

(3) any assertion that the Alaska National Interest Lands Conservation Act is or is not Indian Law.

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

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

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

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

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

10 [(c) THE BOARDS MAY NOT PERMIT SUBSISTENCE HUNTING OR
11 FISHING IN A NONSUBSISTENCE AREA. THE BOARDS, ACTING JOINTLY, SHALL
12 IDENTIFY BY REGULATION THE BOUNDARIES OF NONSUBSISTENCE AREAS. A
13 NONSUBSISTENCE AREA IS AN AREA OR COMMUNITY WHERE DEPENDENCE UPON
14 SUBSISTENCE IS NOT A PRINCIPAL CHARACTERISTIC OF THE ECONOMY,
15 CULTURE, AND WAY OF LIFE OF THE AREA OR COMMUNITY. IN DETERMINING

1 **Draft Revised Fish & Game Statutes (AS 16.05)**
2 **Subsistence Act of 1997**

3
4
5
6 **Sec. 16.05.258. Subsistence use and allocation of fish and [GAME] wildlife.**

8 (a) ~~[EXCEPT IN NONSUSTAINANCE AREAS,] In areas and communities classified as rural,~~

9 the Board of Fisheries and the Board of Game shall identify the fish stocks and [GAME] wildlife

10 populations, or portions of stocks or populations, that are customarily and traditionally taken or

11 used for subsistence. The commissioner [SHALL] may¹ provide recommendations to the boards

12 concerning the stock and population identifications. [THE BOARDS SHALL MAKE

13 IDENTIFICATIONS REQUIRED UNDER THIS SUBSECTION AFTER RECEIPT OF THE

14 COMMISSIONER'S RECOMMENDATIONS.]

15 (b) The appropriate board shall determine whether a portion of a fish stock or

16 [GAME] wildlife population identified under (a) of this section can be harvested consistent with

17 sustained yield. If a portion of a fish stock or wildlife population can be harvested consistent with

¹This change was suggested by ADF&G in 1996 to reflect actual practice.

1 sustained yield, the board shall determine the amount of the harvestable portion that is reasonably
2 necessary for subsistence uses and

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

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

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

9 (C) may adopt regulations to differentiate among uses;

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

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

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

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

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

8 (A) determine the portion of the fish stocks or wildlife populations that can be
9 harvested consistent with sustained yield; and

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

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

1 WHETHER DEPENDENCE UPON SUBSISTENCE IS A PRINCIPAL CHARACTERISTIC OF
2 THE ECONOMY, CULTURE, AND WAY OF LIFE OF AN AREA OR COMMUNITY
3 UNDER THIS SUBSECTION, THE BOARDS SHALL JOINTLY CONSIDER THE RELATIVE
4 IMPORTANCE OF SUBSISTENCE IN THE CONTEXT OF THE TOTALITY OF THE
5 FOLLOWING SOCIO-ECONOMIC CHARACTERISTICS OF THE AREA OR COMMUNITY:]

6 (c) On the effective date of this Act, all communities and areas outside the
7 nonsubsistence areas established by regulations adopted by the Board of Fisheries and Board
8 of Game and effective on May 15, 1993, shall be classified as rural for purposes of this Act.
9 The Board of Fisheries and the Board of Game, acting jointly, shall determine by regulation
10 whether additional communities or areas should be classified as rural and whether
11 communities or areas classified as rural should no longer be classified as rural.

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

1 (e) Takings and uses of fish and [GAME] wildlife authorized under this section are
2 subject to regulations regarding open and closed areas, seasons, methods and means, marking and
3 identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations.
4 Takings and uses of resources authorized under this section are subject to AS 16.05.831 and
5 AS 16.30.²

6 (f) For purposes of this section, "reasonable opportunity" means an opportunity,
7 [AS DETERMINED BY THE APPROPRIATE BOARD, THAT ALLOWS A SUBSISTENCE
8 USER] consistent with customary and traditional uses, to participate in a subsistence hunt or
9 fishery [THAT PROVIDES A NORMALLY DILIGENT PARTICIPANT] with a reasonable
10 expectation of success. [OF TAKING OF FISH OR GAME] Reasonable opportunity shall not
11 guarantee the taking of fish or wildlife.

12 (g) No provision of this section requires the Board of Fisheries to close
13 non-retention fishing if the board has made a finding that the mortality caused by

²These two statutes prohibit waste of salmon and wanton waste of game, respectively.

1 non-retention fishing does not jeopardize subsistence uses or the conservation of healthy
2 stocks.

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

6
7 Sec. 16.05.260. Advisory committees. (a) The Board of Fisheries and the Board
8 of Game may adopt regulations they consider advisable in accordance with AS 44.62
9 (Administrative Procedure Act) establishing, at places in the state designated by the individual
10 boards, advisory committees to be composed of persons who collectively represent user groups
11 in the area and who are well informed on the fish or [GAME] wildlife resources of the locality.
12 The boards shall set the number and terms of each of the members of the advisory committees,
13 shall delegate one member of each committee as chairman, and shall give the chairman authority
14 to hold public hearings on fish or [GAME] wildlife matters.

1 (b) Recommendations from the advisory committees on uses other than
 2 subsistence shall be forwarded to the appropriate board for their consideration but if the Board
 3 of Fisheries or the Board of Game chooses not to follow the recommendations of the local
 4 advisory committee the appropriate board shall inform the appropriate advisory committee of this
 5 action and state the reasons for not following the recommendations.

6 (c) Recommendations from the advisory committees on subsistence uses shall
 7 be sent to regional subsistence councils. If the regional subsistence council does not adopt
 8 the recommendation of the advisory committee, the council shall inform the advisory
 9 committee, state the reasons, and forward the advisory committee recommendation to the
 10 board.

11 Sec. 16.05.261. Alaskan Regional Subsistence Councils. (a) The Board of
 12 Fisheries and the Board of Game shall adopt regulations establishing at least six subsistence
 13 resource regions which, taken together, cover the entire state. The number and boundaries
 14 of the regions shall be sufficient to assure that regional differences in subsistence uses are
 15 adequately accommodated.

1 **(b) Each subsistence resource region shall be represented by a regional**
 2 **subsistence council with members appointed by the Governor. Each regional subsistence**
 3 **council shall have ten members, four of whom shall be selected from nominees who reside**
 4 **in the region submitted by tribal councils in the region, and six of whom shall be selected**
 5 **from nominees submitted by local governments and local advisory committees. Three of**
 6 **these six shall be subsistence users who reside in the region and three shall be sport or**
 7 **commercial users. Sport and commercial representatives may be residents of any subsistence**
 8 **resource region. The regulations shall provide for staggered terms of council members. The**
 9 **maximum term shall be three years, with no limit on the number of terms served. A**
 10 **quorum shall be a majority of the members of a council.**

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

13 **(d) Each regional subsistence council shall have the authority to**
 14 **(1) elect officers and adopt rules of procedure;**

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

3 (3) in consultation with the local fish and game advisory committees in its
 4 region and with the department, review, evaluate, and make a recommendation to a board
 5 on any existing or proposed regulation, policy, or management plan, or any other matter
 6 directly relating to the subsistence use of fish and wildlife within its region;

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

8 (5) make recommendations concerning permits provided in AS 16.05.330(d)
 9 and .405(g);

10 (6) submit to the boards, the department, and the Secretaries of Interior and
 11 Agriculture of the United States, by November 15 of each year, an annual report,
 12 containing:

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

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

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

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

9 (7) perform other duties specified by a board.

10 (e) Each council shall provide a forum for, and assist its local fish and game
 11 advisory committees in, obtaining the opinions and proposals of people interested in fish and
 12 wildlife matters so as to achieve the greatest possible local participation in the
 13 decision-making process.

1 (f) Proposals relating primarily to subsistence issues initiated by the public or
2 by local fish and game advisory committees must be reviewed by the appropriate regional
3 subsistence council before the board takes action on the proposal.

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

6 (h) The appropriate board shall consider the reports and recommendations of
7 the regional subsistence councils and shall give deference to their subsistence
8 recommendations. If the council recommendation is unanimous, there is a presumption in
9 favor of adoption by the board. However, the board may decide not to adopt any
10 recommendation which it determines violates the sustained yield principle, is not supported
11 by substantial evidence, is detrimental to subsistence uses, involves an unresolved statewide
12 or inter-regional subsistence management issue, or is contrary to an overriding statewide fish
13 or wildlife management interest. If a recommendation is not adopted by the board, the
14 board shall provide a written statement of the factual basis and reasons for its decision and

1 shall remand the recommendation to the regional subsistence council for further
 2 consideration.

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

7 (g) Regional subsistence councils may adopt a mediation process.

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

13 (i) The regional subsistence councils shall be adequately funded.

14

1 **Sec. 16.05.330. Licenses, tags, and subsistence permits. (a) Except as otherwise**
2 permitted in this chapter, without having the appropriate license or tag in actual possession a
3 person may not engage in

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

5 (2) hunting, trapping, or fur dealing;

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

7 (4) taxidermy.

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

11 (c) The Board of Fisheries and the Board of Game may adopt regulations providing
12 for the issuance and expiration of subsistence permits for areas, villages, communities, groups,
13 or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of fish
14 and [GAME] wildlife. [THE BOARDS SHALL ADOPT THESE REGULATIONS WHEN THE
15 SUBSISTENCE PREFERENCE REQUIRES A REDUCTION IN THE HARVEST OF A FISH

1 STOCK OR GAME POPULATION BY NONSUBSISTENCE USERS.]³ To be eligible to take
2 fish or wildlife in a rural community or area, a person must be a resident domiciled in that
3 community or area.

4 (d) The Board of Fisheries and the Board of Game shall adopt regulations
5 allowing the commissioner to issue permits for the taking of fish and wildlife in order to
6 teach and preserve historic or traditional uses and harvest practices. The permits under this
7 paragraph shall not entitle successful applicants to the subsistence priority in AS 16.05.258.

8
9 **Sec. 16.05.405. Taking fish and [GAME] wildlife by proxy.** (a) Subject to
10 regulations adopted by the Board of Fisheries or the Board of Game to implement this section,
11 including regulations relating to or restricting seasons, areas, methods and means, and species,
12 a resident may take fish or [GAME] wildlife harvested primarily for food on behalf of another
13 person under this section.

³This sentence is deleted because it applies only in the context of the current "all Alaskans" system, which would be eliminated.

1 (b) Notwithstanding AS 16.05.420(c), a resident holding a valid resident hunting
2 license may take [GAME] wildlife on behalf of a person who is blind, a person with physical
3 disabilities, or a person who is 65 years of age or older if the resident possesses on the resident's
4 person

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

8 (2) the person's

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

11 (B) harvest ticket, tag, stamp, or other document required by law as a condition of
12 taking the [GAME] wildlife being hunted.

13 (c) Notwithstanding AS 16.05.420(c), a resident holding a valid noncommercial
14 fishing license may take fish on behalf of a person who is blind, a person with physical

1 disabilities, or a person who is 65 years of age or older if the resident possesses on the resident's
2 person

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

6 (2) the person's

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

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

10 (C) resident personal use fishing permit issued under AS 16.05.403.

11 (d) A resident who takes fish or [GAME] wildlife on behalf of another person
12 under this section may, subject to applicable regulations of the Board of Fisheries or the Board
13 of Game, take the fish or [GAME] wildlife only under those conditions that would apply to the
14 other person if the other person took the fish or [GAME] wildlife personally.

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

7 (1) another person's license, permit, or identification card and the other person's
 8 signed document under (b)(1) or (c)(1) of this section; or

9 (2) fish or [GAME] wildlife taken on behalf of another person.

10 (f) A resident who takes fish or [GAME] wildlife on behalf of another person under
 11 this section shall

12 (1) complete reports relating to the taking of the fish or [GAME] wildlife as
 13 required by the commissioner of fish and [GAME] wildlife under AS 16.05.370;

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

4 (3) retain the license or permit and the signed document required under (b)(1) or
5 (c)(1) of this section of the person on whose behalf the fish or [GAME] wildlife is taken until the
6 fish or [GAME] wildlife is delivered to that person.

7 (g) In addition to the proxy hunting and fishing opportunities authorized by
8 AS 16.05.405(a)-(f), the Board of Fisheries and the Board of Game shall adopt regulations
9 to permit a resident who is a member of the family of a resident of a community or area
10 classified as rural or any person who is a resident of a rural community or area to
11 participate in subsistence harvest activities as a proxy for a resident eligible for the
12 subsistence priority under AS 16.05.258, regardless of the eligible resident's age or physical
13 ability to hunt or fish. A proxy hunter or fisher who is not part of the eligible resident's
14 family must be a resident of the area in which the eligible resident lives. For purposes of this
15 paragraph, "family" has the same meaning as in AS 16.05.940(32). The amount of fish or

1 wildlife permitted to be taken for subsistence uses in an area or community shall not be
 2 increased because of proxy hunting or fishing. Any fish or wildlife taken by a proxy
 3 pursuant to this section shall belong to the person on whose behalf it was taken and the
 4 majority of the fish and wildlife taken by a proxy shall remain in the community or area in
 5 which it was taken. No person may give or receive cash remuneration in connection with
 6 any proxy harvest. A person who gives a proxy pursuant to this section may not participate
 7 in the hunt or fishery for which the proxy was given. The proxy hunting and fishing
 8 authorized by this section shall be further subject to the limitations and reporting
 9 requirements of AS 16.05.405(d), (e), and (f).

10
 11

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

12

...

13

(2) "barter" means the exchange or trade of fish or [GAME] wildlife, or their

14

parts, taken for subsistence uses

15

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

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

3 . . .

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

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

. . .

14 (11) "domicile" means the true and permanent home of a person from which the
15 person has no present intention of moving and to which the person intends to return whenever the

1 person is away; [DOMICILE MAY BE PROVED BY PRESENTING EVIDENCE
2 ACCEPTABLE TO THE BOARDS OF FISHERIES AND GAME;]

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

6 ...

7 (14) "fishery" means a specific administrative area in which a specific fishery
8 resource is taken with a specific type of gear; however, the Board of Fisheries may designate a
9 fishery to include more than one specific administrative area, type of gear, or fishery resource;
10 in this paragraph

11 (A) "gear" means the specific apparatus used in the harvest of a fishery resource;

12 and

13 (B) "type of gear" means an identifiable classification of gear and may include

1 (I) classifications for which separate regulations are adopted by the Board of
 2 Fisheries or for which separate gear licenses were required by former AS 16.05.550 - 16.05.630;
 3 and

4 (ii) distinct subclassifications of gear such as "power" troll gear and "hand" troll
 5 gear or sport gear and guided sport gear;

6 ...

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

9 ...

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

1 (19) ["GAME] "Wildlife population" means a group of game animals of a single
 2 species or subgroup manageable as a unit;

3 ...

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

8 ...

9 (26) "resident" means a person who for the preceding 12 consecutive months has
 10 maintained a permanent place of abode in the state and who has continually maintained a voting
 11 residence in the state; [AND IN THE CASE OF A PARTNERSHIP, ASSOCIATION, JOINT
 12 STOCK COMPANY, TRUST, OR CORPORATION, "RESIDENT" MEANS ONE THAT HAS
 13 ITS MAIN OFFICE OR HEADQUARTERS IN THE STATE;] however, a member of the
 14 military service who has been stationed in the state for the preceding 12 consecutive months is a
 15 resident for the purposes of this paragraph, and the dependent of a resident member of the military

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

4 **NOTE:** CSHB 25 (RES), signed by the Governor May 21, 1997, changes this definition
 5 of "resident" effective January 1, 1998. A copy of the new definition is
 6 attached as page 51.
 7
 8

9 [(27) "RURAL AREA" MEANS A COMMUNITY OR AREA OF THE STATE
 10 IN WHICH THE NONCOMMERCIAL, CUSTOMARY, AND TRADITIONAL USE OF FISH
 11 OR GAME FOR PERSONAL OR FAMILY CONSUMPTION IS A PRINCIPAL
 12 CHARACTERISTIC OF THE ECONOMY OF THE COMMUNITY OR AREA;]

13 (27) "rural community or area" is a community or area substantially
 14 dependent on fish and wildlife for nutritional and other subsistence uses.

15 ...

16 (30) "subsistence fishing" means the taking of, fishing for, or possession of fish,
 17 shellfish, or other fisheries resources [BY A RESIDENT DOMICILED IN A RURAL AREA OF

1 THE STATE] for subsistence uses with gill net, seine, fish wheel, long line, or other means
2 defined by the Board of Fisheries;

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

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

1 (33) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner
 2 disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner
 3 capture or kill fish or [GAME] wildlife;

4 . . .

5
 6 Sec. . . . This Act takes effect on the effective date of [describe the
 7 constitutional amendment authorizing a rural priority].

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

21 (26) "resident" means

22 (A) a person who for the [PRECEDING] 12 consecutive months
23 immediately preceding the time when the assertion of residence is made
24 has maintained the person's domicile (A PERMANENT PLACE OF ABODE)
25 in the state and who is neither claiming residency in another state, territory,
26 or country nor obtaining benefits under a claim of residency in another
27 state, territory, or country;

28 (B) [HAS CONTINUALLY MAINTAINED A VOTING
29 RESIDENCE IN THE STATE; AND IN THE CASE OF] a partnership,
30 association, joint stock company, trust, or corporation [, "RESIDENT" MEANS
31 ONE] that has its main office or headquarters in the state; a natural person
1 who does not otherwise qualify as a resident under this paragraph may not
2 qualify as a resident by virtue of an interest in a partnership, association,
3 joint stock company, trust, or corporation;

4 (C) [HOWEVER,] a member of the military service, or United
5 States Coast Guard, who has been stationed in the state for the
6 [PRECEDING] 12 consecutive months immediately preceding the time when
7 the assertion of residence is made;

8 (D) a person who is [A RESIDENT FOR THE PURPOSES OF
9 THIS PARAGRAPH. AND] the dependent of a resident member of the military
10 service, or the United States Coast Guard and who has lived [BEEN
11 LIVING] in the state for the 12 consecutive months immediately preceding
12 the time when the assertion of residence is made; or

13 (E) [PRECEDING YEAR IS A RESIDENT FOR THE
14 PURPOSES OF THIS PARAGRAPH; AND A PERSON WHO IS] an alien
15 [BUT] who for the 12 consecutive months immediately preceding the time
16 when the assertion of residence is made [ONE YEAR] has maintained the
17 person's domicile (A PERMANENT PLACE OF ABODE) in the state and
18 who is neither claiming residency in another state, territory, or country
19 nor obtaining benefits under a claim of residency in another state,
20 territory, or country [IS A RESIDENT FOR THE PURPOSES OF THIS
21 PARAGRAPH];

22 * Sec. 4. This Act takes effect January 1, 1998.

1

2 **NOTE:** The sunset provision in Section 12, Chapter 1, SSSLA 1992 must be repealed
3 as part of the package.

4
5 **NOTE:** Should boards be given authority to adopt implementing regulations before
6 the effective date of the statute?

7
8 **NOTE:** Appropriate legislative findings should be added to the Act.

9
10 **NOTE:** There is some housekeeping to do after basic structure is in place (*e.g.*,
11 consistent use of community or area, capitalization, use of domicile and
12 resident).

13
14 **NOTE:** The term "wildlife" has been used in place of "game" in the draft statutes.
15 Other statutes governing fish and game/wildlife use the term "game."
16 Conforming amendments will be necessary in the rest of AS 16.05 and the
17 regulations to standardize the use of these terms.

