HJR
202

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)
Date Referred to Committee: September 27, 1999

FURTHER REFERRALS:

Date of Committee Action: 9/27/99

The FINANCE Committee considered: HJR 202

HOUSE JOINT RESOLUTION NO. 202 CONST.AM: SUBSISTENCE

Proposing an amendment to the Constitution of the State of Alaska relating to use of indigenous subsistence resources by residents.

recommends it be replaced with the following committee substitute CS HJR 202 (FIN) [ ] the same title [ ] a new title

[ ] additional referral to ____________ Committee
[ ] attached amendment(s)

ADOPTS: ____________ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) ____________

[ ] zero fiscal note(s) ____________

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) Of of Lt Gov 9/27/99
Fish & Game 9/27/99

[ ] zero fiscal note(s) ____________

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
[signature]	Therriault				
[signature]	Mulder	X			
[signature]	Austerman	X			
[signature]	Bunde			✓	
[signature]	Kohring		X		
[signature]	Moses	X			
[signature]	Williams	X			
[signature]	G. Davis			✓	
[signature]	Foster	X			
[signature]	J. Davies	X			
[signature]	Grussendorf	X			

CHAIR'S SIGNATURE [signature]

No: 2

FISCAL NOTE

Bill Version: CSHJR 202(JUD)
(H) Publish Date: 9/27/99

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)		Dept. Affected	Office of the Governor
Title	Constitutional Amendment: Subsistence	BRU	Elective Operations
		Component	General and Primary
Sponsor	House Judiciary Committee		
Requester	House Judiciary Committee	Component Serial No.	22

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual		1.5				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	1.5	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF		1.5				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	1.5	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: ______

POSITIONS

Full-time						
Part-time						
Temporary						

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

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by	Gail Fenumiai	Phone	465-3935
Division	Division of Elections	Date/Time	9/27/99 8:57 AM
Approved by C	Lt. Governor Fran Ulmer	Date	9/27/99
Agency	Lieutenant Governor's Office		

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Bill Version: CSHJR 202 (JUD)
(H) Publish Date: 9/27/99

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction)
Title: Constitutional amendment for a subsistence preference
Sponsor: House Rules
Requester: House Judiciary

Dept. Affected: Fish and Game
BRU: ComFish, Boards, Subsistence
Component:
Component Serial No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	10,000.0					

FUND SOURCE (Thousands of Dollars)

	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
1002 Federal Receipts	10,000.0					
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	10,000.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: ____

POSITIONS

Full-time						
Part-time						
Temporary						

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

If the legislature places a constitutional amendment before the Alaskan voters before October 1, 1999, the US Congress has authorized $10,000.0 to go to the State of Alaska to implement a unified system of subsistence management and to provide support to the state boards of fish and game and local and regional fish and game advisory committees. The authorization for the department of fish and game to receive and expend these funds is contained in Section 8 of Chapter 84 SLA 99.

Prepared by: Geron Bruce
Division: Commissioner's Office
Approved by Commissioner Frank Rue: Geron Bruce for
Agency: Department of Fish and Game

Phone: 465-6143
Date/Time: 09/27/99
Date: 9/27/98

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COMMITTEE COPY

Subsistence Handbook

Second Special Session – 21st Legislature

September 1999

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RESOLUTION FOR A

CONSTITUTIONAL AMENDMENT ON SUBSISTENCE

FINAL EXTENSION OF

MORATORIUM ON FEDERAL TAKEOVER

Statement of Senator Stevens
Subsistence
October 13, 1998

Two weeks ago I met with Secretary Babbitt at my home to discuss the subsistence situation in Alaska. Senator Murkowski and Congressman Young both had introduced legislation calling for a two-year moratorium on the federal takeover of fish and game management in Alaska. Each asked me to include such a moratorium on an appropriations bill moving through Congress. Reluctantly, I sat down to explore with the Secretary the options Alaska could pursue to forestall a takeover.

My reluctance stemmed from the fact that I could not guarantee the Secretary that the State Legislature would act to resolve this crisis. In essence, all Frank, Don and I could do was to seek more time with the knowledge that the Secretary has stated repeatedly that any delay of the December 1 deadline would have to be acceptable to him or he would recommend a veto by the President. The Secretary drove a hard bargain. His position was that he would not support granting any more time unless the subsistence regulations were finalized and when the federal government took over it would receive the financial resources to manage immediately and effectively.

Secretary Babbitt also insisted that Congress let lapse the hard-fought changes we made to ANILCA last year. Those changes would have, among other things, forced federal courts to give deference to state administrative decisions on subsistence, thereby making it much harder for the federal government to overrule state managers. That modification, and many other positive changes such as a sensible definition of "rural" and limitations on the commercial sale of subsistence goods expire December 1.

Alaska has earned more time, but the Secretary has won a clear path toward federal management by obtaining the financial resources to effectively implement the takeover, if the Legislature does not act this coming session. Senator Murkowski, Congressman Young and I worked with the Secretary on this proposal and we all have agreed to this approach.

It is our hope that Alaskans will join together to retain fish and game management. If they do, this amendment will allow the State of Alaska to use as much as $11 million to help defray the cost of management, rather than the federal government gaining the funds.

Throughout these discussions Secretary Babbitt has been accessible, straightforward and and honest.

The amendment:

Delays until September 30, 1999, the expenditure of funds (totaling $11 million) to implement and enforce federal regulations regarding the federal law preference for subsistence uses of fish and wildlife on navigable waters in Alaska that are subject to federal reserved water rights. The measure allows the federal government to publish final subsistence regulations.

If the Alaska Legislature does not act to place a subsistence amendment on the ballot by June 1, 1999, the Department of the Interior will receive $1 million of the $11 million total to begin preparing for the implementation and enforcement of federal regulations.

If the Alaska Legislature fails to place a subsistence amendment on the ballot prior to September 30, 1999, the federal takeover will occur and the Departments of the Interior and Agriculture will receive a total of $11 million for management. If the State Legislature does act to place an amendment on the ballot, the takeover will be forestalled and the State will receive the $11 million for management.

FROM THE CONGRESSIONAL RECORD, OCTOBER 19, 1998

H.R. 4328 - MAKING OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR FY 1999

SEC 339 - REGARDING RESTRICTIONS ON FEDERAL MANAGEMENT UNDER TITLE VIII

SEC. 339. (a) RESTRICTION ON FEDERAL MANAGEMENT UNDER TITLE VIII OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.—

(1) Notwithstanding any other provision of law, hereafter neither the Secretary of the Interior nor the Secretary of Agriculture may, prior to December 1, 2000, implement or enforce any final rule, regulation, or policy pursuant to title VIII of the Alaska National Interest Lands Conservation Act to manage and to assert jurisdiction, authority, or control over land, water, and wildlife, in Alaska for subsistence uses, except within—

(A) areas listed in 50 C.F.R. 100.3(b) (October 1, 1998) and

(B) areas constituting "public land or public lands" under the definition of such term found at 50 C.F.R. 100.4 (October 1, 1998).

(2) The areas in subparagraphs (A) and (B) of paragraph (1) shall only be construed to mean those public land which as of October 1, 1998, were subject to federal management for subistence uses pursuant to Title VIII of the Alaska National Interest Lands Conservation Act.

(b) SUBSECTION (A) REPEALED.—

(1) The Secretary of the Interior shall certify before October 1, 1999, if a bill or resolution has been passed by the Alaska State Legislature to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability consistent with, and which provide for the definition, preference, and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act.

(2) Subsection (a) shall be repealed on October 1, 1999, unless prior to that date the Secretary of the Interior makes such a certification described in paragraph (1).

(c) TECHNICAL AMENDMENTS TO THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.—Section 805 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3115) is amended—

(1) in subsection (a) by striking "one year after the date of enactment of this Act,"

(2) in subsection (d) by striking "within one year from the date of enactment of this Act,".

(d) EFFECT ON TIDAL AND SUBMERGED LAND.—Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska.

105th CONGRESS
2D SESSION

H.R. 4328

CONFERENCE REPORT

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4328) "making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1999, and for other purposes", having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment, insert:

DIVISION A—OMNIBUS CONSOLIDATED APPROPRIATIONS

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1999, and for other purposes, namely:

NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION

NATURAL RESOURCE DAMAGE ASSESSMENT FUND

To conduct natural resource damage assessment activities by the Department of the Interior necessary to carry out the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 et seq.), Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.), the Oil Pollution Act of 1990 (Public Law 101–380), and Public Law 101–337; $4,492,000, to remain available until expended: Provided, That unobligated and unexpended balances in the United States Fish and Wildlife Service, Natural Resource Damage Assessment Fund account at the end of fiscal year 1998 shall be transferred to and made a part of the Departmental Offices, Natural Resource Damage Assessment and Restoration, Natural Resource Damage Assessment Fund account and shall remain available until expended.

MANAGEMENT OF FEDERAL LANDS FOR SUBSISTENCE USES

SUBSISTENCE MANAGEMENT, DEPARTMENT OF THE INTERIOR

For necessary expenses of bureaus and offices of the Department of the Interior to manage federal lands in Alaska for subsistence uses under the provisions of Title VIII of the Alaska National_Interest Lands Conservation

Act (Public Law 96–487 et seq.) except in areas described in section 339(a)(1) (A) and (B) of this Act, $8,000,000 to become available on September 30, 1999, and remain available until expended: Provided, That if prior to October 1, 1999, the Secretary of the Interior determines that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, the Secretary of the Interior shall make an $8,000,000 grant to the State of Alaska for the purpose of assisting that State in fulfilling its responsibilities under sections 803, 804, and 805 of that Act: Provided further, That if, on June 1, 1999, the Secretary is unable to make a determination that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, $1,000,000 of these funds shall

become available on June 1, 1999, and shall remain available until expended (with expended amounts to be subtracted from the amount that could be granted to the State), for the Secretary to conduct data gathering and research on subsistence uses, and formulate plans for operational aspects and in-season management, but not to implement and enforce subsistence use management beyond those public lands which as of October 1, 1998, were subject to federal management for subsistence uses pursuant to Title VIII of the Alaska National Interest Lands Conservation Act.

MANAGEMENT OF NATIONAL FOREST LANDS FOR SUBSISTENCE USES

SUBSISTENCE MANAGEMENT, FOREST SERVICE

For necessary expenses of the Forest Service to manage federal lands in Alaska for subsistence uses under the provisions of Title VIII of the Alaska National Interest Lands Conservation Act (Public Law 96–487 et seq.) except in areas described in section 339(a)(1)(A) and (B) of this Act, $3,000,000 to become available on September 30, 1999, and remain available until expended: Provided, That if prior to October 1, 1999, the Secretary of the Interior determines that the Alaska State Legislature has approved a bill or resolution to amend the Constitution of the State of Alaska that, if approved by the electorate, would enable the implementation of state laws of general applicability which are consistent with, and which provide for the definition, preference and participation specified in sections 803, 804, and 805 of the Alaska National Interest Lands Conservation Act, the Secretary of Agriculture shall make a $3,000,000 grant to the State of Alaska for the purpose of assisting that State in fulfilling its responsibilities under sections 803, 804, and 805 of that Act.

CHRONOLOGY OF STATE AND FEDERAL SUBSISTENCE MANAGEMENT

Chronology of State and Federal Subsistence Management

1978
Alaska Subsistence Law

The Alaska legislature passed the state's subsistence law in 1978. The law established subsistence as the highest priority use of the state's fish and game resources, directed the Boards of Fisheries and Game to develop regulations to allow for subsistence harvests whenever a biological surplus was available, and created the Division of Subsistence within the Alaska Department of Fish and Game. The 1978 law defined subsistence *uses* of fish and wildlife, but not subsistence *users*.

1980
Alaska National Interests Lands Conservation Act

Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) in 1980. Title VIII of ANILCA establishes subsistence uses of fish and wildlife and other renewable resources as the priority consumptive use of all resources on the public lands. "Subsistence uses" are customary and traditional uses by rural Alaska residents of wild, renewable resources for personal or family consumption, for the making and selling of handicrafts, for barter or sharing for personal or family consumption, and for customary trade. Title VIII provides that the Secretaries of Interior and Agriculture shall not implement its provisions if the state enacts laws consistent with the priority. In 1980, state law was consistent with title VIII, and the state managed subsistence uses on all lands in Alaska.

1982
Joint Boards Rural Regulation

Alaska's subsistence statute originally did not include a preference for rural residents. Nonetheless, in 1982, the Joint Boards of Fisheries and Game adopted regulatory language establishing a subsistence priority for rural residents.

1985
Madison Decision

In 1985, the Alaska Supreme Court ruled in *Madison v. Alaska Department of Fish and Game*, 696 P.2d (Alaska 1985), that the Joint Boards' regulations were not consistent with the 1978 subsistence statute, since the statute did not provide a priority for rural residents. The regulations therefore were invalid, and the state fell out of compliance with title VIII.

1986
Amendments to Alaska's Subsistence Law

In 1986, the Alaska legislature substantially changed the state's 1978 subsistence law. It amended the definition of "subsistence uses" to require residency in a rural area and defined "rural areas." The amended law required the state boards to identify which fish stocks and wildlife populations were customarily and traditionally taken by subsistence users, and to adopt regulations providing subsistence users reasonable opportunity to harvest these resources. The Department of Interior again found the state to be in compliance with title VIII of ANILCA.

1989
***McDowell* Decision**

A group of non-rural residents filed a court challenge to the state's revised subsistence law. In 1989, the Alaska Supreme Court ruled in *McDowell vs. State of Alaska*, 785 P.2d 1 (Alaska 1989), that the rural preference language of the state's subsistence statute violated the equal access clauses of the state constitution. Consequently, the state's subsistence program was no longer in compliance with title VIII of ANILCA.

1990
Federal Management Begins

Because state law no longer provided rural residents a priority for subsistence hunting and fishing on public lands, the Secretaries of Interior and Agriculture assumed management authority over subsistence uses on public lands in Alaska on July 1, 1990. They created the Federal Subsistence Board (FSB), composed of one representative from each of the five federal land management agencies in Alaska (Bureau of Land Management, National Park Service, Bureau of Indian Affairs, U.S. Forest Service, and U.S. Fish and Wildlife Service). In addition, a member of the public serves as the FSB chair. Initially, the federal agencies interpreted "public lands" to include only lands and waters owned by the United States. Therefore, the agencies did not generally regulate subsistence uses in navigable waters.

1992
Amendments to the Alaska Subsistence Law

In 1992, the Alaska legislature further amended the state's subsistence law. These statutory changes did not bring the state's subsistence laws into compliance with title VIII, however. The law continued to grant a subsistence priority over other consumptive uses, but required the state boards to identify nonsubsistence areas where no subsistence priority exists. To comply with the 1992 law, the Boards of Fisheries and Game conducted a comprehensive review of existing subsistence regulations, and developed new subsistence regulations, including those creating non-subsistence areas.

1994
***Katie John* Decision**

After the Secretaries assumed subsistence management authority on public lands, several rural residents filed suit against the state and the United States to include navigable waters in the federal subsistence program. In March 1994, the U.S. District Court in Anchorage ruled in *Katie John v. United States* that "public lands" to which title VIII applies include all navigable waters in Alaska under the navigational servitude doctrine.

On appeal, the U.S. Court of Appeals for the Ninth Circuit ruled in April 1995 that the navigational servitude does not constitute "public lands" within the meaning of ANILCA. However, it found that "public lands" include navigable waters in which the United States has a reserved water right, and it ordered the federal agencies to identify the waters subject to that right. The U.S. Supreme Court denied the state's petition for certiorari review of the Ninth Circuit decision.

1994
***Babbitt* Decision**
In *Alaska v. Babbitt*, which was consolidated with the *Katie John* case, the state challenged the authority of the federal agencies to preempt state management of subsistence harvests on public lands. The U.S. District Court in Anchorage ruled that Congress granted the Secretaries authority in ANILCA to preempt state management. In January 1995, the state withdrew its appeal of the *Babbitt* case.

1995
***Kenaitze* Decision**
In *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995), the Alaska Supreme Court upheld the non-subsistence area provisions of the state's 1992 subsistence law. However, the Court struck down the state's "tier II" criteria of proximity of domicile in light of *McDowell*. The Court ruled that the practice of considering proximity of the applicant's domicile to a fish or game population in determining eligibility for tier II permits violated the equal access clauses of the state constitution.

1995
***Totemoff* Decision**
In October 1995, the Alaska Supreme Court ruled in *Totemoff v. State*, 905 P.2d 954 (Alaska 1995), that the state may enforce its hunting and fishing laws against subsistence users on federal land, so long as state laws do not conflict with federal laws or regulations. The state therefore could prosecute a subsistence user charged with spotlighting deer, since state law was not in conflict with ANILCA. The Court also ruled that the state had jurisdiction to prosecute the subsistence hunter because he violated Alaska law in navigable waters and ANILCA does not give the federal government authority to regulate subsistence uses in navigable waters of Alaska. This decision directly conflicts with the Ninth Circuit's holding in *Katie John*.

1998
Legislative Council lawsuit
In January 1998, the Alaska Legislative Council and seventeen state legislators in their individual and official capacities filed suit challenging title VIII and federal regulations for subsistence harvests on public lands. The district court dismissed the case in July 1998. Although the Legislative Council's claims were different than the state's claims in the *Babbitt* case, the court barred claims that could have been brought in that case. The court also found that the six-year statute of limitations bars a facial Equal Protection challenge to ANILCA's rural/nonrural distinction. Lastly, the court declined on ripeness grounds to review the proposed rule extending federal jurisdiction to navigable waters since the rule was not final when the case was initiated.

On July 13, 1999, the Court of Appeals for the D.C. Circuit affirmed on other grounds, ruling that the plaintiffs lacked standing to sue. The court held that the claimed injuries to the Council and legislators in their official capacities are losses of political power, not personal losses, and are not sufficient to confer standing. Similarly, the Legislative Council suffers no injury distinct from the state's, and the Council is not authorized to bring suit on behalf of the state. The legislators in their individual capacities did not allege sufficient facts to show injury that would entitle them to

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challenge ANILCA on Equal Protection grounds, or to challenge federal subsistence regulations under the Administrative Procedures Act.

1999

Expanding Federal Program

In January 1999, the Secretaries issued a final rule implementing the *Katie John* decision. The rule is to become effective on October 1, 1999, but may be delayed to December 1, 2000 if the state legislature passes a bill or resolution to amend the state constitution to provide for the title VIII priority. The final rule expands the federal subsistence program to include all waters within the exterior boundaries of 34 identified federal areas, including waters passing through inholdings within these areas, as well as inland waters adjacent to the exterior boundaries of the 34 areas.

The rule also expands federal jurisdiction to lands selected but not conveyed to the State of Alaska and Alaska Native Corporations, if the lar 1 is within the boundaries of the National Park System, National Wildlife Refuge System, National Wild & Scenic River Systems, National Forest Monument, National Recreation or Conservation Areas, or new National forest or forest addition.

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Summary of Subsistence Cases

SUMMARY OF SUBSISTENCE CASES
March 5, 1998

I. FEDERAL CASES

1. Alaska v. Babbitt, 1994 WL 487830 (D. Alaska 1994).

In 1992, the state challenged regulations adopted by the Secretaries of Interior and Agriculture to implement Title VIII of ANILCA (subsistence uses on federal "public lands"). The State claimed that ANILCA does not provide statutory authority for the Secretaries' implementation of a comprehensive scheme for fish and wildlife management on the "public lands." The case was consolidated with *Katie John v. State (John II)*.

On March 30, 1994, Judge Holland ruled that the Secretaries of Interior and Agriculture have authority to manage the taking of fish and wildlife on "public lands." The state appealed, but dismissed its appeal on January 24, 1995. The Alaska legislature and the Alaska Outdoor Council (AOC) attempted unsuccessfully to intervene and continue the appeal. The legislature and AOC filed petitions for writ of certiorari, which the U.S. Supreme Court denied.

2. State v. Babbitt (known as the *Katie John* case), 72 F.3d 698 (9th Cir. 1995), on remand District Court No. A90-484-CV (HRH).

In this ANILCA subsistence case, the plaintiffs claim that ANILCA requires the federal government to manage fisheries in navigable waters of Alaska, and accordingly, that the Federal Subsistence Board should assume management of the Copper River and authorize a subsistence fishery at Bazulnetas.

The Ninth Circuit Court of Appeals reversed the District Court ruling that navigable waters are "public lands" because the navigational servitude is an interest to which the United States has title. (The navigational servitude is a power that enables the federal government to regulate navigable waters for purposes of commerce, navigation and national defense). The Ninth Circuit accepted the alternative argument that "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation). The court remanded the case to the Departments of Interior and Agriculture to identify those waters. The U.S. Supreme Court denied the state's petition to review the Ninth Circuit decision.

In December 1997, the Departments of Interior and Agriculture published proposed rules that include in federal regulation subsistence activities on inland navigable waters in which the United States has a reserved water right, and that identify about half the state as subject to federal authority to regulate fisheries. The regulations also would extend the Federal Subsistence Board's management to some federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act until conveyed. In addition, the regulations would specify that the Secretaries have authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when they determine that these activities interfere with the subsistence priority on the public lands to such an extent as to result in a failure to provide the subsistence priority. They would also delegate authority to the Federal Subsistence Board to recommend to the Secretaries further extensions of its authority in lands or waters with federal interests.

Congress has stalled the formal progress of the agencies' regulations by adding moratoriums to its budget bills. The current moratorium expires December 1, 1998.

3. Arctic Regional Council v. United States, United States District Court No. A90-419-CV (HRH) (state not a party, but case is consolidated with *Kluti Kaah v. Alaska*).

This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

Plaintiffs challenge several aspects of regulations adopted by the Federal Subsistence Board including the failure of federal regulations to extend to navigable waters and territorial seas.

4. Fish and Game Fund v. Alaska and United States (United States District Court No. A92-0443-CV (HRH).

The court has stayed this ANILCA case pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

A coalition of commercial salmon fishermen in the Yukon and Kuskokwim Rivers challenge the Area M (False Pass) fishery also addressed in the *Elim* state court case. Plaintiffs raise various constitutional and statutory grounds, including violation of the Magnuson Act and Title VIII of ANILCA, and seek to have the Secretary of Commerce or Interior take over management of commercial and subsistence fisheries in Area M and in the Y-K region. A coalition consisting of the Peninsula Marketing Association, Concerned Area M Fishermen, Aleutians East Borough, and various Area M Native groups have intervened. The state, federal defendants, and intervenors have filed motions to dismiss plaintiffs' second amended complaint. Judge Holland had the matter under advisement until the case was stayed.

5. *Ketzler v. Alaska*, United States District Court No. F90-040-CV (HRH).

This ANILCA case has been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

This case challenged the closure of the Kantishna and Toklat Rivers to subsistence fishing for chum salmon under state regulations now superseded. The plaintiffs assert that the Board of Fisheries has impermissibly denied them subsistence rights provided under ANILCA and the Alaska Native Allotment Act. The state moved for dismissal of plaintiffs' ANILCA and Allotment Act claims in September, 1991, based on jurisdictional grounds similar to those asserted by the state in *John* and *Kluti-Kaah*. The state's motion was denied with leave to renew if and when the case is reactivated.

6. *Kluti Kaah v. Alaska*, United States District Court No. A90-004-CV (HRH).

This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

Plaintiffs and intervenors initially challenged state and federal regulations governing subsistence hunting of caribou in the Copper River basin. Plaintiffs claimed, among other things, that the federal regulations impermissibly fail to cover caribou located on state lands. This case has been consolidated with *Arctic Regional Council v. United States*. Kluti-Kaah filed an amended complaint which does not include any claims against the state. The court granted an unopposed motion by the federal government to dismiss TCC's claims against it and the court dismissed all of the claims against the state following an unopposed motion by the state.

7. *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994), on remand District Court No. A93-023-CV (HRH).

This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

The plaintiffs (the villages of Quinhagak and Goodnews Bay, the AVCP, and individual Yup'ik Natives) seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanektok and Goodnews Rivers for subsistence. The plaintiffs claim that navigable rivers are "public lands" for purposes of ANILCA, that the state has no subsistence jurisdiction over the waters of the Kanektok and Goodnews River systems, and that the federal government has the authority to regulate non-public lands and waters owned by the state when necessary to provide for subsistence uses.

In March 1993, the Board of Fisheries lifted the ban on harvest of rainbow trout for subsistence in southwest Alaska and allowed fishermen to keep rainbow trout harvested incidentally in other subsistence fisheries. In April 1993 the Federal Subsistence Board adopted regulations which allow the harvest of rainbow trout for subsistence in non-navigable waters, with some restrictions. Judge Holland denied the plaintiffs' motion for preliminary injunction. The plaintiff appealed. The Ninth Circuit reversed, finding that the villages face a threat of loss of an important subsistence food source, as well as destruction of their culture and way of life. The Ninth Circuit suggested that the state's "incidental takings" regulation denigrates the importance of subsistence fisheries, and that by its narrow interpretation of "public lands" the United States has allowed Alaska to continue a policy of promoting sport and commercial fishing at the expense of subsistence users.

The parties agreed to stay proceedings on the merits of the case pending final action on the proposed rulemaking that would extend the federal subsistence program to navigable waters in which the United States has a reserved water right. Congress' current budget bill contains a moratorium forbidding the agencies to finalize regulations until December 1, 1998.

8. Stevens Village v. McVee and Rosier, United States District Court, No. A92-567-CV (HRH).

This is one of the jointly managed ANILCA cases that have been stayed pending final resolution of the jurisdictional issues raised in *John* and the rulemaking petition requesting that federal regulatory authority be extended to state and private lands.

In 1992, plaintiffs filed suit against the Federal Subsistence Board (FSB) and ADF&G, alleging they are being denied their federal subsistence priority within Game Management Unit 25(D) West. Following denial of a TRO, the federal defendants moved for a voluntary remand to the FSB. On remand, the FSB changed its regulations to accommodate plaintiffs' requests for: an extension of the season; provisions allowing a permittee to designate another person to hunt on his or her behalf; and closing federal public lands in GMU 25D West to hunting by non local residents. The parties filed cross-motions for summary judgment and held oral argument on the only remaining issue, which is whether the FSB has authority to regulate hunting on state managed lands adjacent to federal lands in GMU 25D West to protect subsistence uses on "public lands" in GMU 25D West. Judge Holland has characterized this as the "where II" issue.

Judge Holland tentatively indicated in the stay order that the FSB lacks authority off "public lands" because the Secretaries of Interior and Agriculture did not grant such authority in the regulations establishing the FSB. Judge Holland expressed no opinion on the question of whether the Secretaries themselves have that authority, but indicated that he would entertain further briefing on the issue. Meanwhile, the *Stevens Village* plaintiffs and others submitted a rulemaking petition to the Secretaries of Agriculture and Interior, requesting that they extend the FSB's authority to state and private lands. The parties agreed to stay the case while the Secretaries considered the petition.

In December 1997, the Departments of Interior and Agriculture published proposed rules that include in federal regulation subsistence activities on inland navigable waters in which the United States has a reserved water right, and that identify about half the state as subject to federal authority to regulate fisheries. The regulations also would specify that the Secretaries have authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when they determine that these activities interfere with the subsistence priority on the public lands to such an extent as to result in a failure to provide the subsistence priority. They would also delegate authority to the Federal Subsistence Board to recommend to the Secretaries further extensions of its authority in lands or waters with federal interests.

Congress has stalled the formal progress of the agencies' regulations by adding moratoriums to its budget bills. The current moratorium expires December 1, 1998.

9. Peratrovich v. United States (United States District Court No. A92-734-CV (HRH).

This is one of the jointly managed ANILCA cases.

In an amended complaint filed on October 24, 1996, plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the waters of southeast Alaska as "customary trade." (The state "customary trade" regulation allows sale of up to 32 pounds of herring roe on kelp by an individual, and up to 158 pounds per household.) The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur.

Plaintiffs contend primarily that (1) the United States owns the submerged lands within the Tongass National Forest as a result of a prestatehood withdrawal, and (2) that the waters in question are "public lands" within the meaning of ANILCA, on a reserved water rights theory. On December 18, 1996, the United States moved for judgment on the pleadings, arguing that the case should be dismissed for failure to join the state as an indispensable party, and also on the grounds that the plaintiffs have not exhausted administrative remedies, and that the plaintiffs' remaining claims have been rejected by the Ninth Circuit in the *Katie John* decision.

The court agreed to defer ruling on the United States' motion for judgment until the state obtained legislative authority to intervene. On March 14, 1997, the state moved to intervene, at which time it also filed a proposed counterclaim and answer to plaintiffs' amended complaint. The state's counterclaim seeks in part a declaration that the state owns the lands beneath the marine waters of the Tongass. The court granted the state's motion to intervene on April 30, 1997. The United States' motion for judgment on the pleadings was pending when the court ordered the case stayed until July 1, 1998, when it will be clear whether the legislature will permit a constitutional amendment to be put to the vote.

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

Subsistence hunters sought declaratory and injunctive relief with respect to alleged illegal Alaska Board of Game regulations regarding subsistence hunting of moose and caribou. The district court held that: (1) regulations establishing seasons and bag limits on taking of moose and caribou by subsistence hunters were arbitrary and invalid; (2) whether Alaska's statute on taking of antlerless moose was applicable to subsistence hunters was not yet ripe for review; and (3) neither ANILCA nor Alaska's second subsistence law preclude subsistence hunter from challenging validity of hunting regulation as defense to a criminal prosecution.

On remand, the issue of the insufficient basis for the board's finding went back and forth between the court and the board. Eventually, Lime Village decided to voluntarily dismiss the suit.

11. Kenaitze Indian Tribe v. State, 860 F.2d 312 (9th Cir. 1988).

The Kenaitze Indian tribe brought suit to force the state to promulgate regulations defining the term "rural area" in a manner that would implement the federal subsistence priority in ANILCA, and for a preliminary injunction to prevent the state from enforcing its existing statutory and regulatory definition of "rural area." The District Court granted the state's motion for partial summary judgment, and the tribe appealed. The Court of Appeals held that: (1) neither Secretary of Interior nor state was entitled to deference in their interpretation of term "rural," and (2) state's definition of "rural area" was in conflict with federal definition.

12. McDowell v. United States, A92-531-CV (HRH)("McDowell II"); 32 F.3d 572 (table)(9th Cir. 1994), unpublished decision.

Sam McDowell and other individuals and organizations filed suit in federal court challenging title VIII of ANILCA as violative of Equal Protection, the right to travel, due process, the Alaska Statehood Act, the Equal Footing Doctrine, and the Eleventh Amendment, among other counts. The district court reached the merits of the plaintiffs' claims in ruling on motions for summary judgment, ruling against the plaintiffs on all of them. As to the equal protection claim, the court found that subsistence hunting and fishing is not a fundamental right entitled to "strict scrutiny." The plaintiffs argued that ANILCA violated their right to pursue a livelihood and argued also that the act infringed on their right to travel, a fundamental right. The court held that the right to pursue a calling is not a fundamental right for purposes of the equal protection clause and that the Constitution does not protect intrastate travel. Moreover, title VIII only requires

continuing residency, not a particular duration of residency. The latter is subject to strict scrutiny, while the former is subject only to the rational basis standard of review.

Finally, the plaintiffs argued that the right to engage in subsistence hunting and fishing is in and of itself a fundamental right. The court rejected this argument as well, finding therefore that the rational basis test applies for purposes of the equal protection analysis and finding the urban/rural classification to be rationally related to a legitimate government interest, protecting the nutritional, economic, traditional, and cultural needs of rural Alaskans.

On appeal, the United States argued that the plaintiffs had not demonstrated standing to bring their claims. The Ninth Circuit agreed and remanded with instructions that the district court could consider the merits if the plaintiffs presented affidavits or other evidentiary material on the standing issue. The plaintiffs did submit affidavits, and the district court found that they had sufficiently demonstrated standing, but the United States then filed a motion to dismiss for lack of subject matter jurisdiction. The court granted the motion, holding that it lacked subject matter jurisdiction when the suit was filed, June 22, 1990, because the Secretary did not recognize his obligation to implement title VIII of ANILCA and publish regulations for subsistence management of federal lands in Alaska until June 29, 1990 (effective July 1, 1990). The court dismissed the case without prejudice to refile. The plaintiffs appealed this order to the Ninth Circuit, but later withdrew it, as *Olson v. United States*, a new case filed by one of the *McDowell* plaintiffs in federal district court, raises substantially the same issues.

13. Olson v. United States, A97-031-CV(HRH)

Olson, also a plaintiff in *McDowell v. United States*, A92-531-CV (HRH), filed this case in January 1997 (the numerous other plaintiffs on the complaint all are plaintiffs also in *McDowell*, but Mr. McDowell is not a plaintiff in this case). Judge Holland dismissed the *McDowell* case for lack of subject matter jurisdiction because the plaintiffs filed suit before the Secretary assumed management authority. In dismissing the case, he invited the plaintiffs to refile it. Most of the plaintiffs took his suggestion and filed this case, raising substantially the same claims. The case has been stayed while the State pursues a political resolution to the federal takeover, but in March 1998, the plaintiffs moved to dismiss the case without prejudice in an effort to avoid removal to Alaska of a separate case filed by the Alaska Legislature Council against the United States in federal district court in Washington, D.C., *Alaska Legislative Council v. Babbitt*, No., 98-0069(JR). In response to a motion for a change of venue to Alaska, the D.C. district court granted the motion on the condition that the *Olson* case is not dismissed before March 15. The United States is expected to oppose the motion for dismissal.

14. United States v. Alexander, 938 F.2d 942 (9th Cir. 1991).

Mr. Alexander was tried and convicted under the Lacey Act of transporting herring roe taken or sold in violation of Alaska law in interstate commerce. On appeal, the Ninth Circuit held that Alaska's blanket prohibition of cash sales of herring roe conflicted with ANILCA, as ANILCA's definition of "subsistence" includes customary trade, which in turn includes sales for cash. The court also held that ANILCA's civil cause of action created by the state's failure to provide for subsistence uses did not prevent the court from considering the validity of state regulations in the course of a criminal prosecution, and that the conflict did not require that the court strike down the law, but defendants were permitted to defend against the criminal prosecution on the grounds that their activity was protected by ANILCA.

15. United States v. Skinna, 931 F.2d 530 (9th Cir. 1990).

Mr. Skinna appealed his conviction for unlawful transportation in interstate commerce of illegally taken herring roe on kelp, contending that the Alaskan fishing regulations underlying his Lacey Act conviction were invalid because they conflicted with ANILCA's priority for subsistence uses.

Mr. Skinna argued that Alaska's laws on subsistence conflicted with ANILCA's definition of "subsistence" to include "customary trade." The Court rejected this argument primarily because Skinna had failed to present any evidence at trial of customary trade.

II. STATE CASES

1. McDowell v. State, 785 P.2d 1 (Alaska 1989) ("McDowell I").

Urban residents brought suit challenging the constitutionality of Alaska's law granting a priority for rural fishers and hunters. The Alaska Supreme Court held that the law violated article VIII, sections 3, 15, and 17 of the Alaska Constitution.

Article VIII, section 3 provides that "whenever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, section 15 provides that no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

Article VIII, section 17 provides that laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

The court reasoned that section 15 was meant to ensure an equal right to participate in fisheries, regardless of where one resides. It found that although section 15 pertains only to fisheries, the prevention of grants of exclusive or special privileges with respect to fish and game is also one purpose of the common use and the uniform application clauses. The court noted that it was not implying that the constitution bars all methods of exclusion where exclusion of some residents is required for species protection, but was holding only that the residency criterion used in the act before it, which conclusively excluded all urban residents from subsistence hunting and fishing regardless of their individual characteristics, was unconstitutional.

2. *State v. Eluska*, 724 P.2d 514 (Alaska 1986).

Mr. Eluska was found in possession of a freshly killed doe in May, 1983, when deer season was closed. When charged with possessing game taken in violation of the Board of Game's regulations, he claimed that the regulations failed to differentiate between subsistence hunting and other hunting. Both the trial court and the court of appeals agreed that the state subsistence law required separate subsistence regulations. To remedy the situation, the court of appeals created a "subsistence defense," providing that if the state does not adopt regulations for subsistence uses, conduct that otherwise would violate a regulation restricting hunting is justified as a "subsistence use" if the person charged believed he or she was taking the game for subsistence uses.

The Supreme Court reversed, holding that the legislature did not intend to grant any personal right to take or possess game in the absence of regulation. Therefore, in the absence of a regulation authorizing a person to take deer when Mr. Eluska took it, the taking was unlawful.

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

The Board of Fisheries denied subsistence permits to two groups of residents because their use of salmon did not meet the Board's regulatory definition of subsistence, and both groups challenged the regulation, claiming that it is inconsistent with the statutory language and legislative intent of the 1978 subsistence law.

The Board applied all of the ten criteria of 5 AAC 01.597(a) to determine "customary and traditional" uses eligible for the subsistence priority for the Cook Inlet region, and determined that no group or community in the region satisfied all ten of the

criteria except Tyonek, English Bay, and Port Graham. As a result, the Board eliminated from the protection of the State's subsistence statute the majority of Cook Inlet fishermen who formerly fished under the State's subsistence regulations. The Supreme Court found that the Board did not properly apply the ten criteria. These criteria are to be used to distinguish first-tier general subsistence users from second-tier preferred subsistence users, not, as the Board argued, to define first-tier subsistence users by their area of residence, without regard to the amount of salmon available.

4. Totemoff v. State, 905 P.2d 954 (Alaska 1995).

Mr. Totemoff, a resident of Tatitlek, was convicted of taking deer on Naked Island (federal "public land" located in Prince William Sound) using a spotlight, which is prohibited under state general and federal subsistence hunting regulations. Mr. Totemoff appealed, arguing that spotlighting is a customary and traditional method of subsistence hunting and that ANILCA preempts all state hunting regulations on Naked Island. The Alaska Court of Appeals affirmed the conviction. The Alaska Supreme Court granted Mr. Totemoff's petition for hearing and ordered the parties to specifically address three issues: (1) whether Mr. Totemoff is entitled to a subsistence defense under ANILCA; (2) whether there is "a sufficient nonfederal land nexus" to sustain Totemoff's conviction solely under Alaska law; and (3) whether *John v. U.S.* precludes the state from asserting that tidelands or lands under navigable waters to the 3 mile limit are not subject to ANILCA.

The court issued its decision in August 1995. It held that the state has jurisdiction to enforce its hunting and fishing laws against subsistence users on federal land as long as those laws do not conflict with federal laws or regulations (i.e. the Federal Subsistence Board's jurisdiction and promulgation of regulations do not preempt nonconflicting state laws, and the state can cite and prosecute rural residents violating these laws.)

The court held also that title VIII of ANILCA does not protect customary and traditional means and methods, and therefore even if Totemoff could establish that spotlighting deer is a customary practice, he has no entitlement to engage in that practice by virtue of ANILCA.

Alternatively, the court held that even if ANILCA did protect spotlighting, Totemoff did not shoot the deer from "public lands" as defined in § 102 of ANILCA because public lands do not include navigable waters. In so concluding, the court expressly disagreed with the Ninth Circuit Court of Appeals' decision in *State v. Babbitt,* 54 F.3d 549 (commonly known as the *Katie John* case).

Finally, the court found that the regulation banning spotlighting is not invalid because the Board of Game failed to hold a hearing to determine whether the regulation was suitable for application to subsistence hunting. Totemoff had not offered any evidence that the regulation was invalidly adopted. The District Court failed to consider this issue because it ruled that Totemoff's challenge was barred by *Eluska*, however, so the case is remanded to determine whether the regulation was invalidly adopted in some other way.

The United States Supreme Court denied Mr. Totemoff's petition for certiorari.

5. *Miyasato v. State* (Alaska Court of Appeals No. A-05486).

This case was an appeal from a criminal conviction of Mr. Miyasato for taking salmon over 16 inches long from Starrigavin Creek in Sitka. Mr. Miyasato claimed that the state did not have jurisdiction to prosecute him for violations of state regulations because he was a rural resident who was taking fish from federal "public lands," over which he claims the United States has exclusive jurisdiction. The state argued that it had jurisdiction because Starrigavin Creek does not constitute "public lands" under the ninth circuit's *Katie John* decision and because the state law does not conflict with federal law. The court ruled in favor of the State based on the *Totemoff* decision.

6. *James v. State* (Alaska Supreme Court No. S-7350).

The Alaska Supreme Court heard this case on a petition for hearing from the Court of Appeals. The petitioners claimed that the Federal Subsistence Board rather than the state has jurisdiction to regulate the taking of herring roe on kelp from the tidelands of the Tongass National Forest. The Supreme Court asked the parties to brief two issues: (1) whether these waters constitute "public lands" under ANILCA and; (2) whether the state took title to the submerged lands at statehood.

In December 1997, the court resolved the case in favor of the state. It held that the state took title to the lands underlying the marine waters within the Tongass National Forest, and that therefore they do not constitute "public lands" subject to federal regulation under title VIII of ANILCA. The court decision includes a very thorough analysis of the equal footing doctrine.

DISCUSSION OF *ALASKA V. BABBITT* AND *ALASKA LEGISLATIVE COUNCIL V. BABBITT*

Discussion of *Alaska v. Babbitt* and *Alaska Legislative Council v. Babbitt*

September 16, 1999

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1. *Alaska v. Babbitt, A92-0264-CV,* was filed February 27, 1992, in U.S. District Court in Alaska. Count III of that lawsuit challenged the authority of the Secretaries of Interior and Agriculture to issue regulations implementing Title VIII of ANILCA. The U.S. District Court ruled against the state on this claim and the state appealed to the Ninth Circuit. The state stipulated to dismissal with prejudice of its appeal on Count III.

2. The complaint in *Alaska v. Babbitt* did not challenge the constitutionality of Title VIII of ANILCA, and it could not have raised these arguments on appeal.

3. ANILCA was enacted on December 2, 1980. The applicable statute of limitations, 28 U.S.C. §2401(a), requires a facial challenge to the constitutionality of the statute to be brought within six years of its enactment. Therefore, these claims were already time barred more than five years before *Alaska v. Babbitt* was filed.

4. *Alaska Legislative Council v. Babbitt*, 98-0069 (JR), was filed in 1998 in U.S. District Court in Washington, D.C. The first claim alleged that Congress did not have authority to enact Title VIII under the Indian Commerce Clause, the Commerce Clause, or the Property Clause of the U.S. Constitution, and that Title VIII violates the Tenth and Eleventh Amendments. The second claim alleged that Title VIII's rural preference violates the Equal Protection Clause. The third claim alleged that the proposed federal regulations exceed the scope of ANILCA in implementing the act.

5. Judge Robertson dismissed *Alaska Legislative Council v. Babbitt* in its entirety on July 24, 1998.

6. The judge dismissed the first claim based on the doctrine of *res judicata,* and ruled alternatively that this claim is barred by the statute of limitations. The judge ruled that this claim is barred because the state could have raised it in *Alaska v. Babbitt.* When a case has been decided on the merits, the parties are precluded from relitigating the issues raised, and the issues that could have been raised. The judge found that both the state and the Legislative Council represent the "common public rights" of the state and its citizens and therefore cannot be considered separate entities for *res judicata* purposes. The judge ruled that this claim also is barred by the six-year statute of limitations, which had already expired when the state filed *Alaska v. Babbitt.*

7. The judge also dismissed the equal protection claim based on the statute of limitations.

8. Finally, the judge ruled that the challenge to the regulations proposed by the Departments of Interior and Agriculture is not yet ripe for judicial review because the United States has not yet adopted or implemented the regulations.

9. On July 13, 1999, the U.S. Court of Appeals for the District of Columbia Circuit affirmed Judge Robertson's decision. The appellate court held that the Alaska legislators and Legislative Council lacked standing because their claimed injuries were not "personal;" their complaint revealed no harm to the legislators in their individual capacities. The State as a whole has the power to manage fish and wildlife; the legislature and individual legislators do not have the authority to sue to protect this power. Also, the appellees' claims were not ripe since the proposed federal regulations will not take effect until October 1, if at all.

9. In the only case to address the merits of some of these arguments, ***McDowell v. United States,*** A92-531-CV (HRH)("McDowell II"), the U.S. District Court rejected the equal protection and Eleventh Amendment challenges to Title VIII of ANILCA. That decision was later vacated and the case ultimately dismissed on jurisdictional grounds, but it does provide a judicial analysis of the claims.

Prepared by Alaska Department of Law

Updated September 16, 1999

POSSIBLE EFFECT OF

BESS V. ULMER DECISION

BESS V. ULMER APPLIED TO THE SUBSISTENCE AMENDMENT

1. The Alaska Supreme Court decided that there is a definite difference between an amendment to and a revision of the Alaska Constitution.

2. The difference is important because:

   A. an amendment, which makes few, simple, independent, and comparably unimportant changes to the constitution, may be proposed by the legislature as a single question for ratification by the voters;

   B. a revision, which makes numerous and important changes in the text of the constitution, can only be proposed for voter ratification by a constitutional convention with the power to reconsider any provision in the constitution.

3. In Bess v. Ulmer the Alaska Supreme Court defined a revision of the constitution to be either a qualitative or quantitative change.

4. A quantitative revision is one which makes numerous alterations to several sections or articles in the constitution.

5. A qualitative revision is one which changes the substance and integrity of the constitution to such an extent that it must be evaluated in light of the entire document.

6. It is the opinion of the attorney general that the subsistence amendment proposed by the governor is not a qualitative or quantitative revision of the Alaska Constitution.

   A. The change proposed in the subsistence amendment and the effect is localized within Article VIII of the Alaska Constitution; and

   B. While controversial, the change proposed is not so important to the substance and integrity of the Alaska Constitution to require that it be considered as a part of a reconsideration of the entire constitution.

MEMORANDUM

State of Alaska
Department of Law

TO: Pat Pourchot, Legislative Director
Office of the Governor

DATE: September 16, 1999

FILE NO:

TEL. NO: 465-3600

SUBJECT: Possible effect of Alaska Supreme Court decision on proposed subsistence amendment

FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs Section - Juneau

You have requested an analysis of whether the Alaska Supreme Court's recent opinion in Bess v. Ulmer, ___ P.2d ___, 1999 WL 619092 Supreme Court No. S-08811/8812/8821 (Alaska August 17, 1999) would prevent the legislature from proposing a constitutional amendment establishing a priority for subsistence uses of fish and game.[1] The recent decision in Bess is a final opinion issued by the court in the case. This question was first considered after the supreme court issued a preliminary opinion and order before the 1998 general election. This memorandum will reconsider the question in light of the court's final opinion. In summary, there is nothing in the final opinion to change our original conclusion that a proposed change to the state constitution authorizing a priority for the subsistence taking of fish and game may be adopted by the legislature using the amendment process set out in article XIII, section 1 of the Alaska Constitution.

In Bess the court determined that the legislature's power to propose a change in the text of the Alaska Constitution is limited to amendments which are changes that are "few, simple, independent, and of comparatively small importance."[2] According to the Alaska Supreme Court, the legislature may not propose basic changes to the "substance and integrity" of the state constitution. The court conceded that the distinction between an amendment and a revision is

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1 For the purpose of this memorandum, it is assumed that the proposed amendment would be similar in content to SJR 101 under consideration by the Twentieth Alaska State Legislature during its first special session.

2 Bess Slip Op. at 8. An amendment would make changes of this nature, while a revision would not. The Court also associated this standard with the idea that an amendment is related to a single subject so that the people have an opportunity to express approval or disapproval to each proposal offered for ratification. Id. at 6.

difficult to define. When substantial alterations to the text of the constitution are proposed which are so numerous and important to the core institutions of state government, these changes may be characterized as revisions which may only be proposed by a popularly elected constitutional convention. See Alaska Const. art. XIII, §§ 1 and 4.

In Bess, the court evaluated three proposed constitutional amendments. The principal attack was against the marriage amendment.[3] However, two other proposed amendments were implicated when the appellants argued that by offering three amendments, the legislature was attempting to revise the constitution without first convening a constitutional convention to adopt the proposals. These other amendments included the amendment restricting prisoners' rights to federal rights and the amendment reorganizing the reapportionment process.[4]

In the decision, the court addressed the contention that collectively and individually these amendments constituted a "qualitative" revision of the state constitution. The court stated:

> The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.

Bess, Slip Op. at 8. This contention involves a claim that a proposed amendment makes such basic changes to the form of government established in the constitution that it should be examined and adopted only by a constitutional convention which is expressly chosen for this purpose. A constitution is intended to bring stability to government. For this reason, the framers required that a revision be a focused effort through a democratically elected body that is not easy to convene.

The court relied heavily on a rationale developed by the Supreme Court of California in Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990).[5] The Raven court was considering a challenge

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[3] The marriage amendment was passed by the Twentieth Alaska Legislature during its second regular session in the form of HCS CSSJR 42(RLS) and is formally designated as Legislative Resolve 71. This amendment would define marriage as being solely between a man and a woman.

[4] The prisoners' rights amendment, formally designated Legislative Resolve 59, would limit the rights of state prisoners to whatever rights they may have under the federal constitution. Legislative Resolve 74 proposes amendments to the article on legislative apportionment and would establish a redistricting board.

[5] Raven is the leading case in which the qualitative/quantitative analysis was applied to annul
(continued...)

to an initiative, entitled by its framers as the "Crime Victims Justice Reform Act," which altered various California constitutional provisions and statutes relating to criminal law and procedure. The court upheld all of the challenged provisions except for one. It annulled a constitutional amendment that provided:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

801 P.2d at 1086.[6]

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5 (...continued)
a discrete provision of questionable validity. There were other cases leading up to Raven where the purported amendment was unquestionably a revision. See, e.g., Holmes v. Appling, 392 P.2d 636 (Or. 1964) (upholding the secretary of state's refusal to prepare a ballot title for a "proposed constitutional amendment" which would have repealed the existing constitution and adopted an entirely new constitution); McFadden v. Jordan, 196 P.2d 787 (Cal. 1948)(striking down an initiative measure that would have added 21,000 words to the then existing 55,000-word constitution), cert. denied, 336 U.S. 918 (1949).

6 According to the Alaska Supreme Court there was an "obvious resemblance" between this amendment and the Prisoners' Rights Amendment removed from the ballot in Bess. Bess, Slip Op. at 8. In fact the state conceded during argument that if the Court were to adopt the rationale of the California Supreme Court, the Prisoner's Rights Amendment would be very difficult to defend against the argument that it constituted a proposed revision of the constitution.

Raven restated the analysis used by the California courts in deciding claims that an amendment was in fact a revision:

> [O]ur revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision.

Id. at 1085 (citations omitted). The Alaska Supreme Court adopted this dual method of analysis. In applying the analysis the court agreed with the conclusion of the California court that the measure was a qualitative revision but differed in one respect by finding that the prisoners' rights amendment also was a quantitative amendment.[7]

The Raven court concluded that the amendment at issue there would qualitatively revise the state constitution because

> [i]n essence and practical effect, new article I, section 24 would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating.

Id. at 1087 (italics in original). The court went on to explain that new section 24 was invalid only because it was so sweeping:

> It is true, as the Attorney General observes, that in two earlier cases we rejected revision challenges to initiative measures which included somewhat similar restrictions on judicial power. In *In re Lance W.* (1985) 37 Cal.3d 873, 891, 210 Cal.Rptr. 631, 694 P.2d 744, we upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment to the federal Constitution. In *People v. Frierson* (1979) 25 Cal.3d 142, 184-187, 158 Cal.Rptr. 281, 599 P.2d 587, we upheld a provision which in essence required California courts in capital cases to apply the state cruel or unusual punishment clause consistently with the federal Constitution.

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[7] The Raven court found that the amendment at issue there was not a revision quantitatively, as it "deletes no existing constitutional language and it affects only *one* constitutional article, namely, article I." 801 P.2d at 1086-87 (italics in original).

> Both *Lance W.* and *Frierson* concluded that no constitutional revision was involved because the isolated provisions at issue therein achieved no far reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution. New article I, section 24, more closely resembles *Amador's* hypothetical provision vesting all judicial power in the Legislature, a provision we deemed would achieve a constitutional revision. As noted, in practical effect, the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

Id. at 1089. The qualitative effect of the Prisoners' Rights Amendment was found in the dramatic loss of power of the judicial branch of state government to interpret and protect the rights of litigants.

The extent of change necessary before a measure becomes a qualitative revision cannot be precisely answered. In Bess, the court struck the Prisoners' Rights Amendment on qualitative and quantitative grounds but left standing the Redistricting Amendment which altered a substantial check on legislative power and proposed several changes to sections within the article on legislative apportionment. Similarly, in other cases, the California Supreme Court rejected "revision" attacks on constitutional amendments that made major changes to the structure and operation of the state government. See Amador Valley, 583 P.2d at 1286-89 (imposing limits on taxation of real estate); Brosnahan v. Brown, 651 P.2d 274, 288-89 (Cal. 1982)(making numerous changes to the provisions of the constitution on rights of criminal defendants); Legislature of State of California v. Eu, 816 P.2d 1309, 1316-20 (Cal. 1991)(term limits on state legislators). These cases establish that substantial changes in the structure of government or the rights of individuals can be proposed and ratified as amendments.

A successful challenge of the subsistence amendment will turn on whether it can be shown to "substantially alter the substance and integrity of the state constitution as a document of independent force and effect." Bess, Slip Op. at 8 (quoting from Raven, 801 P.2d at 1087). Also part of the analysis is whether a number of other sections of the constitution would be expressly or impliedly altered by the addition of the material contained in the measure under consideration. Id. at 4. The arguments advanced against the proposed subsistence amendment during past regular and special sessions of the legislature focus on allegations of a weakening of the right of equal access to fish and game afforded by existing articles I and VIII of the Alaska Constitution. In McDowell v. State, 785 P.2d 1 (Alaska 1989), a statute granting a preference to rural residents to take fish and game for subsistence purposes was found to violate the reservation for common use set out in article VIII, section 3 of the Alaska Constitution, the no exclusive right of fishery clause in

article VIII, section 15, and the uniform application clause set out in article VIII, section 17. The foregoing sections appear to provide a specially focused kind of equal protection requirement for resource allocation purposes.[8] Based on the scope of the decision in McDowell, the subsistence amendment would appear to be limited to making changes in other sections within article VIII applicable to natural resources of the state.

The interests of subsistence users of fish and wildlife resources could be characterized as a small and limited aspect of fishery management in the state. According to the Department of Fish and Game, 20 percent of the state's population are engaged in subsistence. However, only two percent of the fish and wildlife taken each year is harvested by subsistence users.[9] It is also a fact that during the period that the subsistence priority enacted in 1986 was in effect, no major reallocations between users of fish and wildlife resources were necessary. Using these comparisons, a strong case may be made that the change embodied in the subsistence proposal is not so important to the structure and integrity of the state constitution to require a fresh look at the entire document before the legislature is authorized to enact a subsistence priority. The stability of the state would not be threatened by this fairly specific change in the organic law. In the words of the Alaska Supreme Court, the subsistence amendment recently under consideration by the legislature would be "few, simple, independent, and of comparative unimportance." As for its quantitative effect, the proposed amendment would bear only on provisions in article VIII of the constitution. These changes resemble the alterations embodied in the redistricting amendment which were found to collectively be an amendment rather than a quantitative revision. Finally, the concept of a priority for the subsistence use of fish or wildlife resource is not complex. The amendment is precisely worded and is easily understood.

For the foregoing reasons, we believe there is nothing in the final opinion in Bess that prevents the legislature from using the process described in article XIII, section 1 to change the Alaska Constitution. Based on our review of the final opinion in Bess the legislature retains the power to validly adopt a resolution similar to SJR 101 (20th Leg. 1st Spec. Sess.) proposing an

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[8] A subsistence priority has some of the attributes of the limited entry fishery authorized by article VIII, section 15. Each measure permits the creation of a class of persons entitled to take fish and wildlife resources. The limited entry amendment was found to not violate the equal protection guarantee of the state and federal constitutions. State v. Ostrosky, 667 P.2d 1184 (Alaska 1983). This supports the conclusion that the effect of the subsistence amendment would be localized within article VIII of the Alaska Constitution.

[9] These statistics were taken from *Subsistence in Alaska: 1998 Update* Division of Subsistence, Alaska Department of Fish and Game (March 1, 1998).

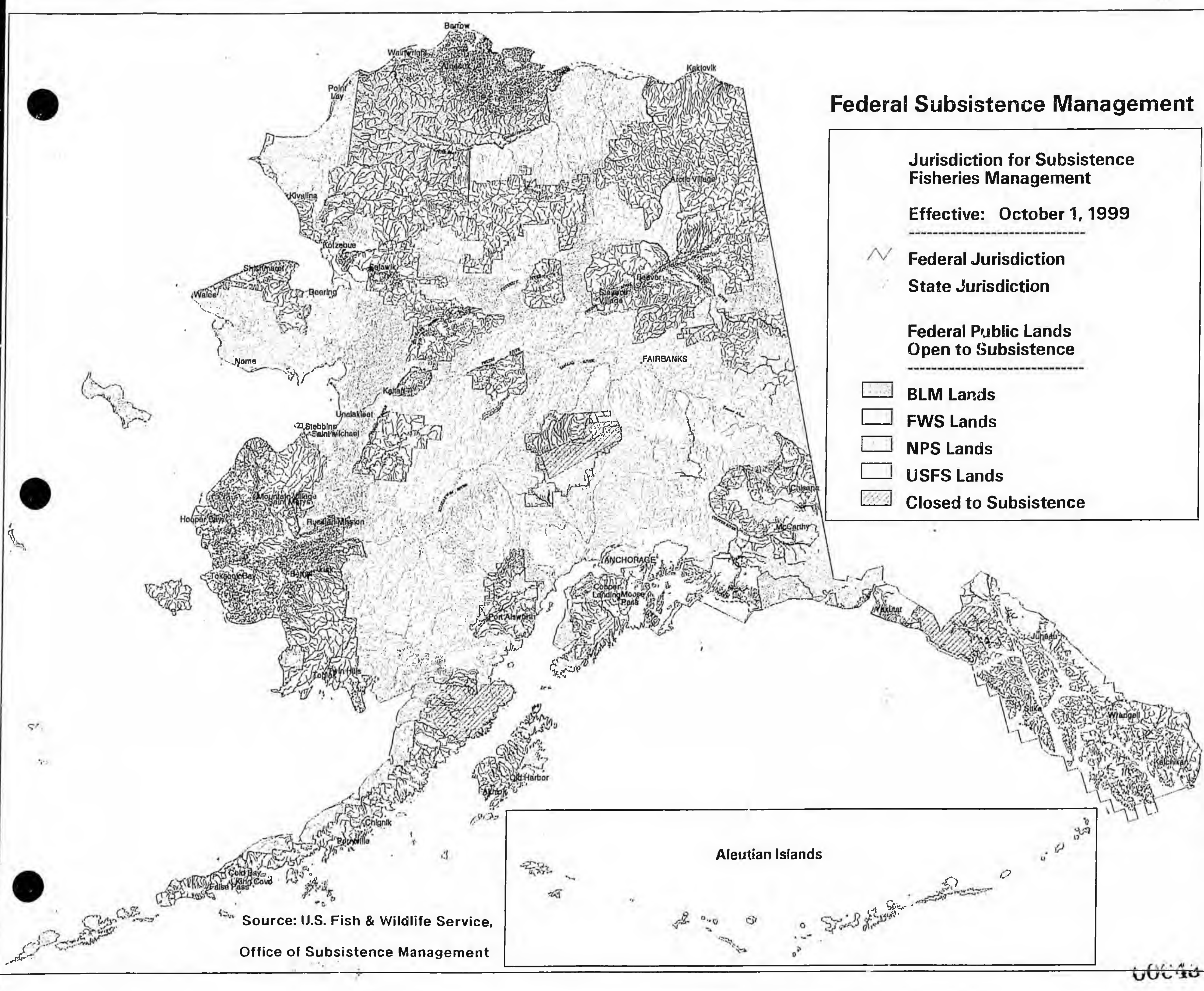
amendment to the Alaska Constitution authorizing the establishment of a priority for subsistence uses of fish and game.

JLB:jn

Map

Jurisdiction for Federal Subsistence

Fisheries Management



Federal Subsistence Management
Jurisdiction for Subsistence Fisheries Management
Effective: October 1, 1999
Federal Jurisdiction
State Jurisdiction
Federal Public Lands Open to Subsistence
BLM Lands
FWS Lands
NPS Lands
USFS Lands
Closed to Subsistence
Barrow
Kaktovik
Point Lay
Kivalina
Kotzebue
Wales
Nome
Unalakleet
Stebbins
Saint Michael
Hooper Bay
Russian Mission
Arctic Village
FAIRBANKS
McCarthy
ANCHORAGE
Port Alsworth
Juneau
Wrangell
Old Harbor
Chignik
Cold Bay
Aleutian Islands
Source: U.S. Fish & Wildlife Service, Office of Subsistence Management

Federal Subsistence Regulations:

Extra-territorial Reach

of Land Management, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, National Park Service, and U.S. Forest Service) have separate penalty provisions for offenses occurring on lands they manage. More detailed information can be obtained from each agency.

___.9 Information collection requirements

One commentor said that data collection to manage the Federal subsistence program is prohibited unless approved by the Office of Management and Budget (OMB). While OMB approval is not required for all data collection, it is required where Federal officials request information from more than ten persons. As stated elsewhere in this preamble (Paperwork Reduction Act), OMB has already approved the initial information collection requirements of these regulations and additional approvals will be sought whenever required.

___.10 Federal Subsistence Board

Several commentors disagreed with the language of § ___.10(a) of the Proposed Rule which stated that the Secretaries retain their existing authority to restrict or eliminate hunting, fishing, or trapping activities which occur on lands or waters other than the lands identified in the applicability and scope section of the regulation. We did not modify this section. The authority of the Secretaries to restrict or eliminate activities off Federal public lands has been confirmed in cases as *Kleppe* v. *New Mexico* (426 U.S. 529) and *Minnesota* v. *Block* (660 F.2d 817). This regulation does not expand or diminish the Secretaries' authority, it only states that it exists. This authority has rarely been exercised and is not exercised in this Final Rule.

One commentor recommended that the Secretaries should delegate to the Federal Subsistence Board authority to extend jurisdiction beyond Federal lands. Extension of Federal jurisdiction is a significant policy decision, only applied in very rare circumstances, and the Secretaries have chosen not to delegate that authority to the Board. They have delegated overall management of the subsistence program to the Board. By adoption of these regulations, the Board will assume the responsibility for management of an expanded fishery program on all lands identified in § ___.3 of this rule.

One commentor said that the Federal agencies do not have sufficient expertise to assure compliance with ANILCA and recommended that management authority be vested in the National Marine Fisheries Service and that the regulations provide clear guidelines for cooperation with the Alaska Department of Fish and Game. The Federal Subsistence Board, and its member agencies, understand the complexity of the issues associated with the implementation of these regulations. The Board will obtain whatever expertise is needed to implement these regulations in order to assure that the subsistence opportunity is protected consistent with the conservation of healthy populations of fishery resources.

One commentor recommended that a tribal liaison appointed by the Federally-recognized tribes should be included as one of the official liaisons to the Federal Subsistence Board. Any tribe or group of tribes (or any other organization) can designate at any time a person to act in a liaison role to the Board. At this time, the Board believes that tribes have sufficient opportunity to provide input to the Board through the existing Regional Advisory Council structure, or through direct presentation of information to the Board without the designation of a formal liaison position.

One commentor recommended that the Chairs of the ten Regional Advisory Councils be included as voting members of the Federal Subsistence Board. Separate from this rulemaking, the Federal Subsistence Board just recently completed an internal examination the Board structure and considered one option of including Regional Council chairs on the Board. That option was rejected, in part because ANILCA stipulates that the Regional Councils are to provide recommendations to the government. A conflict would occur if those chairs sat on a board that would deliberate and make decisions on recommendations made by the Councils on which those chairs sit.

Five commentors recommended that use of compacts, contracts, and co-management or other agreements should be included within this rule. We clarified the wording of this section without changing its scope by changing the phrase "Native corporations" to "Native organizations." Section 10(d)(4)(xv) of this regulation now states that the Federal Subsistence Board may "Enter into cooperative agreements or otherwise cooperate with Federal agencies, the State, Native organizations, local governmental entities, and other persons and organizations, including international entities to effectuate the purposes and policies of the Federal subsistence management program". This regulatory language derives from section 809 of ANILCA, and permits a wide range of cooperative mechanisms to carry out the purposes of the title, including, where appropriate, the cooperative mechanisms suggested above. The subsistence priority of Title VIII is not solely a priority for Alaska Natives, but is a priority for all rural residents, Native or otherwise.

One commentor objected to § ___.10(d)(4)(xviii) of the Proposed Rule which states that the Board can investigate and make recommendations to the Secretaries identifying additional Federal reservations, Federal reserved water rights or other Federal interests in lands or waters to which the Title VIII subsistence priority would be extended. This commentor said that section constituted a granting authority beyond the scope of ANILCA. We did not revise this section in this final rule. If additional waters or Federal interests are proposed for inclusion, the Board would need to investigate and provide a recommendation based on their findings to the Secretaries. This section only authorizes the Board to do so. The addition of any other waters or interests to this rule will involve a further rulemaking, with public notice and comment.

Two commentors questioned the regulation dealing with delegation of certain actions by the Board to agency field officials (§ ___.10(d)(6)). One said that the regulatory language was not clear as to what type of actions might be delegated and the other said that field officials might abuse such delegation resulting in harm to the resource. As written, such delegation will be limited to setting harvest limits, defining harvest areas, and opening or closing specific fish or wildlife harvests. In all cases such delegation will specifically define "frameworks established by the Board" as specified in the regulation. Thus, field officials will always be constrained by the framework of any delegation, and the Board will not lose its oversight of actions by agency officials.

One commentor recommended that the authority to open or close fish or wildlife harvest seasons should be community-based, and not in the hands of an agency field official. Implementation and enforcement of Federal regulations is the responsibility of the Departments. Field managers will work with local communities and local biologists to assure that community interests are addressed in any actions.

___.11 Regional advisory councils

Four organizations or individuals commented on the make up of the Regional Advisory Councils. Two

Subsistence Myths – and Facts

SUBSISTENCE MYTHS – and FACTS

BACKGROUND

Federal law[1] gives rural residents a priority to take fish and game for subsistence uses on federal public lands. If state law grants that priority, the State manages fish and wildlife, for subsistence and all other uses, on all lands.

Alaska enacted a rural subsistence priority in 1978. In 1982, Alaskans voted to retain the rural priority by a margin of almost two to one. In 1989, the Alaska Supreme Court found the priority unconstitutional because it granted the priority to rural residents and excluded urban residents. The result is dual management, with the federal managers playing an increasing role. Neither fish nor game respects federal-state land boundaries and many people fear that dual management will have drastic consequences for our fish and game. Subsistence, sport, and commercial fisheries are especially vulnerable because of recent court decisions.

There is widespread, but not unanimous, agreement that dual management is bad and that the State should manage for all purposes on all lands. Fundamentally, there are only two ways to achieve that goal. One is to repeal the rural priority in ANILCA and the other is to amend the Alaska constitution to permit the rural priority. There is no reason to believe that the courts will eliminate the rural priority.

Recent polls indicate that the rural priority is favored by 60 percent to 80 percent of Alaskans. The congressional delegation has said repeatedly that it is impossible to get Congress to repeal the rural priority.

Many people, including those who oppose the rural priority, are insisting on the right to express their opinion by voting on the constitutional amendment. Two-thirds of the legislature must vote to put a constitutional amendment on the ballot. The

[1]The law is Title VIII of ANILCA (the Alaska National Interest Lands Conservation Act). ANILCA closes some national parks and monuments to subsistence hunting and fishing.

legislature's last chance, before a federal takeover of fisheries, will be in September 1999.

Subsistence -- legally, culturally, and historically -- is complex and tears at people's emotions. Much of the debate has been well informed, but myths have arisen that should be replaced by fact. Here are some of them

A DOZEN MYTHS

Myth 1: ANILCA's subsistence priority is racially based.

Fact 1: At the insistence of the State of Alaska, Congress rejected a Native priority. The subsistence priority is for rural residents, the majority of whom are non-Native.

* * *

Myth 2: The constitution should never be amended.

Fact 2: Alaskans have voted on an average of almost one constitutional amendment per year since statehood. Twenty-five of these amendments have passed.

* * *

Myth 3: A subsistence priority will mean that rural people can fish and hunt without seasons or bag limits.

Fact 3: The constitutional amendment, the existing constitutional provisions, the state statutory amendments, and ANILCA all constrain the priority with the sustained yield principle. Under both ANILCA and the state law, subsistence hunting and fishing are restricted by time, area, gear, and bag limits. As is currently the case, a subsistence user would get a reasonable opportunity to take, not a guarantee of success.

* * *

Myth 4: The federal management system is part of ANILCA and is a stable system that guarantees local control of subsistence.

Fact 4: Under ANILCA, there is only a skeletal framework for management. The management structure is created entirely by federal regulation. The Federal Subsistence Board, which is the dominant and controlling body, is appointed by the Secretaries of Interior and Agriculture and composed of career federal employees. Its appointed chair is also a federal employee while serving in the position. The regional subsistence advisory councils are appointed by the Secretary of Interior, and there is

no requirement that any member be a subsistence user or a rural resident. Membership on the regional councils will change as the federal government responds to changing national priorities.

* * *

Myth 5: The Alaska Constitution, in Article XII, Section 12, permits Alaskans to veto federal legislation that conflicts in some way with the Statehood Act.

Fact 5: This is a misreading of a constitutional amendment passed 37 years after statehood. Alaskans cannot veto federal law and they cannot repeal ANILCA.

* * *

Myth 6: Natives gave up all hunting and fishing rights in ANCSA (the Alaska Native Claims Settlement Act).

Fact 6: Natives did not give up anything. Congress extinguished aboriginal hunting and fishing rights, but not subsistence rights. There is a big difference between Natives giving up something and Congress extinguishing it. What Congress extinguishes, Congress can restore. Congress has the power to restore whatever rights were extinguished by ANCSA, and to create new rights.

* * *

Myth 7: ANCSA was a final settlement of all Native hunting and fishing rights.

Fact 7: The legislative history of ANCSA shows that Congress intended to provide for subsistence rights later if the State and the Secretary of the Interior failed to do so. Subsistence rights were not accommodated, and Title VIII of ANILCA was the result.

* * *

Myth 8: The constitutional amendment will not work because it does not expressly override the equal protection provisions of Article I of our constitution.

Fact 8: This issue has already been addressed by our supreme court in finding that limited entry cannot "be challenged as unconstitutional under pre-existing clauses in the same document." The amendment, coupled with the statutory changes, constitutionally implements exactly the rural priority contemplated in ANILCA.

* * *

Myth 9: ANILCA is unconstitutional.

Fact 9: The federal court in Alaska has rejected constitutional challenges to the rural priority (*McDowell v. U.S.*). The property clause of the U. S. Constitution and U. S. Supreme Court cases recognize the right of the federal government to manage fish and wildlife on federal land and, if need be, on adjacent non-federal land (*Kleppe v. New Mexico; Minnesota v. Block*).

* * *

Myth 10: Fish or game taken for subsistence uses will be sold for big dollars.

Fact 10: Not so. The ANILCA amendments and the state statutory amendments require the state boards to make regulations that specify how much fish or game may be exchanged for cash. The amount must be "minimal."

* * *

Myth 11: If the feds take over management, so what? The courts will throw them out later.

Fact 11: Only the *federal* courts can throw out the federal managers. Important hunting and fishing rights are at stake. It is a huge gamble to assume that after five or ten years of lawsuits, and five or ten years of federal management, the federal courts will conclude that the federal government cannot manage fish and game on federal land.

* * *

Myth 12: The people cannot be allowed to vote on a rural priority. The public trust doctrine makes it illegal for the legislature to put on the ballot a constitutional amendment that would permit a rural subsistence priority.

Fact 12: The constitution has very clear provisions for amendment. Nothing about the proposed amendment prohibits the legislature from putting it on the ballot. The public trust doctrine generally deals with the transfer of public lands. It has no bearing on the allocation of hunting and fishing rights among Alaskans. Even if it did, the doctrine can be altered or repealed by changes to our constitution.

Prepared by Alaska Department of Law and Alaska Department of Fish and Game.

September 14, 1999

SUBSISTENCE IN ALASKA: 1998 UPDATE

Subsistence In Alaska: 1998 Update

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

Introduction

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

What is Subsistence?

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

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

Who Qualifies for Subsistence?

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

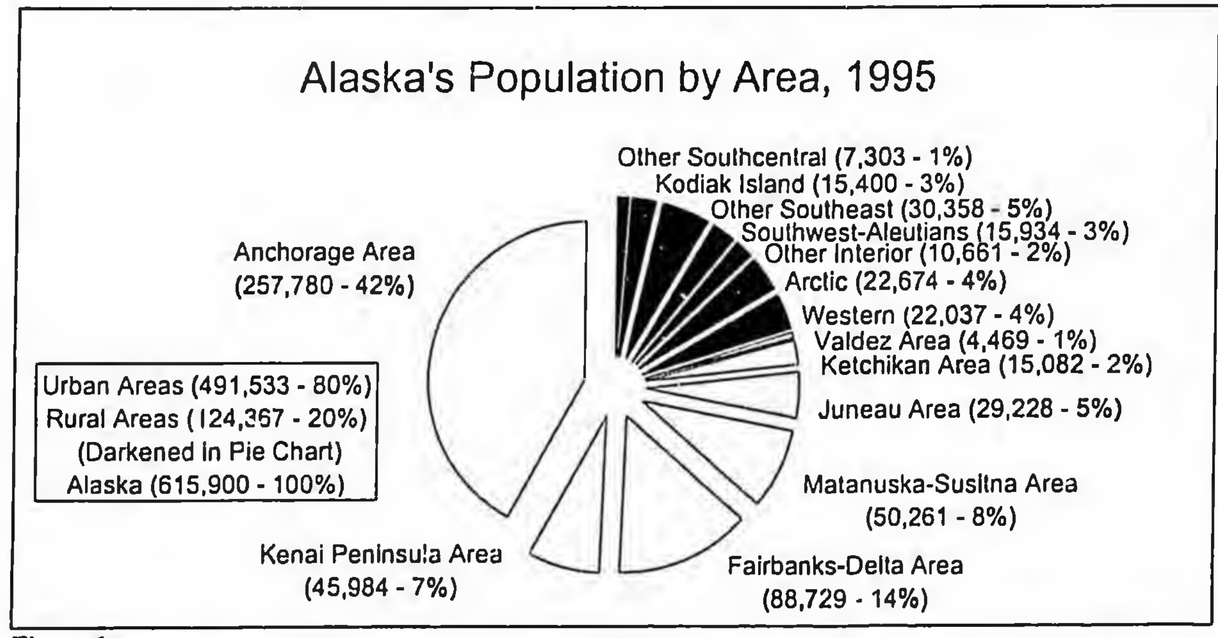


Figure 1

Percent of Households Participating in Subsistence Activities in Rural Areas

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

Figure 2

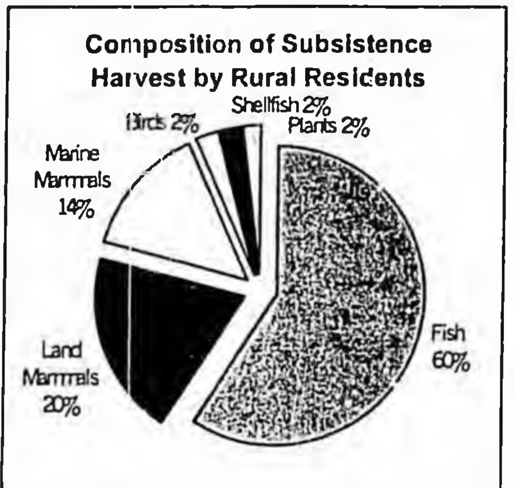


Figure 3

Who Participates in Subsistence?

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

What is the Rural Food Harvest?

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

How Large is the Subsistence Harvest?

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

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

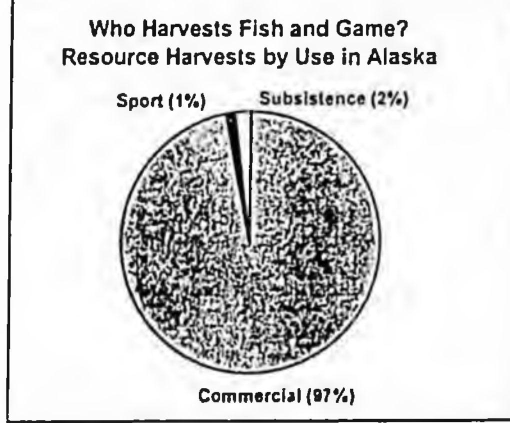


Figure 4

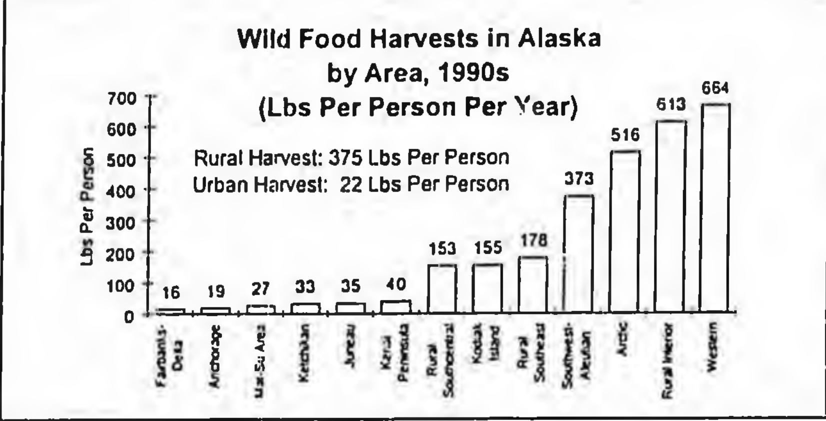


Figure 5

Nutritional Value of Subsistence

The subsistence food harvest provides a major part of the nutritional requirements of Alaska's population. The annual rural harvest of 375 lbs per person contains 242%

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

Wild Food Harvests in Alaska: Nutritional and Replacement Values

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

Figure 6

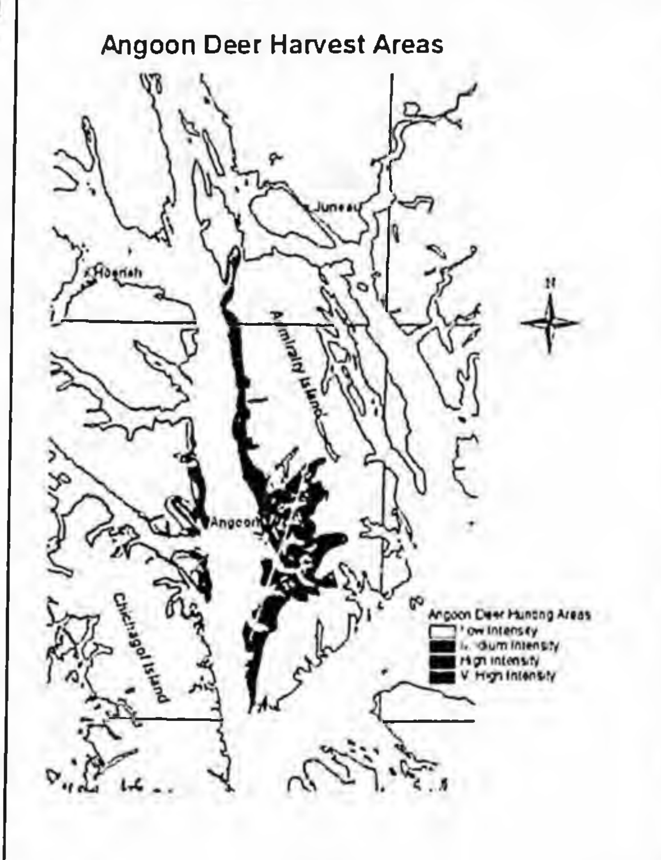


Figure 7

Traditional Harvest Areas

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

The Monetary Value of Subsistence Harvests

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

Subsistence and Money

Subsistence is part of a rural economic system, called a "mixed, subsistence-market" economy. Families invest money into small-scale, efficient technologies to harvest wild foods, such as fishwheels, gill nets, motorized skiffs,

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

Subsistence and Sport

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

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

The Subsistence Priority

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

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

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

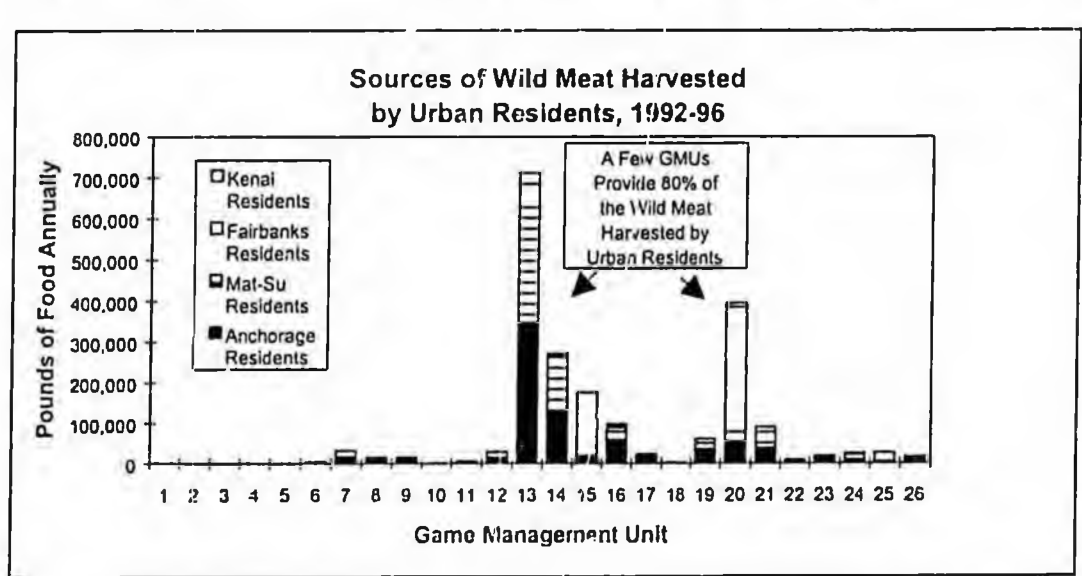


Figure 8

FREQUENTLY ASKED QUESTIONS ABOUT STATE-FEDERAL MANAGEMENT

Frequently Asked Questions
About State-Federal Management of Fish and Wildlife

CHANGES THAT MAY AFFECT STATE FISHERIES AFTER FEDERAL SUBSISTENCE MANAGEMENT BEGINS

Q.: What happens October 1, 1999?
A.: *The federal subsistence program will begin to establish a program to manage federally authorized subsistence fisheries for rural residents in Alaska.*

Q.: Who qualifies for the subsistence priority under state and federal laws?
A.: *Under state law, all Alaska residents qualify for subsistence uses of fish stocks and game populations for which the boards of fisheries and game have determined are subject to customary and traditional uses. Under federal law, only federally qualified residents have subsistence uses of fish and wildlife on federal public lands.*

Q.: Where will federal regulations apply?
A.: *The regulations that are effective October 1 will apply (1) on all public lands where subsistence is allowed, including non-navigable waters on those lands; (2) on all navigable and non-navigable waters (including some marine waters) within the exterior boundaries of specified federal areas, including wildlife refuges, park units, conservation and recreation areas, wild and scenic river system units, and national forests (excluding marine waters); (3) on inland waters adjacent to the exterior boundaries of the specified federal areas; and (4) potentially on other waters where federal reserved water rights have not yet been identified.*

Q.: What does "dual management" refer to?
A.: *Dual management refers to the fact that there will be two authorities for managing subsistence fish and wildlife uses in Alaska—a state management authority and a federal one. The geographic areas of authority overlap. Each authority makes regulations, which may differ.*

Q.: Under "dual management" who makes the regulations?
A.: *There will be two sets of regulations, one state and one federal. State regulations will continue to be developed by the Alaska Board of Fisheries and Board of Game; the Federal Subsistence Board will adopt federal regulations. State regulations will be implemented by the Alaska Department of Fish and Game and Department of Public Safety, and federal regulations by the Federal Subsistence Management Program.*

Q.: Will the state still be managing fisheries once the federal subsistence fisheries program begins?
A.: *The state will continue to manage state-authorized commercial, sport, subsistence, and personal use fisheries under its existing authority. The state still has a legal mandate to provide for all uses on all lands and waters and subsistence uses on state and private lands and in state waters.*

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Q.: What impact will there be on the state with federal subsistence management of fisheries?
A.: *Impacts will include restricting state authorized subsistence, commercial, sport, and personal use fisheries when federal subsistence allocations threaten conservation of fisheries resources; addressing requests for information from federal agencies; and evaluating and responding to the effects of differing state and federal regulations on fisheries and fisheries management.*

Q.: Who will be enforcing the fishing regulations?
A.: *State regulations will continue to apply on all lands and waters within the state—state, federal, and private—and will be enforced by state officers. State officers will not enforce federal subsistence regulations.*

Q.: Will it be confusing to the public if state and federal regulations are different?
A.: *There will be confusion for the public regarding where the state and federal regulations apply; where and how they differ; and who is eligible to participate under state or federal regulations.*

Q.: Will the Board of Fisheries be coordinating its schedule with the Federal Subsistence Board?
A.: *This has been discussed as a desirable outcome, although no plans are underway.*

Q.: Is it possible that commercial and sport fisheries could be restricted or closed to provide for a federal subsistence priority?
A.: *Yes. Commercial and sport fisheries are already closed by state managers when returns are insufficient to provide for these as well as a reasonable opportunity for subsistence users. Unlike the Alaska Board of Fisheries, the Federal Subsistence Board has not defined reasonable opportunity for subsistence fisheries. This creates a difficult management situation for fisheries managers who will need to manage commercial and sport fisheries more conservatively to ensure adequate escapements.*

Q.: Could sport fishing for rainbow trout, steelhead and cutthroat trout or other species be restricted or closed to provide for a federal subsistence priority?
A.: *It is possible. Federal regulations already apply to freshwater fisheries in non-navigable waters and some navigable waters and this has not occurred. For some freshwater streams, the extent to which sport fishing closures will occur to accommodate federal regulations is unclear, although it is possible. The state may have to adjust management of state fisheries, if conservation or other concerns arise.*

Q: Is subsistence fishing under state regulations likely to be affected by the federal subsistence priority?
A.: *Yes, particularly if the federal program over-allocated the fish resource, requiring the state to impose restrictions to or closures of state subsistence fisheries for conservation reasons.*

Q.: How will the sale of subsistence fish that will be allowed under the federal regulations affect management of the state's fisheries?
A.: *It is too soon to say. Under the federal program, customary trade is an exchange that is not a significant commercial enterprise. There may be some species of concern in site-specific areas depending on how the federal program determines what is a customary trade practice.*

Q.: Will the state be receiving any funding from the federal agencies for fisheries management?
A.: *It is possible that contracts for research, resource assessment, and harvest monitoring may be developed between federal and state agencies for fisheries management.*

Problem Statements on State-Federal Subsistence Management

Alaska Board of Fisheries'
Problem Statement
on
State – Federal Subsistence Management
April, 1999

1. **Narrow Scope of Federal Authority Will Disrupt Relationships Between Fisheries**

   The Alaska Board of Fisheries (BOF) provides for subsistence uses first, then provides for other uses based on the availability of the resource. In some cases subsistence uses are inextricably linked with commercial uses; the BOF recognizes that change in subsistence fishing regulations can have effects on a commercial fishery and vice-versa.

   The Federal Subsistence Board (FSB), in its deliberations, does not consider uses other than subsistence. The FSB approach creates a problem, inasmuch as actions of the FSB may unintentionally disrupt the relationship between subsistence and other fisheries. This can occur to the detriment of subsistence uses as well as other uses. A complicating factor is that the FSB considers special action requests that can result in unscheduled allocation changes and unanticipated impacts on other uses. FSB actions may require that the BOF react, sometimes on short notice, to address conservation or allocative issues. Significant in-season disruptions to subsistence and other uses can be expected.

2. **State and Federal Subsistence Allocation Procedures Are Not Compatible**

   State law requires the BOF to identify those fish stocks for which there are customary and traditional uses, to identify a specific allocation needed for subsistence use, and provide a priority opportunity for that use. This explicit stock definition becomes the basis for identifying whether a harvestable surplus exists, and determining the amount necessary for subsistence use. These procedural steps enable the BOF to provide a priority for subsistence use and then provide for other uses.

   The FSB is under no such obligation to explicitly identify the stock of concern and the subsistence need, or other needs, prior to making a subsistence allocation. How the FSB will determine the amount to be harvested by subsistence users is unclear. To provide a subsistence priority and also accommodate as many other uses of salmon as possible requires knowledge of the available resource full range of competing uses. The fact that the FSB is under no obligation to follow procedures like this in making subsistence allocations is a problem that will vastly complicate state fishery management efforts. It is likely to result in lost fishing opportunity and under certain conditions could lead to overharvest.

3. **State's Ability to Make Crucial In-Season Management Decisions is Jeopardized**

   Alaska's salmon management programs have been successful in part because of the ability of on-site managers to effect in-season closures or openings as required to assure conservation

and allocation objectives are met. These decisions must be made decisively based on available information; they will often be made on short notice. Imposing a new management authority (the FSB) into the process will be problematic. In-season management decisions can result in restrictions in subsistence opportunity in years with poor returns. Reactions of the FSB to state actions may not be consistent with state conservation needs or allocation objectives. The results of increased complexity in in-season management are unpredictable, but there is a great risk of conservation problems arising in the absence of a unified in-season management system.

4. **State and Federal Boards Take Different Approaches to Customary Trade & Barter**

Both the state and federal subsistence laws recognize customary trade and barter as a legitimate subsistence use. However, the two boards take different approaches to providing for these uses. The BOF takes proposals for creation of regulations that define and allow for particular customary trade practices. In effect, trade is closed until opened by the board. In contrast, the FSB takes the approach that trade is allowed, yet unregulated, unless the FSB acts to restrict the activity. The FSB approach is a problem, given the controversial nature of this activity, the potential for this practice to affect other uses, and the risk of abuse with subsistence caught fish being introduced into the commercial markets. While this may be acceptable if reasonably constrained, it is easy to see circumstances where problems can arise in the absence of a prior review and approval process.

5. **There is a Need For an Innovative Approach**

Dual management of Alaska's fisheries will bring substantial risk for fish resources and user groups alike. Given the apparent unwillingness of the Alaska State Legislature to enable unified management of the state's fisheries, the BOF is faced with an extraordinarily challenging and complex regulatory task. In order to minimize problems a new, carefully crafted, dual management framework and strategy is clearly needed. Current FSB regulations do not appear to provide the necessary flexibility and basis for innovation in designing and implementing such a framework. The state has suggested alternative models for dual management, including the federal/state Bering Sea Crab Management Plan approach. Developing a workable, innovative dual management framework and strategy will require a willing FSB, and may require changes in the federal subsistence management regulations.

Draft

State-Federal Dual Management
Board of Game Problem Statement

(To be presented at the next meeting of the Federal Subsistence Board, State Board of Game and Board of Fish, and ADF&G)

1) There is no coord nation between the State Board of Game and the Federal Subsistence Board.

2) The two regulatory systems operate under different rules:

The Board of Game places the priority on the resource and relies on biological information to make allocation decisions.

The Board of Game manages for all uses when the resource is plentiful; limiting uses to subsistence only when shortages occur.

In order to do this the Board of Game follows this procedure:

(a) identify and define populations
(b) determine harvestable surplus in each population
(c) determine amount necessary for subsistence uses in each population

If the amount necessary for subsistence is less than or equal to the harvestable surplus than the population harvest is managed for subsistence use only.

The Federal Subsistence Board considers biological information a lower priority than the satisfaction of subsistence users.

The Federal Subsistence Board does not determine the amount necessary for subsistence relative to harvestable surplus or population size. Using this system, the only way to evaluate whether the Federal Subsistence Board has succeeded in meeting the needs of subsistence users on federal lands is the satisfaction of the users themselves. The best way to satisfy people is to give them more than they need.