

ALASKA LEGISLATURE


1714

HOUSE and SENATE FINANCE COMMITTEE FILES, 1997-1998

MEMO

Date: 4/17/98

To: Representative Therriault

From: Ron Somerville 

Subject: Fiscal Note - CSHB 406 (FIN)

I have reviewed the fiscal notes for Departments of Law and Fish and Game for CSHB 406 (FIN). My first reaction is that everything is significantly over-inflated. It is inconceivable that 8 cases the first year and 6 cases annually thereafter would be appealed to the State Supreme Court.

The request for travel for Advisory Committees and the Boards (456.9) is more than the total travel requested (374.7) in their FY 99 budget. It is unlikely that the new law would require more than a doubling of travel for this section of the department. Although the amount of travel drops for this section in subsequent years (376.6), it is still more than requested for all of FY 99.

The Subsistence Division fiscal note calls for a 35% increase over their FY 99 request. Their FY 00 fiscal note represents a 67% increase over their FY 99 request. Both seem unreasonable.

There is an excellent argument that a significant amount of what the department is already doing could and should be charged to the \$5 million authorized in ANILCA for support of the advisory committees and regional councils. Some data collection, staff support and general supporting operations are arguably eligible. In 1987, the state requested reimbursement of \$3.3 million and only received \$.9 million.

Conceptually, if the state could resolve its differences and meet the basic intent of ANILCA, some federal monies, up to \$5 million, could be available to offset these costs. If the Alaska delegation were able to convince Congress that this proposal meets the intent of ANILCA and subsequent changes were made synchronizing the two laws, then it is possible that the state would qualify for reimbursable costs.

I disagree with the Subsistence Division's analysis from two basic points. First, their cost projections are way out-of-line but there is little available to refute their estimates. The other is on page two of their analysis, under "Overview." They state that "Individuals will have to apply for each species and fish stock an game population for which they wish (emphasis added) to hunt and fish." Since residents outside of a designated subsistence area with a shortage are presumed to be "out" of the preference, it is up to the applicant to demonstrate their past dependence on that particular stock or population. I believe this requirement is going to make it extremely difficult, but not impossible, for most people to qualify. Thus, I would project that

instead of 120,000 applicants, they will be looking at 40,000 - 50,000 at the most. I am also convinced that after the initial year, the number of applicants will fall significantly.

I also do not agree that the application and processing mechanism requires elaborate staffing. Applicants could be required to sign an affidavit and provide minimal documentation before being issued a permit. Subsequent spot checks by enforcement could provide the public exposure necessary to discourage unqualified applicants -- especially if there was a severe enough penalty.

I have provided you with a couple of scenarios for FY 99 and FY 00. Without attempting to refute all their numbers, I have provided a couple of options. You can make the law effective January 1, 1999 and cut your fiscal year costs by more than half for that year. If the legislature eliminates the "substantially increase" provision for non-subsistence areas, you will significantly reduce the number of permit applicants. At least half of the advisory committee and board increase could be conceptually charged against the \$5 million if Congress declared that we were in compliance. A big "if." At least you can argue that it is legitimate to expect that reimbursement and their budget can be modified accordingly if the funds are not available.

Another key point is the fact that at present our fish and wildlife populations are high and most people can get their "true" subsistence needs without having special seasons or special preferences. I would agree that once we go through another cycle where populations decline that this will trigger Board declared shortages for subsistence and subsequently more conflicts. As Mary Pete testified, at present there are no major conflicts in the state at present where residents are not getting their subsistence needs met.

Last, I wanted to acknowledge that there is an underlying fiscal problem associated with this whole debate. At present, subsistence advocates take the position that everyone outside of the metropolitan areas are eligible for subsistence and thus no individual criteria are required until you get to the last "tier II" situation. This is certainly cheaper and easier to administer but arguably unfair. Any legislation establishing an individual based system with specific criteria is going to cost money. HB 406 is an attempt to come down in the middle by using the rebuttable presumption process. It is also clear that the major benefactors will be dependent rural subsistence users.

There is a valid argument that although this process may take more funds to administer, it could be offset by reduced litigation costs. What the Department of Law didn't identify is the costs associated with past and present litigation efforts associated with implementing the pre 1986, pre 1992 and present state subsistence laws. My guess is that the costs have been significant if you look at the litigation list.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 16, 1998

TONY KNOWLES, GOVERNOR

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The Honorable Ben Grussendorf
Alaska House of Representatives
State Capitol, Rm. 415
Juneau, AK 99801-1182

Re: Constitutionality of
CSHB 406 (Fin)

Dear Representative Grussendorf:

You have asked us to describe the constitutional issue in CSHB 406 (Fin) that was discussed in the April 8 and 9 meetings of the House Finance Committee.

A constitutional issue is presented in section 2 of the bill, proposed AS 16.05.258(d).¹ That subsection identifies Alaska residents who are "qualified subsistence users" and thus are eligible to participate in subsistence hunting and fishing.² It makes a distinction based upon where residents live. Those who live in an area that is determined to be "customarily and traditionally dependent on the stock or population" are presumed to be qualified subsistence users. Those who do not live in such areas are presumed not to be qualified subsistence users.

In two cases, the Alaska Supreme Court has considered the use of residency-based criteria for determining whether persons are eligible to be subsistence users. In the first case, the Court examined a version of the subsistence law adopted in 1986. Under that law, residents who lived in rural areas of the state qualified

¹ Subsection (d) is set out in lines 12-18, page 5 of draft #0-LS1573\M.

² "Qualified subsistence users" are also identified in another subsection of the bill, proposed AS 16.05.258(c). It qualifies residents, regardless of where they live, according to whether they satisfy certain individual characteristics.

for subsistence hunts and fisheries, and persons who lived in urban areas did not.

In *McDowell v. State* (789 P.2d 1 (Alaska 1989)), the Court held that the urban-rural distinction violated the "equal access" clauses of the Alaska Constitution. Those clauses -- the "common use" clause (Alaska Const. art. VIII, sec. 3), the "no exclusive right of fisheries" clause (Alaska Const. art. VIII, sec. 15), and the "uniform application clause" (Alaska Const. art. VIII, sec. 17) -- have been interpreted to collectively prohibit "exclusive or special privileges to take fish and wildlife." *Id.* at 6.

In striking down the rural resident preference, the Court implicitly followed an analysis that is used in equal protection cases. It examined the individual interest that was at stake in the subsistence law, the state's purposes for the law, and whether the means used by the law presented the "least possible infringement on article VIII's open access values." *Id.* at 10. In holding that the urban-rural criterion violated the equal access clauses, the Court commented that the clauses afford protection against the creation of a "closed class" of fish and game users, but they do not bar "all methods of exclusion where exclusion is required for species protection purposes." *Id.* at 6-7, 9.³

Because of the analysis and comments in *McDowell*, some persons have concluded that where a person resides may, in limited circumstances, be used to distinguish subsistence users from others. For example, they have said that residency may be used to reduce the number of subsistence users if a reduction is needed for species protection purposes or if residency satisfies the "interest-purpose-means" test under equal protection. Another view is that residency is a permissible criterion if it is used only as a factor for eligibility, that is, if the location of a person's residence does not alone determine whether he or she may be a subsistence user.

³ Under that analysis, the Court observed that the 1986 subsistence law was not precisely drafted to achieve one of its purposes -- to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic needs are able to do so. The urban-rural criterion was over-inclusive because it qualified some rural residents who had no legitimate claims to subsistence, and it was under-inclusive because it disqualified some urban residents who did have legitimate claims. *McDowell v. State*, 785 P.2d 1, 10-11 (Alaska 1989).

Proponents of the residency-based presumptions of HB 406 have said that the presumptions are merely an "administrative convenience" for the State. They say that the presumptions will only be an inconvenience for those residents who, because of where they live, will be presumed not to be subsistence users.

The effect of the presumptions is spelled out in section 2 of the bill, proposed AS 16.05.258(e).⁴ Under that subsection, a person who lives in a subsistence-dependent area, and thus, is presumptively a qualified subsistence user, may immediately participate in subsistence hunts and fisheries. That person may continue to participate unless someone makes the effort, and bears the expense, of assembling and presenting evidence at a hearing that shows that he or she should not qualify. Even if a presumptively qualified person is eventually disqualified, he or she will be able to participate in subsistence hunts and fisheries until a board makes a final determination against the person, and maybe until all appeals through the courts have been exhausted. In the meantime, the person may have participated for months, perhaps years.

On the other hand, an Alaskan who lives outside of subsistence-dependent areas and is, thus, presumptively not a qualified subsistence user may not participate in subsistence hunts and fisheries unless the person makes the effort, and bears the expense, of assembling and presenting evidence at a hearing that shows that he or she should qualify. Including appeals, this process could also take months or years.

The residency-based presumptions in HB 406, therefore, create an advantage for one group of Alaskans and a disadvantage for another group that, even if eventually rebutted, will allow the former to participate in subsistence hunts and fisheries for months or years longer than the latter. The consequence of the presumptions is significant, and the burden of rebutting them is more than "inconvenience."

For several years, the belief that residency-based criteria may be permissible was supported by another aspect of the *McDowell* decision. In *McDowell*, the Court, although it struck down the urban-rural criterion, let stand another feature that was based on residency. That feature was a criterion used to determine a person's eligibility to participate in "Tier II" subsistence hunting and fishing.

⁴ Subsection (e) is set out in lines 19-25, page 5 of draft #0-LS1573\M.

Tier II occurs when fish and game resources have diminished to a point where, even after all other uses have been eliminated, there is not enough to provide "reasonable opportunity" for subsistence uses. AS 16.05.258(b)(4). In that situation, the law directs the State to distinguish among subsistence users and to allow those persons who score highest under three criteria to continue subsistence uses. One of the three qualifying criteria was "the proximity of the domicile of the subsistence user to the stock or population." AS 16.05.258(b)(4)(B)(ii).

In other words, the subsistence law gave an advantage to persons who lived closer to a subsistence fish stock or game population. Although proximity was only one of three factors for Tier II eligibility,⁵ a person who lived closer to the wildlife was more likely to qualify for a Tier II hunt or fishery than a person who lived further away.

Six years after the *McDowell* decision, the Alaska Supreme Court focused on the Tier II proximity criterion. In 1995, the Court decided that the criterion violated the equal access clause. *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 639 (Alaska 1995).

Several features of the *Kenaitze* case are significant. First, the constitutionality of the proximity criterion was not an issue before the lower trial court. Both the plaintiffs (the *Kenaitzes* and other Cook Inlet Native Tribes) and the defendant (State) assumed, because the criterion was undisturbed in *McDowell*, that it was constitutional. The parties' only difference at the trial court level, and the only point on appeal before the Supreme Court, was whether the nonsubsistence area provision of the 1992 subsistence law was constitutional.⁶ The Court, on its own, asked the parties to brief the legality of the proximity criterion.

⁵ The other Tier II factors are the person's "customary and direct dependence on the fish stock or game population . . . for human consumption as a mainstay of livelihood" and the person's "ability . . . to obtain food if subsistence use is restricted or eliminated." AS 16.05.258(b)(4)(B)(i) and (iii).

⁶ Although legality of the proximity criterion was not an issue before the trial court, the *Kenaitzes*, in their arguments to both courts, did refer to it. They unsuccessfully argued that the overlap of that criterion with nonsubsistence areas made residents of those areas unable to effectively be subsistence users, thus implicating the equal access clauses.

It is also significant that both the Kenaitzes and the State argued in favor of the proximity criterion. Their arguments are similar to those that are now being offered to support the residency-based presumptions of HB 406. For example, the State, in its brief to the Court, argued that the proximity criterion only came into play when resources were so diminished that it was necessary to reduce the number of users -- in other words, it was used only "for species protection purposes." The State also pointed out that the criterion was not conclusive; there were two other criteria that could outweigh it. Finally, the State argued that proximity to the resource -- unlike the urban-rural criterion -- was neither over-inclusive or under-inclusive, and that it is reasonable to believe that persons living closer to a declining resource have a greater need for it.

In spite of those arguments, the Court held that the proximity criterion violated the equal access clauses. The Court made several comments that cast doubt on any method of deciding subsistence eligibility that is based on where a person lives. The Court, referring to its *McDowell* decision, said:

We explained that the constitution does not bar "all methods of exclusion where exclusion is required for species protection purposes." While we had no occasion to state what exclusionary criteria might be permissible in such circumstances, the opinion makes it quite clear that *residency-based criteria are not permissible. . . .* We both quoted and stressed language holding that *people who reside near a fish or game population do not have a higher claim to that population than state residents whose domiciles are more distant. . . .* Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, *eligibility to participate in Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population.*

Kenaitze at 638, citations omitted, emphasis added.

After the *Kenaitze* decision, we cannot conceive of any circumstance in which the Supreme Court would allow a person's residence to be used to determine eligibility to participate in subsistence hunts and fisheries. We believe that the Court unconditionally rejected residency-based criteria, even if they would have only an indirect or indeterminative affect on eligibility. Our belief is supported by the fact that the common use clause has words that specifically reject location as a factor; it guarantees common use of fish and game "[w]herever occurring."

The Honorable Ben Grussendorf
Alaska House of Representatives
Re: Constitutionality of CSHB 406 (Fin)

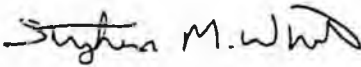
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Page 6

Alaska Const. art VIII, sec. 3.⁷

Please contact us if you need further advice on this matter.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: 
Stephen M. White
Assistant Attorney General

SMW:lmr

cc: Pat Pourchot, Legislative Director, Office of the Governor
The Honorable Gail Phillips, Speaker of the House
Members, House Finance Committee
Chrystal Smith, Legal Administrator, Department of Law

⁷ In its entirety, the common use clause says, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art VIII, sec. 3.

FISCAL NOTE

No: 2

Version: CSHB 406 (RES)
 (H) Publish Date: 3/6/98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date: 3/5/98
 Title: AN ACT Relating to Subsistence
 Use of Fish & Game
 Sponsor: Representative Scott Ogan
 Requester: House Resource Committee

Dept. Affected: Dept. of Law
 3FU
 Component:
 Component Serial No.:

Expenditures/Revenues		(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF Program Receipts							
1037 GF Mental Health							
1091 Designated Program Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	

Estimate of any current year (FY97) cost: _____

POSITIONS

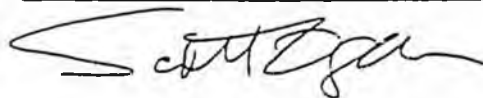
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary.)

Any cost associated with this legislation will be identified in the next committee of referral and has not been brought to my attention at this time.

Prepared by: House Resources Committee
 Division: _____
 Approved by: Representative Scott Ogan
 Agency: Co-Chair House Resources Committee

Page: 465-3715
 Date: 3/5/98
 Date: _____



FISCAL NOTE

No: 3

Version: CSHB 406 (JUD)

(H) Publish Date: 4/7/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date: April 6, 1998
 Title: Relating to subsistence uses
of Fish & Game
 Sponsor: House Resources Committee
 Requester: House Judiciary Committee

Dept. Affected None
 BRU None
 Component None
 Component Serial No. _____

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES	*	*	*	*	*	*
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CHANGE IN REVENUES ()	*	*	*	*	*	*
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FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1091 Designated Program Receipts						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY97) cost: _____

POSITIONS

POSITIONS	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Con Bunde
use @ mail

Prepared by Jeff Logan
 Division House Judiciary Committee
 Approved by Representative Con Bunde, Vice Chairman
 Agency House Judiciary Committee

Phone 465-6841
 Date April 6, 1998
 Date April 6, 1998

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. HB406

Revision Date: _____ Dept. Affected: Fish and Game
 Title: Act Relating to Fish and Game BRU: Subsistence
 Component: Subsistence
 Sponsor: House Judiciary
 Requester: House Finance COMPONENT SERIAL NO. 483

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 100	FY 101	FY 02	FY 03	FY 04
PERSONAL SERVICES	1,336.0	2,439.0	2,439.0	2,439.0	2,439.0	2,439.0
TRAVEL	487.4	407.1	407.1	407.1	407.1	407.1
CONTRACTUAL	154.1	380.0	380.0	380.0	380.0	380.0
SUPPLIES	39.0	63.0	63.0	63.0	63.0	63.0
EQUIPMENT	77.0	31.0	31.0	31.0	31.0	31.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	2,093.5	3,320.1	3,320.1	3,320.1	3,320.1	3,320.1

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	300.0	600.0	600.0	600.0	600.0	600.0
1003 GF Match						
1004 GF	1,793.5	2,720.1	2,720.1	2,720.1	2,720.1	2,720.1
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	2,093.5	3,320.1	3,320.1	3,320.1	3,320.1	3,320.1

Estimate of any current year (FY96) cost: \$ _____

POSITIONS

FULL-TIME	24	41	41	41	41	41
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Overview: HB406 would substantially revise the state's subsistence statute, requiring the Board of Fisheries and the Board of Game to establish individual qualification criteria to determine who may participate in subsistence fisheries and hunts in Alaska, as well as an adjudication process for challenges and denials for qualification. Applicants are expected to be residents of areas and communities determined to be nonsubsistence under the provisions of this legislation. Individuals will have to apply for each species and fish and game population for which they wish to hunt and fish. This new qualification system is expected to draw about 122,000 applications each year---64,000 fishing permit applications and 58,000 hunting permit applications.

Prepared by: _____
 Division: _____
 Approved by Commissioner: _____
 Agency: _____

Phone: _____
 Date: _____
 Date: _____

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FISCAL NOTE ANALYSIS: Division of Subsistence

Development of a Subsistence Permitting Program:

OVERVIEW: HB 406 would substantially revise the state's subsistence statute, requiring the Board of Fisheries and the Board of Game to establish individual qualification criteria to determine who may participate in subsistence fisheries and hunts in Alaska. Applicants are expected to be residents of areas and communities determined to be non-subsistence under the provisions of this legislation. Individuals will have to apply for each species and fish stock and game population for which they wish to hunt and fish. These individual applications systems are expected to draw about 120,000 applications each year—64,000 fishing permit applications and 58,000 hunting permit applications.

PROCESS: The team charged with issuing permits for the Board of Fisheries and the Board of Game will consist of a core of 37 individuals: 1 section head, 2 program managers, 2 resource specialists III's, 10 hearing officers, 6 analyst programmers, 4 paralegals, 6 data entry clerks, 2 secretaries, and 4 administrative clerks. Duties of this team will cover two primary functions: (1) the issuance of permits and (2) the process of appeals of unsuccessful applicants. The process of issuing permits requires the design and printing of applications, a distribution system for applications to the public, evaluation of applications, and actual permit issuance to qualified applicants. Appeals and disagreements over the issuance of permits requires a systematic process in which applicants have adequate recourse to resolving disputes prior to seeking judicial relief.

The permit process will have a series of stipulations and safeguards to provide applicants with the greatest opportunity to receive benefits to which they are entitled. The design of the application will include reviews by each board and appropriate staff. The oversight process begins when applications are received and initially reviewed. Applications lacking vital information or incomplete responses will be returned with letters of explanation. Unsuccessful applicants will be notified of their rejection to give them the opportunity to provide additional support to their subsistence preference claim. If after re-evaluation of additional information applicants are still unsuccessful, they may seek an appearance before the hearing officer in order to determine the facts of the case. If the hearing officer still decides against the applicant, the applicant can appeal to the Boards of Fisheries or Game. In the event the board affirms the original denial, the decision would be final for the Department and the applicant could appeal to the Superior Court.

CORE STAFFING: Because each board will have its own permit process for applications each board's process will have its own set of hearing officers, analyst programmers and data entry clerks, resource specialists and administrative clerks. All of these positions will be located in Anchorage to facilitate their access to the entire state as well as applicants' ease of access to them.

SECTION HEAD. An assistant director (range 23) will oversee the entire subsistence eligibility section and coordinate with the rest of the division, the department, and other agencies.

BOARD SECTION LEADER. Two program managers (range 22), one for each board, will lead the application design, issuance and award process. They will each oversee a staff of 17.

SUBSISTENCE RESOURCE SPECIALIST III: The subsistence resource specialist III (SRS III) is a range 18 position and will have programmatic and administrative oversight of the analyst programmers and administrative clerks for each board's permit system. Working with Division's current director and research director, the SRS III will develop and analyze options for the subsistence hunting and fishing application and scoring system for presentation to the Boards of Fisheries and Game. They will oversee the awards and appeals of applications

PARALEGALS: The four (4) paralegals will coordinate the file for each appeals and adjudication. They will conduct the research necessary and make sure the file is complete before each hearing. They will assist the hearing officer.

ADMINISTRATIVE CLERK III: The four (4) administrative clerks (AC III) are a range 10 position and will be responsible for maintaining general administrative functions of the appeals staff of this unit. The AC III will respond to public inquires about the appeals process. They will also serve as recording clerks during hearings.

HEARING OFFICERS: The ten (10) hearing officers (HO) are range 22 positions with responsibilities for determining finding of facts. The two hearing officers will design and implement the necessary procedures to see that the intent of the legislation is met and that applicants who are denied a subsistence hunting or fishing permit are assured of due process. Each of these positions receives clerical support from an administrative clerk II and investigative support from an analyst programmer III position.

ANALYST PROGRAMMER III: The analyst programmers (A/P III) are range 16 positions with responsibilities for the design of the fishing or hunting applications, creation of necessary data management procedures and programs, and collection of administrative information relevant to the applicant. Using hunting license and permit information within the Department of Fish and Game, the two A/P IIIs will provide the hearing officers with data relevant to the applications in dispute. The A/P IIIs will also undertake a random review of successful permit applicants to ensure that the system is meeting its objective of providing a subsistence preference to qualified applicants. The A/P IIIs will have the shared responsibility with the hearing officers for preparation of documentation of applicant cases. They will also directly supervise the administrative clerk II positions.

DATA ENTRY CLERK II: The data entry clerks (AC II) are range 9 positions. The primary responsibility of the two AC IIs will be the review for accuracy of all permit applications and entry of application information. Following data entry, the AC IIs will archive all materials in accordance with administrative procedures. As required, the AC IIs will provide support for the distribution of applications and permits.

SUBSISTENCE SUPPORT STAFF: The unit will draw upon some of the staff resources of the Division of Subsistence. With this unit's SRS III, the Division's current director and research director and AP IV will develop and analyze options for the subsistence applications and scoring systems for presentation to the Boards of Fisheries and Game. These and other support functions will be subsumed within the Division's current budget. Subsistence Resources Specialist IIs and IIIs and clerical staff will provide regional support in informing the public about the process and will respond to and forward inquires of local residents.

BOARD SUPPORT SECTION STAFFING: The new regional coordinator position will work with the new regional committees and existing advisory committees. Staff for existing regional coordinator will be increased from seasonal to full-time. The administrative clerks will provide support to process travel claims, serve as support to both Boards Section staff and to the regional councils and boards.

BUDGET—Division of Subsistence:

ELIGIBILITY SECTION:

FY 99

The initial budget for the eligibility section provides for seventeen (17) full-time employees: one section head, 2 program managers, 2 secretaries, 6 analyst programmer IIIs, and 6 data entry clerk IIs. This group will design and distribute the application forms, respond to public inquiries, score the applications received, and process appeals. Full-time funding for the unit projects personnel costs totaling \$925.2

BOARD MEETING: During the first year of implementation, the Joint Board will meet approximately 12 days to analyze the new statute and establish the regional committee system, including appointments to the councils. Following, each board will meet separately for approximately 12 days to review and revise the nonsubsistence use areas, establish the subsistence permit point system and application form, and establish the appeal process. To perform the regulation consistency review and make determinations for subsistence, each board will meet approximately 7 days. To hear appeals, each board will meet another 7 days. The regional councils will meet about 14 days during the first year and advisory committee travel and meeting days will increase to attend pertinent regional council meetings and board meetings.

During subsequent years, each board will meet approximately 14 additional days. Regional councils will meet an estimated 14 days per year. Advisory committee travel and meeting days will increase to attend pertinent regional council meetings and board meetings.

TRAVEL: A travel budget of \$487.4 provides for program outreach throughout the state, participation of the SRS III at Board of Fisheries and Board of Game meetings, and the appearance of the hearing officers for hearings as required.

CONTRACTUAL: Printing and distribution of applications, permits denials, notices of deadlines and other correspondence and communications are estimated to bring the total for contractual services to \$154.0.

SUPPLIES & EQUIPMENT: Office expendables are estimated at \$39.0. Necessary equipment for this new unit including furniture, computers and office space is estimated at \$72.0 for the first year.

The total budget for the first year of operation is \$ 2,193.5

FY 100

ELIGIBILITY SECTION: Second year staffing will increase to a total of 37 employees with hiring of 10 hearing officers, 4 paralegals and 4 administrative/recording clerks. This group will

process the first set of appeals and challenges, estimated to be about 1,000 per year. Personnel costs total \$2,439.0.

Travel, Contractual, Supplies and Equipment will total \$881.

FY 01

The total budget in the third year will be \$3,201.1, reflecting inflation and \$31.0 for equipment upgrades. Staffing remains the same.

FY 02

The total budget in the third year will be \$3,201.1, again reflecting increases due to inflation. Staffing and other budget categories remain the same.

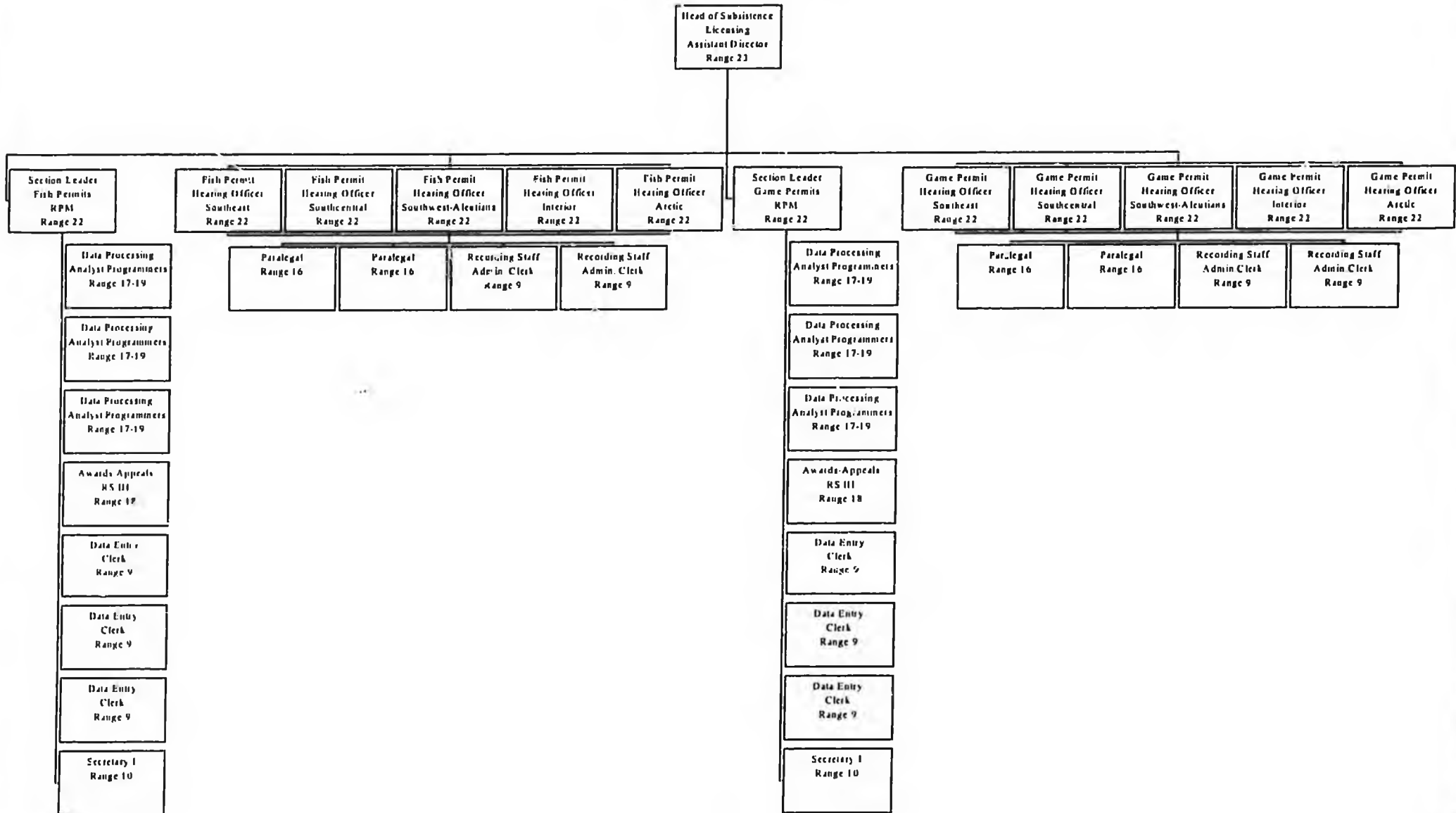
FY 03

The total budget in the fourth year will be \$3,201.1, again reflecting increases due to inflation. Staffing and other budget categories remain the same.

FY 04

The total budget in the fifth year will be \$3,201.1, again reflecting increases due to inflation. Staffing and other budget categories remain the same.

**Subsistence Eligibility Section
(Potential Organization) 4/8/98**



Personnel Costs for New Subsistence Eligibility Section

	Range	Monthly Salary/Benefits	Yearly Salary/Benefits	Number of Positions	Personnel Costs
Assistant Director	23	\$7,300	\$87,600	1	\$87,600
Regional Program Managers	22	\$6,500	\$78,000	2	\$156,000
Resource Specialist III	18	\$5,800	\$69,600	2	\$139,200
Analyst Programmers	16	\$5,000	\$60,000	6	\$360,000
Data Entry Clerks	9	\$3,000	\$36,000	6	\$216,000
Admin Clerks	9	\$3,000	\$36,000	4	\$144,000
Secretary I	10	\$3,100	\$37,200	2	\$74,400
Hearing Officer	22	\$6,500	\$78,000	10	\$780,000
Paralegal Staff	16	\$5,000	\$60,000	4	\$240,000
Total				37	\$2,197,200

Increase in Boards Support Staff*

Regional Coordinator	14	\$3,900	\$46,800	1	\$46,800
Regional Coordinator	14			3	\$77,000
*increase from PT to FT					
Admin Clerks	9	\$3,000	\$36,000	3	\$108,000
Admin Clerks	9			1	\$10,000.00

Total **\$241,800.00**

Grand Total **\$2,439,000.00**

Applicants for Subsistence Permits

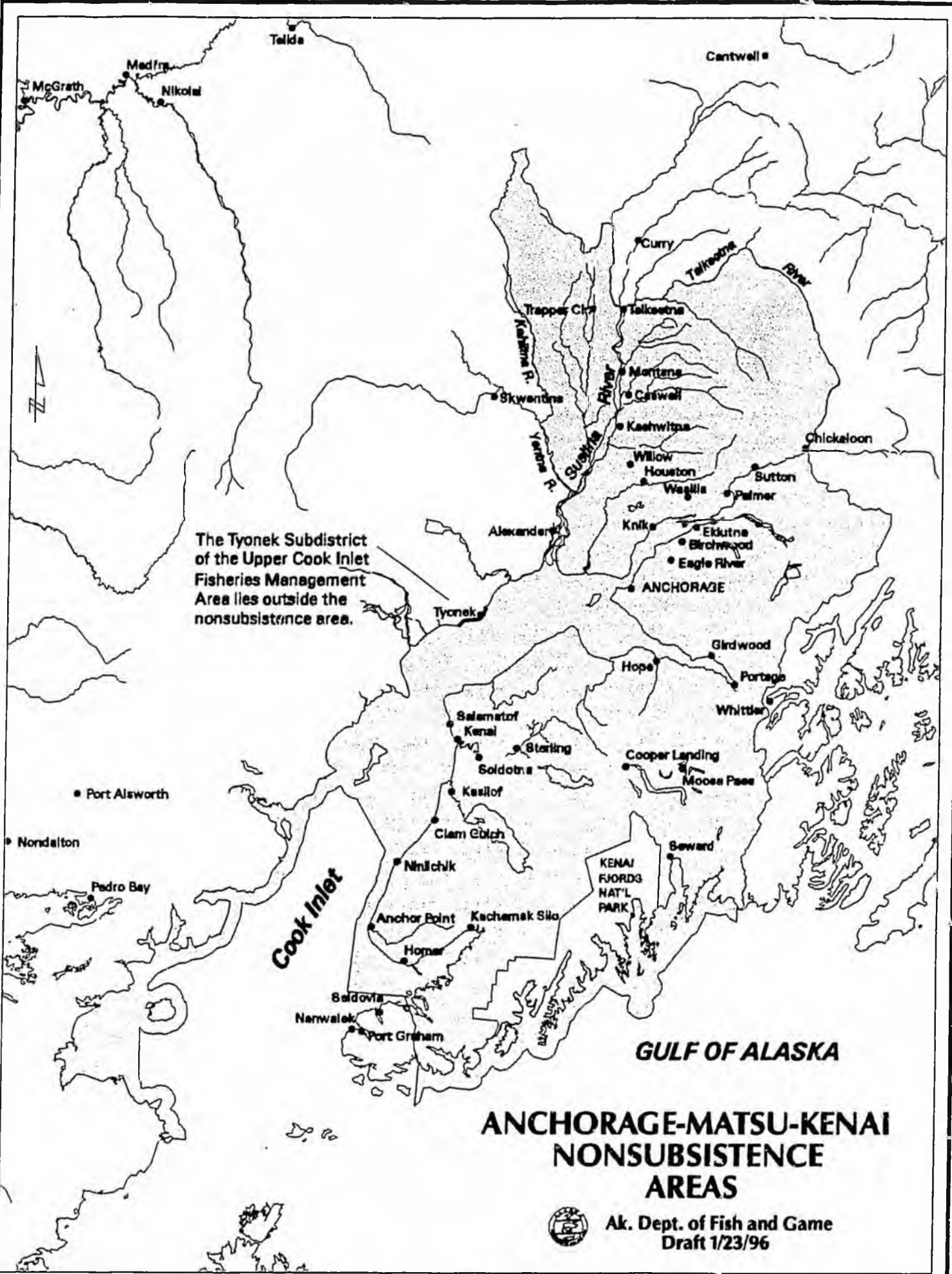
Fish	1995 Population	Households	Percent of Households Wanting to Fish	Number of Households Wanting to Fish	Mean Fishers per HH	Number of People Wanting to Fish	Number of Fish Stocks Applied for per Fisher	Total Number of Fishing Permit Applicants
Unalaska	4,083	1,021	11%	112	2	225	2	449
Bethel	5,195	1,299	70%	909	2	1,818	2	3,637
King Salmon-Naknek	1,305	326	48%	157	2	313	2	626
Dillingham	2,243	561	72%	404	2	807	2	1,615
Kodiak Area	13,498	3,375	26%	877	2	1,755	2	3,509
Nome	3,576	894	50%	447	2	894	2	1,788
Barrow	4,234	1,059	29%	307	2	614	2	1,228
Kotzebue	2,947	737	76%	560	2	1,120	2	2,240
Sitka	9,194	2,299	33%	759	2	1,517	2	3,034
Cordova	2,568	642	27%	173	2	347	2	693
Petersburg	3,374	844	21%	177	2	354	2	709
Wrangell	2,758	985	23%	227	2	454	2	908
Anchorage	257,780	64,445	10%	6,445	1.5	9,667	2	19,334
Fairbanks Area	88,729	22,182	10%	2,218	1.5	3,327	2	6,655
Juneau	29,228	7,307	10%	731	1.5	1,096	2	2,192
Kenai Area	45,984	11,496	10%	1,150	1.5	1,724	2	3,449
Ketchikan Area	15,082	3,771	30%	1,131	1.5	1,697	2	3,393
Mat-Su Area	50,261	12,565	20%	2,513	1.5	3,770	2	7,539
Valdez	4,469	1,117	20%	223	1.5	335	2	670
TOTAL				19,520		31,834		63,668

Game	1995 Population	Households	Percent of Households Wanting to Hunt	Number of Households Wanting to Hunt	Mean Hunters per HH	Number of People Wanting to Hunt	Number of Hunts Applied for per Hunt	Total Number of Hunting Permit Applicants
Unalaska	4,083	1,021	11%	112	1	112	2	225
Bethel	5,195	1,299	20%	260	1	260	2	520
King Salmon-Naknek	1,305	326	58%	189	1	189	2	378
Dillingham	2,243	561	42%	236	1	236	2	471
Kodiak Area	13,498	3,375	48%	1,620	1	1,620	2	3,240
Nome	3,576	894	20%	179	1	179	2	358
Barrow	4,234	1,059	43%	455	1	455	2	910
Kotzebue	2,947	737	73%	538	1	538	2	1,076
Sitka	9,194	2,299	44%	1,011	1	1,011	2	2,023
Cordova	2,568	642	57%	366	1	366	2	732
Petersburg	3,374	844	43%	363	1	363	2	725
Wrangell	2,758	985	34%	335	1	335	2	670
Anchorage	257,780	85,927	9%	7,733	1	7,733	2	15,467
Fairbanks Area	88,729	29,576	13%	3,845	1	3,845	2	7,690
Juneau	29,228	9,743	33%	3,215	1	3,215	2	6,430
Kenai Area	45,984	15,328	19%	2,912	1	2,912	2	5,825
Ketchikan Area	15,082	5,027	37%	1,860	1	1,860	2	3,720
Mat-Su Area	50,261	16,754	18%	3,016	1	3,016	2	6,031
Valdez	4,469	1,490	44%	655	1	655	2	1,311
TOTAL				28,900		28,900		57,801


Applicants for Subsistence Permits

Fish	1995 Population	Households	Percent of	Number of	Mean Fishers	Number of	Number of Fish	Total Number of
			Households	Households				
			Wanting to Fish	Wanting to Fish	per HH	to Fish	for per Fisher	Applicants
Unalaska	4,083	1,021	11%	112	2	225	2	449
Bethel	5,195	1,299	70%	909	2	1,818	2	3,637
King Salmon-Naknek	1,305	326	48%	157	2	313	2	626
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Kotzebue	2,947	737	76%	560	2	1,120	2	2,240
Sitka	9,194	2,299	33%	759	2	1,517	2	3,034
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Anchorage	257,780	64,445	10%	6,445	1.5	9,667	2	19,334
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Juneau	29,228	7,307	10%	731	1.5	1,096	2	2,192
Kenai Area	45,984	11,496	10%	1,150	1.5	1,724	2	3,449
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Valdez	4,469	1,117	20%	223	1.5	335	2	670
TOTAL				19,520		31,834		63,668

Game	1995 Population	Households	Percent of	Number of	Mean Hunters	Number of	Number of	Total Number of
			Households	Households				
			Wanting to Hunt	Wanting to Hunt	per HH	to Hunt	for per Hunt	Applicants
Unalaska	4,083	1,021	11%	112	1	112	2	225
Bethel	5,195	1,299	20%	260	1	260	2	520
King Salmon-Naknek	1,305	326	58%	189	1	189	2	378
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Kotzebue	2,947	737	73%	538	1	538	2	1,076
Sitka	9,194	2,299	44%	1,011	1	1,011	2	2,023
Cordova	2,568	642	57%	366	1	366	2	732
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TOTAL				28,900		28,900		57,801

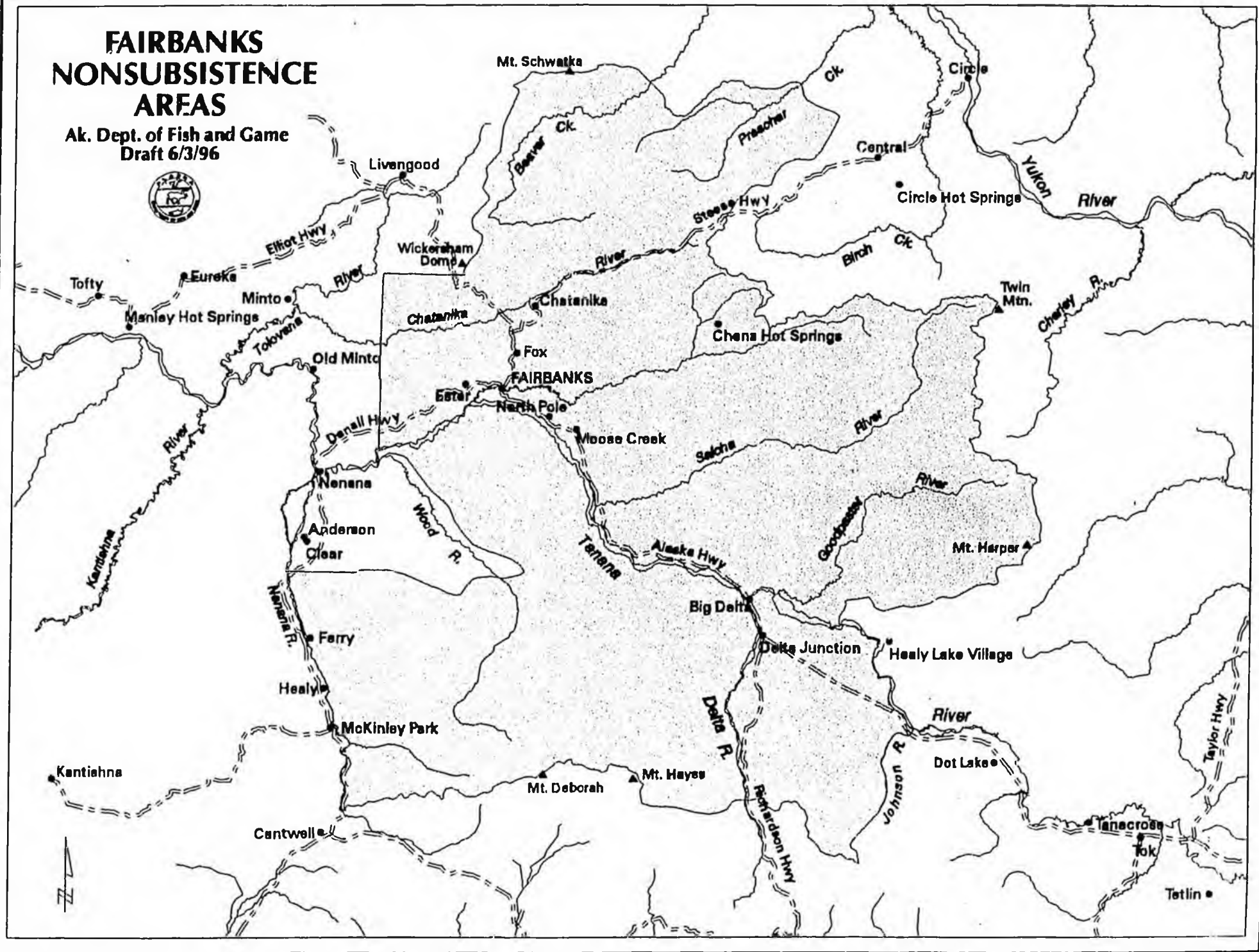


**ANCHORAGE-MATSU-KENAI
NONSUBSISTENCE
AREAS**

 Ak. Dept. of Fish and Game
Draft 1/23/96

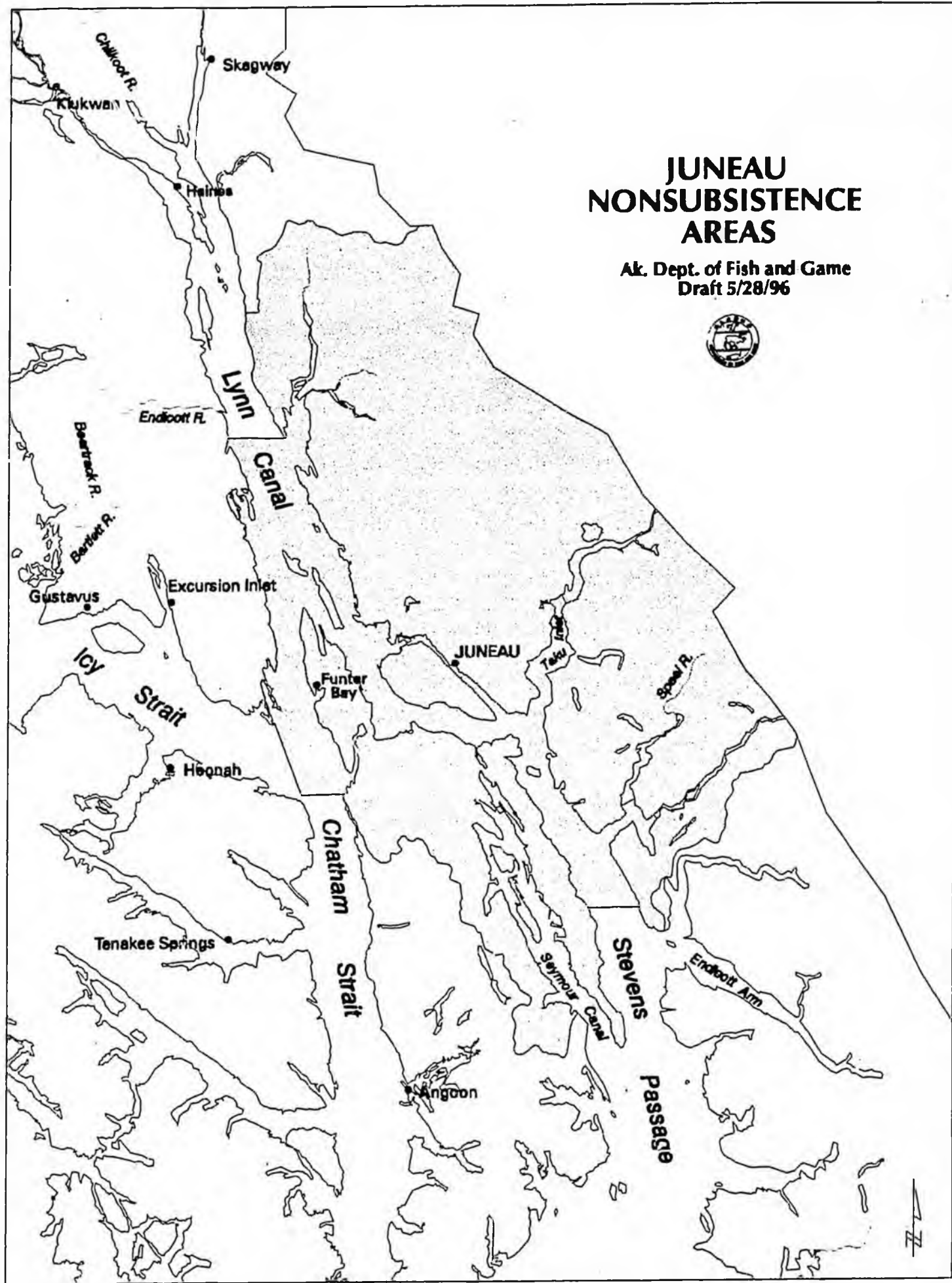
FAIRBANKS NONSUBSISTENCE AREAS

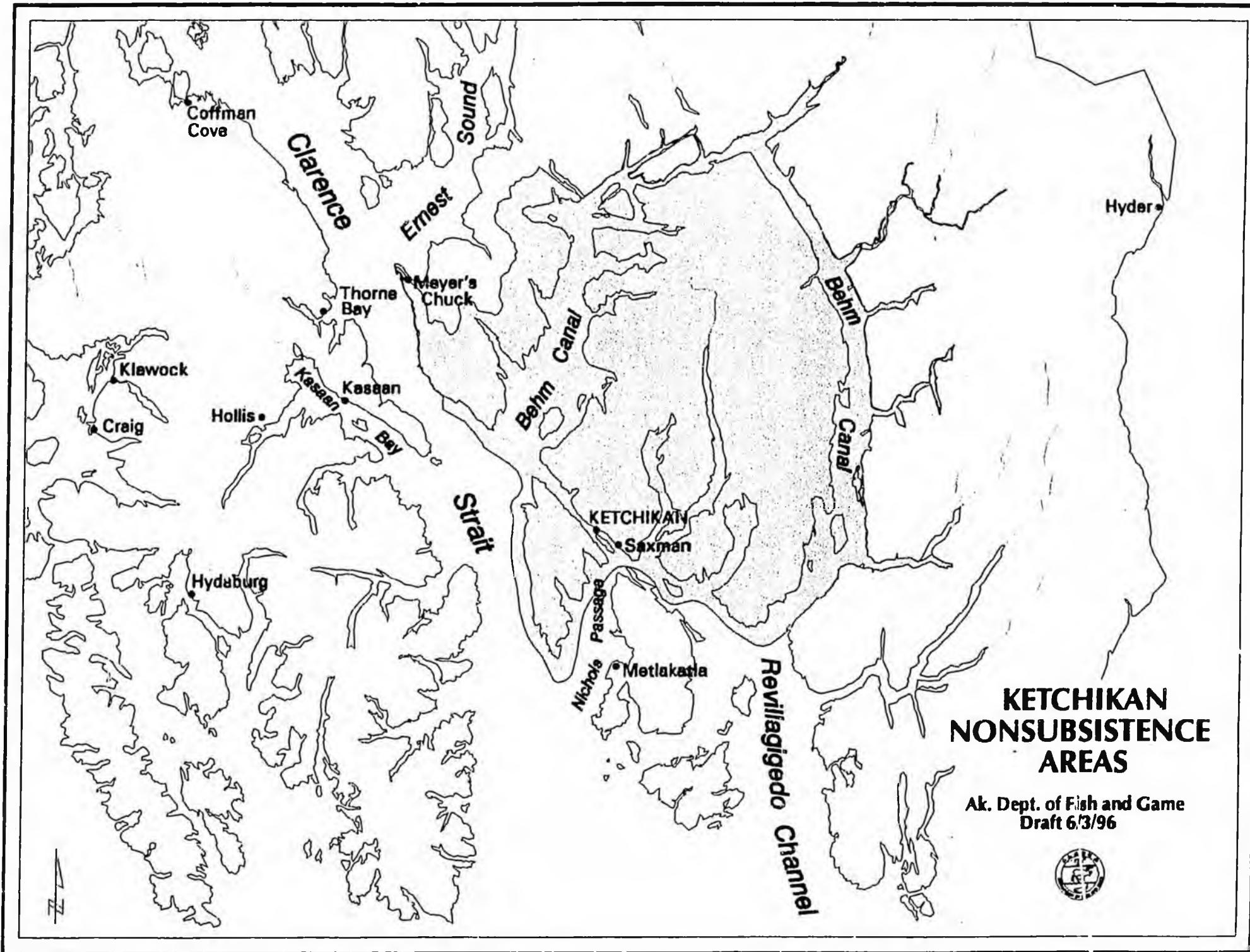
Ak. Dept. of Fish and Game
Draft 6/3/96



JUNEAU NONSUBSISTENCE AREAS

Ak. Dept. of Fish and Game
Draft 5/28/96



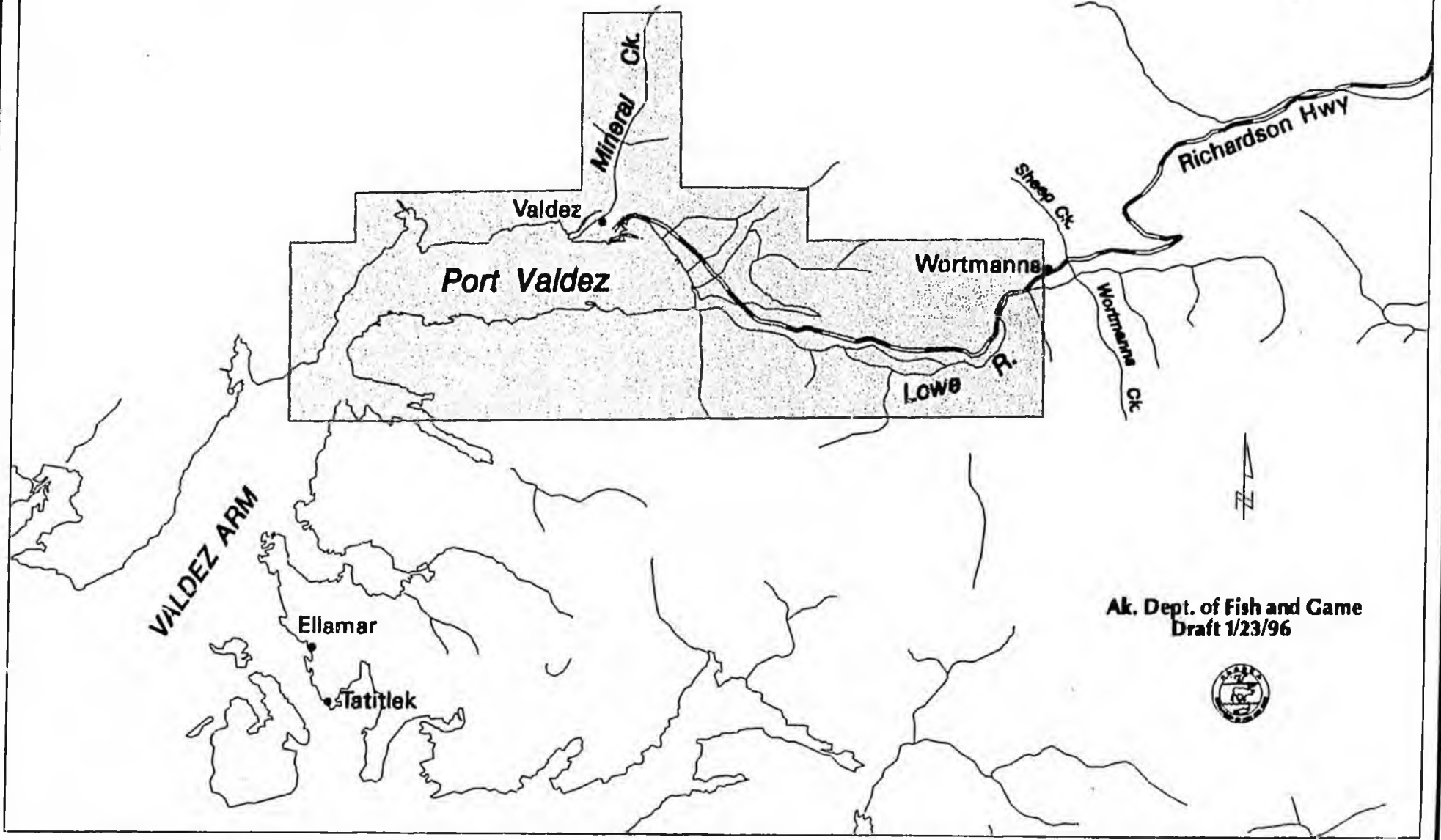


**KETCHIKAN
NONSUBSISTENCE
AREAS**

Ak. Dept. of Fish and Game
Draft 6/3/96



VALDEZ NONSUBSISTENCE AREAS



Ak. Dept. of Fish and Game
Draft 1/23/96



4/8/98

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.

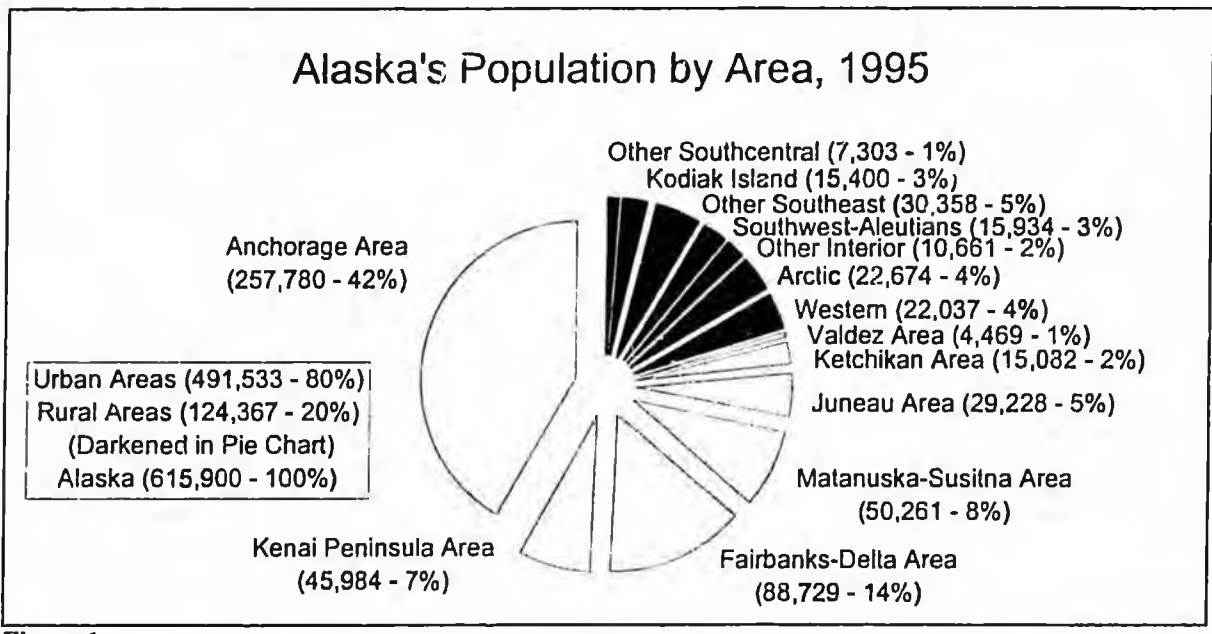


Figure 1

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

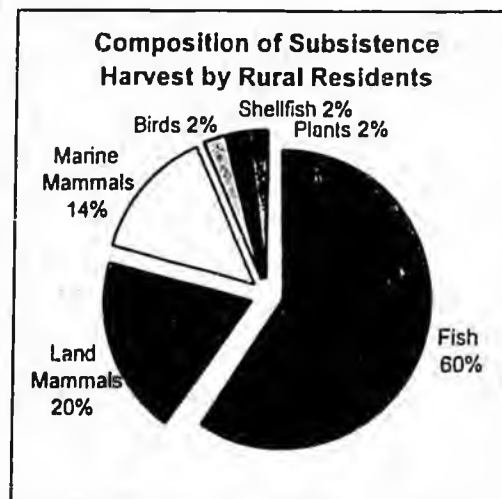


Figure 3

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

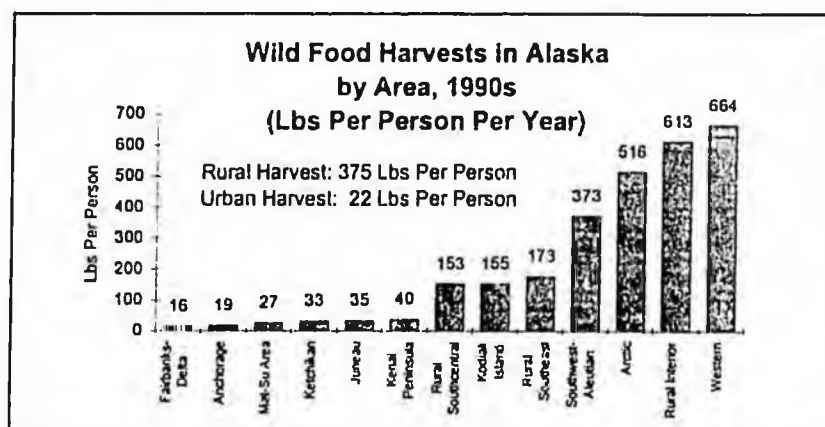


Figure 5

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	398%	57%	\$19,078,791	\$31,797,985
Arctic	518	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	43,714,608	242%	35%	\$131,143,818	\$218,573,030
Urban Areas						
Ketchikan Area	33	461,855	22%	3%	\$1,385,566	\$2,309,270
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%	\$4,800,060	\$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

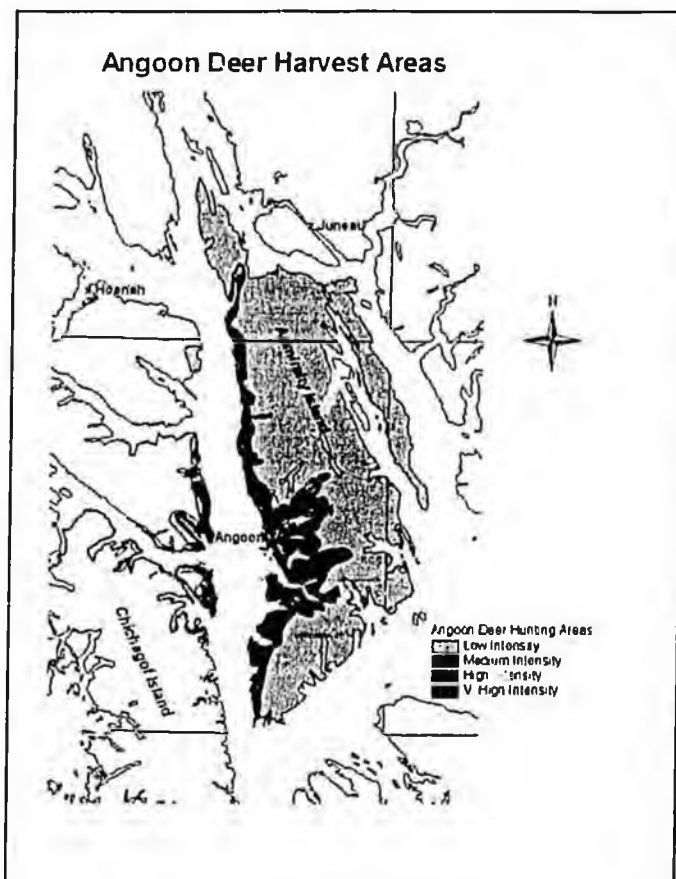


Figure 7

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.

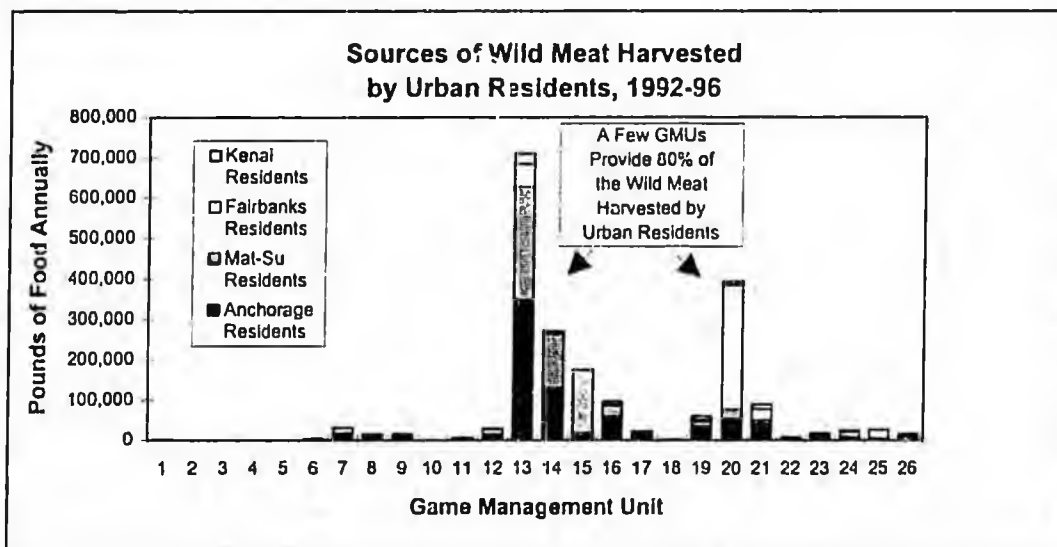


Figure 8



Alaskans Together
 1810 Peanook Parkway Anchorage, AK 99508
 907.278.6639

F
Subsistence

April 2, 1998

Honorable Joe Green
 Chairman of the House Judiciary Committee
 Alaska State Legislature
 State Capitol (MS 3100)
 Juneau, Alaska 99801-1182

SUBJECT: House Joint Resolution No. 66

Dear Mr. Chairman:

Thank you for giving me the opportunity to testify before the Judiciary Committee in Juneau on March 30, 1998. At the time I testified, I had not had time to analyze the new House Joint Resolution No. 66 regarding the Constitutional Amendment. Since my return to Anchorage, I have been able to spend some time on Resolution No. 66 and would like to share a few comments on the proposed legislation.


Regarding the Section 19 Subsistence Amendment, it fails to include ANILCA's two standards of either rural preference or customary and traditional uses. Failure to address these two standards which identify those Alaskan residents who may have subsistence preference, I am fearful that it may not comply with ANILCA. As you are aware, if the Amendment does not comply with ANILCA, a federal takeover of the state's management of fish and game will result.

Regarding the Section 29 Effective Date and Repeal of Amendment, I have a number of serious concerns about it. For one thing, the proposed Amendment calls for a number of amendments to ANILCA. These include amending ANILCA's definition of subsistence terms to fit the state's definitions of these same terms to eliminating the regional advisory councils and references to co-management. If the legislature proposes any major changes to ANILCA, our Senators in the United States Congress have repeatedly stated that will not happen.

Enclosed is a copy of a more detail analysis of the proposed resolution. The legislature has come a long way regarding subsistence. We are so close to a solution and the deadline now, let's keep concentrating our efforts on it to reach our common goal of keeping Alaska's fish and game managed by the state.

Sincerely,

ALASKANS TOGETHER


 Carl H. Marrs
 Secretary/Treasurer

Enclosures
 036TLW.doc

cc: Honorable Gail Phillips, Speaker of the House
 Honorable Brian Porter
 Governor Tony Knowles
 Senator Ted Stevens
 Senator Frank Murkowski
 Congressman Don Young
 Alaskans Together Board of Directors

MEMORANDUM

TO: Carl H. Marrs
CIRI President & CEO

FROM: Theresa L. Williams, Attorney *TLW*

DATE: April 2, 1998

SUBJECT: House Joint Resolution No. 66

Resolution 66 proposes that Article VIII, Constitution of the State of Alaska, is amended by adding:

Section 19. Subsistence. *The legislature may, consistent with the sustained yield principle and during times of shortage, provide a preference to and among residents in the taking of fish and wildlife for subsistence uses based on proximity to the resource and dependence on fish and wildlife.*

Comment - Basing subsistence preference on proximity to the resource gives the state great leeway to arbitrarily draw the subsistence areas. It also fails to include the standards of rural preference and customary and traditional uses, which means it most likely will not pass muster with ANILCA.

And Article XV is amended by adding:

Section 29. Effective Date and Repeal of Amendment. *(a) Section 19 of Article VIII, regarding subsistence uses of fish and wildlife by residents, takes effect on the day following the date that the governor certifies that federal law governing subsistence uses of fish and wildlife on federal public lands in the State*

(1) affirms the sovereignty of the State over State land and water and for the management of fish and wildlife in the State;

Comment - If the state is able to regain management over fish and game by becoming in compliance with ANILCA then this seems feasible.

(2) defines the term "public lands" to expressly exclude State and private land and water, including navigable waters;

Comment - "Public lands" are defined now to expressly exclude State and private land. The legislature is attempting to overturn the Katie John decision by including "water, including navigable waters." ANILCA has a moratorium stating that DOI cannot use any

funds to assert jurisdiction, management, or control over the navigable waters until December 1, 1998, which, in essence, is a mechanism that holds off the Katie John decision to give the State time to comply with ANILCA. If at a later time the State is out of compliance with federal regulations, then, it would seem, Congress would still want to rely on the Katie John decision so they can implement and regulate a rural preference regarding subsistence fishing.

(3) prohibits federal preemption of State management of fish and wildlife on State and private land and navigable waters in the State;

Comment - The legislature is attempting to limit federal "extraterritoriality" when the State is out of compliance. Without knowing what effect it would have on the future, the federal government would most likely not be willing to give up any implied federal powers.

(4) expressly waives or renounces all claims to authority for management of fish and wildlife on State and private land and water that may arise under the navigational servitude doctrine or the doctrine of reserved water rights;

Comment - The legislature is attempting to overturn the Katie John decision and/or sand bag a negative decision that could arise in the latest law suit. Again, if the federal government were to takeover at a later date, with this affirmation, they would not be able to give a rural preference to subsistence fishing since Congress would control over any of the State's waterways.

(5) defines the terms "rural," "customary and traditional," and "customary trade" to be consistent with the laws of the State;

Comment - These terms are already defined in ANILCA, but Green Bill has not defined them. Whether the feds adopt the state's definitions will be dependent on how much or how little they vary from the definitions ANILCA already has in place. There is a one year window after the amendment is voted in for the feds to have an opportunity to amend ANILCA to meet this requirement. Furthermore, this provision is too vague, and leaves to the State to arbitrarily be able to redefine the definitions of these terms on a whim or at their leisure.

(6) either repeals the federal regional advisory councils established under Title VIII of the Alaska National Interest Lands Conservation Act (P.L. 96-487) or amends the powers and functions of the councils so that the councils serve only as advisors to managers of fish and wildlife;

Comment - Hard to do, the regional advisory councils keep a check on the state to help keep the state in compliance with ANILCA. If the federal government is willing for the state to manage fish and game on federal land, then the federal government would want

to keep a check on the state management to insure the interests of the federal government are being protected.

(7) repeals sec. 801(b)(4) of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as added by sec. 316(b)(3)(B) of P.L. 105-83 relating to management by the Secretary of the Interior of fish and wildlife for subsistence uses on all federal public lands in Alaska;

(8) repeals sec. 801(b)(5) of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as added by sec. 316(b)(3)(B) of P.L. 105-83, relating to the application of the federal subsistence priority on federal public lands to navigable waters in which the United States has reserved water rights;

Comment - The provisions referenced above refer to, respectively, Congress' findings that the feds will be managing fish and game because of the failure of state law to provide a rural preference and to the Katie John decision. If the state can regain management of its fish and game, these would probably be fairly easy to repeal.

(9) repeals sec. 814 of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as amended, relating to the adoption of federal regulations as necessary and appropriate to implement Title VIII of the Alaska National Interest Lands Conservation Act;

Comment - It is unclear whether they want to repeal the added amended language or the whole provision. It would be difficult to impossible to delete the whole provision, since this provision restates the powers the U.S. Constitution gives the government, that they have the authority to make rules and regulations that they deem appropriate for federal lands.

(10) amends Title VIII of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as amended, as necessary to limit subsistence uses and the preference for subsistence uses to fish and wildlife;

Comment - It is not clear from this provision how the legislature will be narrowing ANILCA's definition of subsistence and limit subsistence preference. The legislature might be attempting to eliminate berry picking from the subsistence definition by limiting it to fish and wildlife.

(11) amends Title VIII of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as amended, to eliminate references to co-management agreements; and

Comment - These might be hard to eliminate, the references to co-management have been in ANILCA since 1980.

(12) affirms that the laws of the State are consistent with provisions of federal law, as amended in accordance with (1) - (11) of this subsection, governing the subsistence uses of fish and wildlife on federal public land in the State.

Comment - This will not work. The Governor cannot affirm that the laws of the state are in compliance with federal law until the Constitutional Amendment is in effect. The Constitutional Amendment is not in effect until the Governor affirms that the state laws are in compliance with ANILCA.

(b) Section 19 of Article VIII is repealed if (1) within one year from the date that voter approval of the ballot proposition for the amendments proposed by this resolution was certified by the lieutenant governor, the governor does not make the certification described in (a) of this section;

Comment - In light of the comments stated above, the Governor will not be able to make this certification.

(2) the State is determined by a federal agency or federal court to be substantially out of compliance with federal law governing the subsistence uses of fish and wildlife on federal public lands in the State; or

Comment - It is unclear what the legislature is attempting to accomplish here. Either the amendment will be repealed if they never regain state management or if once the state regains management, they are found to be substantially out of compliance then the amendment will be repealed. This provision needs to state specifically that if the state never regains management or if there is a federal takeover, then the amendment will be repealed. As it is now, if the state regained management and a federal court or agency found the state substantially out of compliance and did not takeover, this amendment will still be repealed and with that action the feds would most likely takeover. There might be a chance that if the feds found the state substantially out of compliance, they might give the state a time to cure the defects, the way it is written now the state could lose an opportunity to cure. Furthermore, if the legislature wants a court to trigger a repeal of the amendment, it should be a judgment of the court of last resort.

(3) a federal court issues a final judgment that any provision of Title VIII of the Alaska National Interest Lands Conservation Act (P.L. 96-487), as amended, or the manner in which Title VIII of the Alaska National Interest Lands Conservation Act has been interpreted, enforced, or attempted to be enforced, violates the Constitution of the United States or any other federal law.

Comment - "Any provisions" is too broad to trigger an immediate repeal of the Constitutional Amendment. This provision should be narrowly tailored to the effect that the amendment will be repealed if a final judgment by a federal court of last resort finds that the ANILCA rural preference is unconstitutional.

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

Comment - It is not clear from the resolution of how it will be presented on the ballot, whether voters will have an opportunity to vote yes for one and no for other or whether they will have to take it as a package deal and vote both amendments in.

037TLW

AMENDMENT #1

WTD

OFFERED IN HOUSE FINANCE

BY REPRESENTATIVE THERRIault

TO:CSHB 406(JUD)

- 1 Page 1, line 5. delete "land"
- 2 Insert "fish and game"
- 3 Page 1, line 12. Delete "those resources on land"
- 4 Insert "these resources"

AMENDMENT #2

ADOPT
no/cby 4/9/98

OFFERED IN HOUSE FINANCE

BY REPRESENTATIVE THERRIAULT

TO:CSHB 406(JUD)

1 Page 3, after line 12. Insert new subsection (D)

2 "(D) shall seek to reestablish stock levels, consistent with sound
3 biological and environmental principles, which will attempt to restore a
4 reasonable opportunity for all consumptive uses;"

5 Page 3, after line 19. Insert new subsection (C)

6 "(C) shall seek to reestablish stock levels, consistent with sound
7 biological and environmental principles, which will attempt to restore a
8 reasonable opportunity for all consumptive uses;"

9 Page 4, after line 1. Insert new subsection (C)

10 "(C) shall seek to reestablish stock levels, consistent with sound
11 biological and environmental principles, which will attempt to restore a
12 reasonable opportunity for all consumptive uses;"

AMENDMENT #3

Adopt 4/9/98
no lobby

OFFERED IN HOUSE FINANCE

BY REPRESENTATIVE THERRIault

TO:CSHB 406(JUD)

- 1 Page 3, line 2. Delete "to differentiate among uses."
- 2 Insert "consistent with Article VIII, section 4, of the State of Alaska
- 3 Constitution that recognizes preferences among beneficial uses."

AMENDMENT #4

Adopted
4/9/98

OFFERED IN HOUSE FINANCE

BY REPRESENTATIVE THERRIAULT

TO: CSHB 406(JUD)

1 Page 7, line 22, following "of"

2 Delete "persons"

3 Insert "nine members appointed by the Governor"

4 Page 7, line 23, following "region"

5 Insert "no fewer than ⁵~~4~~ of whom shall reside in the appropriate region."

conceptual
possibly be an additional
sentence.

Adopted
7-3

Kelly-

Version LS1573\J

Conceptual
Amendment

II 5

Offered in House Finance Committee

To: CS for HB 406(JUD)

Page 1, line 5. After: "the use of"

Delete: "land"

Insert: "fish and game resources"

Page 1, line 7. After: ""uses of the"

Insert: "fish and game"

After: "resources"

Delete: "of the land"

Page 2, line 26. After: "board shall determine"

Delete: "the"

Insert: "an"

Replace title with:

ADORA

#6

An Act authorizing the Board of Fisheries and the Board of Game to identify fish and game that are taken or used for subsistence, identify subsistence and nonsubsistence areas, and establish preferences for subsistence fishing and hunting based on the availability of fish and game resources; providing for the identification of qualified subsistence users; providing for the regulation of the subsistence taking and use of fish and game; prohibiting and providing a penalty for false reports of information relating to subsistence taking or use of fish or game or to eligibility to engage in subsistence; establishing regional advisory committees; amending the definition of "customary and traditional", "subsistence fishing", "subsistence hunting", and "subsistence uses"; repealing the definition of "rural area"; repealing subsistence hunting and fishing statutes that are to take effect upon the sunset of the current subsistence hunting and fishing statute; and providing for an effective date.

FISCAL NOTE

No: 1

B. Version: CSHB 406 (RES)
 (H) Publish Date: 3/6/98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date: 3/5/98
 Title: An Act Relating To Subsistence
Use of Fish & Game
 Sponsor: Representative Scott Ogan
 Requester: House Resources Committee

Dept. Affected Fish & Game
 BRU _____
 Component _____
 Component Serial No. _____

Expenditures/Revenues		(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES []						
------------------------	--	--	--	--	--	--

FUND SOURCE		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF Program Receipts							
1037 GF Mental Health							
1091 Designated Program Receipts							
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	

Estimate of any current year (FY97) cost: _____

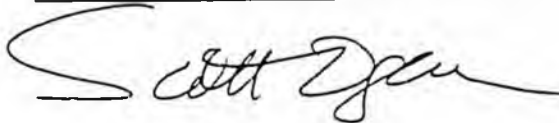
POSITIONS						
Full-time						
Part-time						
Temporary						

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

Any cost associated with this legislation will be identified in the next committee of referral and has not been brought to my attention at this time.

Prepared by House Resources Committee
 Division _____
 Approved by Representative Scott Ogan
 Agency Co-Chair House Resources Committee

Phone 465-3715
 Date 3/5/98
 Date _____



Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0607, fax (907) 276-5808.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA and CARL L. ROSIER, in his official capacity as Commissioner of Fish and Game,)	Supreme Court No. S-6162
Appellants,)	
v.)	Superior Court No. JAN-91-4569 CI
KENAITZE INDIAN TRIBE, NINILCHIK TRADITIONAL COUNCIL, KNIK TRIBAL COUNCIL, and the NATIVE VILLAGE OF EKLUTNA,)	<u>O P I N I O N</u>
Appellees.)	[No. 4201 - May 9, 1995]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Dana Fabe, Judge.

Appearances: Stephen M. White, Assistant Attorney General, Juneau; T. Henry Wilson, Assistant Attorney General, Anchorage; Bruce M. Botelho, Attorney General, Juneau, for Appellants. Carol H. Daniel, Alaska Legal Services Corporation, Anchorage; Eric Smith, Anchorage; William E. Caldwell, Alaska Legal Services Corporation, Fairbanks, for Appellees.

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton and Eastaugh, Justices.

MATTHEWS, Justice.

pg 22

The issues in this case are whether the Alaska Constitution is violated by a statute which (1) requires the creation of areas in which permits for subsistence hunting and fishing may not be granted, and (2) grants priority hunting and fishing rights to a preferred class of subsistence users based on where they reside.

I. BACKGROUND

Since 1978, subsistence hunting and fishing has had statutory priority over sport and commercial hunting and fishing.¹ In practice, when a fish or game population is insufficient to supply all consumptive uses consistent with the sustained yield principle, nonsubsistence uses must be restricted; when a population is sufficient only to supply subsistence uses, non-subsistence uses must be eliminated.²

From the outset, the statute establishing the subsistence priority created two tiers of subsistence users.³ The first tier includes all subsistence users.⁴ The second tier is more restricted. Tier II status becomes important when a fish or game population is inadequate to satisfy all subsistence needs. In such

¹ Ch. 151, § 5, SLA 1978; Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168, 174 n.12 (Alaska 1985).

² AS 16.05.258(b)(4), set forth at note 18 infra.

³ Ch. 151, § 4, SLA 1978.

⁴ AS 16.05.258(b)(3), set forth at note 18 infra.

cases Tier I users' harvest opportunities must be curtailed or eliminated so that Tier II users can harvest the population.⁵

Under the current statutory formulation the Boards of Fisheries and Game define Tier II subsistence users based on:

- (i) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood;
- (ii) the proximity of the domicile of the subsistence user to the stock or population; and
- (iii) the ability of the subsistence user to obtain food if subsistence is restricted or eliminated.

AS 16.05.258(b)(4)(B).

In 1986 the subsistence statute was amended to define subsistence hunting and fishing as activities which can be undertaken "only by a resident domiciled in a rural area of the state."⁶ The term "subsistence uses" was also defined as requiring residency in a rural area.⁷ A rural area, in turn, was defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of

⁵ AS 16.05.258(b)(4), set forth at note 18 infra.

⁶ Ch. 52, §§ 9, 11, SLA 1978; AS 16.05.940(28)-(29) (1986); McDowell v. State, 785 P.2d 1 (Alaska 1989).

⁷ Ch. 52, § 10, SLA 1978; AS 16.05.940(30) (1986).

the community or area."⁸ Subsistence activities were limited to rural areas.⁹

In McDowell v. State, 785 P.2d 1 (Alaska 1989), we held that the 1986 statute was unconstitutional insofar as it disqualified as subsistence users residents of areas classified as nonrural. Following McDowell, all Alaskans became eligible to participate in subsistence hunting and fishing. State v. Morry, 836 P.2d 358, 368 (Alaska 1992).

In 1992 the legislature revised the subsistence statute.¹⁰ As revised, the statute continues to grant subsistence a priority over other consumptive uses and continues to provide for two tiers of subsistence users.¹¹ However, the new statute also requires the Boards to identify nonsubsistence areas -- areas where no subsistence priority exists.¹² The definition of a nonsubsistence area under the 1992 revision, "an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the

⁸ Ch. 52, § 11, SLA 1978; AS 16.05.940(25) (1986).

⁹ Ch. 52, § 6, SLA 1978; AS 16.05.258(a) (1986) provided:

The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

¹⁰ Ch. 1, SSSLA (Second Special Session Laws Amended) 1992.

¹¹ AS 16.05.258(b)(4)(B) set forth at note 18 infra.

¹² AS 16.05.258(c) set forth at note 18 infra.

area or community," is essentially the negative of the definition of "rural area" which is still defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area."¹³ The nonsubsistence provisions of the 1992 revisions to AS 16.05.258 expire on October 1, 1995, and the 1986 version again becomes law.¹⁴

Pursuant to the 1992 revisions, the Boards established the "Anchorage/MatSu/Kenai nonsubsistence area" encompassing most of the Kenai Peninsula, all of the Municipality of Anchorage, and much of the Matanuska Susitna Borough. In addition, the Boards established nonsubsistence areas in regions surrounding Fairbanks, Ketchikan, Juneau, and Valdez. 5 AAC 99.015.

II. PROCEEDINGS BELOW

The Kenaitze Indian Tribe filed suit in 1991, seeking a judicial declaration (1) that it was entitled to operate a communal set net in the Kenai River and (2) that the State was not managing the salmon stocks in Upper Cook Inlet in accordance with the subsistence priority as required by law. When the Boards established the Anchorage/MatSu/Kenai nonsubsistence area, Kenaitze amended its complaint to state claims that the nonsubsistence area violated its members' state constitutional

¹³ AS 16.05.940(27).

¹⁴ Ch. 1, §§ 3, 12, SSSLA 1992.

rights under the equal access clauses of article VIII, sections 3, 15, and 17, and the equal rights and opportunities clause of article I, section 1 of the Alaska Constitution. Further, Kenaitze claimed that the Boards' creation of the Anchorage/MatSu/Kenai nonsubsistence area was not in compliance with the 1992 statute because the Boards had exceeded their authority and acted arbitrarily. The Ninilchik Traditional Council, the Native Village of Eklutna, and the Knik Tribal Council intervened and filed similar claims.¹⁵

The State and Kenaitze filed cross-motions for partial summary judgment on their constitutional claims. The superior court granted the motion of Kenaitze and denied that of the State. The court entered a final judgment declaring the nonsubsistence area provision of the 1992 act unconstitutional in violation of article VIII, sections 3, 15, and 17 of the Alaska Constitution and therefore void, and severed AS 16.05.258(c) from the remainder of the 1992 act. The other claims of Kenaitze were declared moot. The State now appeals.

Briefly stated, the rationale of the superior court was as follows. Residents of nonsubsistence areas and residents of subsistence areas are similarly situated classes. The former are treated differently than the latter because "only residents outside of nonsubsistence areas . . . are afforded convenient local subsistence access to fish and game resources." Moreover,

¹⁵ We will hereafter refer to all the appellees as "Kenaitze."

when fish and game populations are insufficient to satisfy all subsistence needs and the Tier II preference is invoked, "residents of nonsubsistence areas will inevitably suffer compared to other subsistence users," because the section which determines who may become a Tier II hunter or fisherman "requires consideration of 'the proximity of the domicile of the subsistence user to the stock or population.' AS 16.05.258(b)(4)(B)(ii)." This differential treatment may be justified by the need to allocate fish and wildlife resources "given the key social and economic roles that subsistence, sport, and commercial fishing and hunting play in the state, as well as the mandate of article VIII, section 4 of the Alaska Constitution that replenishable resource utilization be 'subject to preferences among beneficial uses.'" However, based on language in Gilbert v. State, 803 P.2d 391, 399 (Alaska 1990), an allocation must restrict competing uses to the least possible extent consistent with the purpose of the allocation. Alaska Statute 16.05.258(c) fails to meet this requirement as it bars subsistence in a particular area without requiring consideration of resource availability: "To create areas where subsistence activities are flatly prohibited, without consideration of whether the resources in the area could support some kind of balance between subsistence, sport and commercial hunting and fishing, does not further the state's expressed purpose to 'allocate' resources among user groups." The superior court concluded as follows:

Stepping back to view the statute in
light of its history, it becomes apparent that

the criteria in AS 16.05.258(c) for determining nonsubsistence areas effectively re-establish the rural/urban residency requirement struck down in McDowell. The statutory language defining "rural areas" in the 1986 statute is repeated in the definition of "nonsubsistence areas" under the 1992 statute. Compare AS 16.05.940(25) (1986) with AS 16.05.258(c) (1992). The only significant change has been to do away with the requirement that only rural residents may become members of the subsistence user class, although subsistence use is still allowed only in rural areas. The statute, by selectively prohibiting local subsistence activities and conferring "tier two" advantages based on the proximity of one's domicile to available subsistence resources, is plainly discriminatory against residents of nonsubsistence areas. Such a substantially residency-based classification scheme, under McDowell, violates the equal access clauses of the Alaska Constitution.

Because of the importance of the role that the Tier II domicile factor assumed in the rationale of the superior court, we ordered that the parties brief the constitutionality of this factor along with the other issues in the case.¹⁶

¹⁶ Our order stated: "To the extent that 'tier two' subsistence users are permitted to take fish and game for subsistence use based on the 'proximity of the domicile of the subsistence user to the stock or population,' AS 16.05.258(b)(4)(B)(ii), is tier two unconstitutional under McDowell v. State, 785 P.2d 1 (Alaska 1989)?"

III. DISCUSSION

A. Relevant Constitutional and Statutory Provisions

The equal access clauses of the Alaska Constitution are article VIII, sections 3, 15, and 17; the sustained yield clause is contained in article VIII, section 4.¹⁷ Alaska Statute 16.05.258 is the current subsistence statute.^{18, 19} Section 1 of

¹⁷ Section 3 of article VIII provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4 of article VIII provides:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

¹⁸ AS 16.05.258 provides:

(continued...)

18 (...continued)

(a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

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

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

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

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

(C) may adopt regulations to differentiate among uses;

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

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

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

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(continued...)

18 (...continued)

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

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

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

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

(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

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

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

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

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

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(continued...)

18 (...continued)

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

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

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

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

(continued...)

¹⁸ (...continued)

determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.

¹⁹ AS 16.05.940, also relevant, provides in part:

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

. . . .

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

. . . .

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

. . . .

(30) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(continued...)

chapter 1, SSSLA 1992 contains the legislative findings, purpose and intent with respect to the 1992 subsistence revisions.²⁰

¹⁹ (...continued)

(31) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game;

(32) "subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis[.]

²⁰ FINDINGS, PURPOSE, AND INTENT. (a) The legislature finds that

(1) there are Alaskans, both Native and non-Native, who have a traditional, social, or cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land and water; the harvest and use of fish and game for personal and group consumption is an integral part of those relationships;

(2) although customs, traditions, and beliefs vary, these Alaskans share ideals of respect for nature, the importance of using resources wisely, and the value and dignity of a way of life in which they use Alaska's fish and game for a substantial portion of their sustenance; this way of life is recognized as "subsistence";

(continued...)

²⁰ (...continued)

(3) customary and traditional uses of Alaska's fish and game originated with Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses, among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users;

(4) while Alaska's fish and game are generally still plentiful, these resources are not unlimited and cannot provide for every desired use, now or in the future; competition for and the level of effort on these resources have required the legislature and the Board of Fisheries and Board of Game to establish a preference for subsistence among the various beneficial uses of fish and game in the state; and

(5) in most areas of the state, a preference for subsistence can be provided without an overly burdensome intrusion upon other consumptive uses of fish and game.

(b) It is the purpose of this Act

(1) to develop and maintain healthy fish stocks and game populations through management based on the sustained yield principle; and

(2) to provide for a preference for subsistence uses over other consumptive uses of fish and game resources.

(c) It is the intent of the legislature that

(1) subsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses; and

(2) this Act not result in significant reallocations of fish and game in Alaska.

B. Is the "Proximity of the Domicile" Factor Unconstitutional?

We turn first to the question of whether linking eligibility for Tier II subsistence status to "proximity of the domicile of the subsistence user" to the target fish or game population violates article VIII, sections 3, 15, and 17 of the Alaska Constitution. This question is governed by our decision in McDowell v. State, 785 P.2d 1 (Alaska 1989).

At issue in McDowell was whether provisions in the 1986 subsistence statute which barred all nonrural Alaska residents from eligibility as first or second tier subsistence users violated the article VIII equal access clauses. Id. at 1. We held that the rural preference was a special privilege explicitly barred by the first sentence of section 15 and implicitly barred by the common use and equal application clauses, sections 3 and 17. Id. at 6, 9. We concluded "that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution." Id. at 9.

Concerning sections 3, 15, and 17 of article VIII, we observed that while they have varied ramifications they share one meaning: "exclusive or special privileges to take fish and wildlife are prohibited." Id. at 6. We noted that these clauses afford protection against the creation of a "closed class" of fish and game users. Id. at 6-7. We observed that although the state was empowered to make decisions concerning which among such diverse

groups as commercial, sport and subsistence users would have a preferred right to harvest a certain species, that authority "does not imply a power to limit admission to a user group." Id. at 8. We explained that the constitution does not bar "all methods of exclusion where exclusion is required for species protection reasons." Id. at 9. While we had no occasion to state what exclusionary criteria might be permissible in such circumstances, the opinion makes it clear that residence-based criteria are not permissible. We both quoted and stressed language holding that people who reside near a fish or game population do not have a higher claim to that population than state residents whose domiciles are more distant:

Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation.

Id. at 12 (quoting Lewis v. State, 161 S.W. 154, 155-56 (Ark. 1913)) (emphasis added by this court in McDowell).

Our holding in McDowell is controlling here. The requirements of the equal access clauses apply to both tiers of subsistence users. Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in

Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population.²¹

We conclude that AS 16.05.258(b)(4)(B)(ii), which uses the proximity of the domicile of the Tier II subsistence permit applicant to the fish or game population which the applicant wishes to harvest as a basis for the applicant's eligibility, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

The question which flows from this conclusion is whether the entire subsistence statute should be declared unconstitutional or whether AS 16.05.258(b)(4)(B)(ii) may be severed from the rest of the statute.

A. general severability clause is contained in AS 01.10.030:

Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

In Lynden Transport, Inc. v. State, 532 P.2d 700, 712-13 (Alaska 1975), we indicated that this clause reverses the common law presumption against severability and creates a slight presumption in favor of severability:

²¹ Section 3 of article VIII is particularly strong in requiring that proximity to the resource be a neutral factor. It reserves "to the people for common use" wild fish and game "whenever occurring."

A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

Id. at 713 (quoting Dorchy v. Kansas, 264 U.S. 286, 290 (1924)).

"The key question is whether the portion remaining, once the offending portion of the statute is severed, is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part." Sonneman v. Hickel, 836 P.2d 936, 941 (Alaska 1992).

Deleting subpart (ii) from AS 16.05.258(b)(4)(B) results in a subsection which requires the creation of a Tier II class of subsistence users based on dependence on the target fish or game population and the ability of the individual subsistence user to obtain food if subsistence use of the particular population were restricted or eliminated. The subsection as thus redacted is logically complete and capable of being given legal meaning.

Whether the legislature would have intended the subsection as redacted to stand had it known that the proximity of the domicile clause would be held unconstitutional is a question which cannot be answered with complete confidence. However, given the importance of subsistence as reflected in the legislative findings prefacing the 1992 act,²² periods in which individuals needfully dependent on subsistence are deprived of an opportunity to harvest fish or game are to be avoided. A holding that

²² See note 20 supra.

subsection (B)(ii) is not severable could result in such a period. Given this, and the statutory presumption in favor of severability, we conclude that (B)(ii) is severable.

C. Is AS 16.05.258(c) Unconstitutional?

Alaska Statute 16.05.258(c) requires the Boards to "identify by regulation" nonsubsistence areas.²³ In these areas, the subsistence priority over sport and commercial uses does not apply, and the statute states that "[t]he boards may not permit subsistence hunting or fishing." However, personal use fishing²⁴ and sport hunting are allowed. As the methods of conducting these pursuits are similar to their subsistence counterparts, the critical difference in nonsubsistence areas is the absence of the subsistence priority. When this is appreciated, the superior court's conclusion that section 258(c) authorizes the creation of "areas where subsistence activities are flatly prohibited, without consideration of whether the resources in the area could support some kind of balance between subsistence, sport, and commercial" uses may be critically examined. Subsistence activities -- fishing with nets or other devices or hunting with firearms for food for personal and family consumption -- are in no sense flatly prohibited in nonsubsistence areas. Though subsistence permits may not be issued, subsistence activities can still take place. What is eliminated in nonsubsistence areas is the statutory subsistence priority. Without the subsistence priority, a balance may be

²³ AS 16.05.258(c) set forth at note 18 supra.

²⁴ See note 18 supra for a statutory definition.

struck in allocating fish and game resources between commercial, sport, and subsistence types of activities. The interests of all competing users can be considered.²⁵ With the statutory subsistence priority intact no balance is possible as long as a fish or game population is not sufficient to provide for all subsistence uses.

A nonsubsistence area "is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community."²⁶ Under the 1986 subsistence statute, only fish and game populations in rural areas could be exploited for subsistence purposes.²⁷ A "rural area" was defined as a "community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area."²⁸ Thus, the areas defined as "nonrural" under the 1986 statute are now defined as "nonsubsistence areas" under the 1992 statute. What the 1992 statute adds is the requirement that the Boards jointly consider the relative importance of subsistence in a given area

²⁵ See AS 16.05.251(e) (Board has "authority to allocate resources among all fisheries."); Peninsula Mktg. Ass'n v. State, 817 P.2d 917 (Alaska 1991) ("The Board of fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries.").

²⁶ AS 16.05.258(c) set forth at note 18 supra.

²⁷ Ch. 52, § 6, SLA 1978; AS 16.05.258(a) (1986) set forth at note 9 supra.

²⁸ Ch. 52, § 11, SLA 1978; AS 16.05.940(25) (1986). Under the 1992 act this definition is found in AS 16.05.940(27).

based on twelve enumerated socio-economic factors.²⁹ Even this did not signal a change in practice, however, as the twelve factors parallel twelve factors expressed in a regulation used by the Boards to determine whether an area was "rural."³⁰

The superior court held that AS 16.05.258(c) is unconstitutional for reasons which we have summarized above. See supra at 7-8. Much of the court's rationale was based on the proximity of the domicile requirement of AS 16.05.258(b)(4)(B)(ii) which effectively barred residents of nonsubsistence areas from participating in Tier II hunts. With the proximity of the domicile requirement stricken, the remaining detriment to residents of nonsubsistence areas identified by the superior court is a claim of differential treatment based on inconvenience: "[O]nly residents outside of nonsubsistence areas . . . are afforded convenient local subsistence access to fish and game resources."

Inconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses. What we recently stated in Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314, 1318 (Alaska 1994), is also applicable to the current case:

We have held that the "common use" clause of article VIII, section 3, the "no exclusive right of fishery" clause of section 15, and the "uniform application" clause of section 17 are not implicated unless limits are placed on

²⁹ AS 16.05.258(c)(1)-(12) set forth at note 18 supra.

³⁰ 5 AAC 99.012 (1986).

the admission to resource user groups. McDowell v. State, 785 P.2d 1, 8 & n.14 (Alaska 1989); see also Owsichuk v. State, Guide Licensing & Control Board, 763 P.2d 488, 492 (Alaska 1988). Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users. In Kenai Peninsula [Fishermen's Cooperative Ass'n v. State], 628 P.2d 897 (Alaska 1981) we said:

While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section.

628 P.2d at 904.

The fact that residents of nonsubsistence areas must travel in order to utilize subsistence permits is not a limitation to their admission to a subsistence user group.³¹ Further, just as

³¹ In State v. Hebert, 803 P.2d 863 (Alaska 1990), we upheld against a claim of article VIII violation a system which frankly was designed to favor local fishermen. Id. at 864. Under this system, "super-exclusive" districts were imposed in two Bering Sea sac roe herring fisheries. Fishermen who fished in one super-exclusive district could not fish for herring in any other district, super-exclusive or otherwise. Id. Fishermen who fished in any other district could not participate in either super-exclusive district. Id. While this system inconvenienced and limited the fishing options both of fishermen residing adjacent to each super-exclusive district and those in more distant locations, we held that the equal access clauses were not violated. Id. at 866. Both groups had an equal opportunity to fish in all districts except the super-exclusive districts, or in one of the super-exclusive districts but no other district. Id.

the fact that a certain species is made available for sport fishing in a given area does not mean that the same species must be made available for commercial fishing in the same area, the fact that a certain species is made available for sport or commercial use in a given area does not mean that the constitution commands that the same species be made available in the same area for priority subsistence use.

The legislature has mandated that the Boards, in determining which areas are to be nonsubsistence areas, make decisions allocating fish and game resources among competing users. Such decisions are constitutionally required under article VIII, section 4 of the Alaska Constitution.³² "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users." McDowell v. State, 785 P.2d 1, 8 (Alaska 1989). Allocation decisions entail a complex mixture of biological, historical, and socio-economic factors.³³ These factors are "often competing." Tongass Sport Fishing Ass'n, 866 P.2d at 1319.

In reviewing allocation decisions made by the Board, a deferential standard of review is employed. Board decisions are upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed. Id. (Board's decision favorable

³² See note 17 supra.

³³ See, e.g., AS 16.05.251(e); Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314 (Alaska 1994); Gilbert v. State, Dep't of Fish & Game, 803 P.2d 391 (Alaska 1990); Meier v. State, Bd. of Fisheries, 739 P.2d 172 (Alaska 1987).

to commercial trollers concerning allocation of king salmon in Southeast Alaska not "unreasonable or arbitrary"); Gilbert v. State, Dep't of Fish & Game, 803 P.2d 391, 399 (Alaska 1990) (Board's decision allocating sockeye salmon between commercial fishing interests in two areas on the Alaska Peninsula not arbitrary or unreasonable); Meier v. State, Bd. of Fisheries, 739 P.2d 172, 174-175 (Alaska 1987) (Board's decision allocating sockeye salmon between commercial setnetters and driftnetters in Bristol Bay "reasonable and not arbitrary."). We have not subjected allocation decisions to the more rigorous least restrictive alternative test employed in cases where entry into a user class is restricted. Compare McDowell, 785 P.2d at 10; Owsichuk, 763 P.2d at 498 n.17; and Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988), with Tongass, 866 P.2d at 1319; Gilbert, 803 P.2d at 399; and Meier, 739 P.2d at 175.³⁴ Allocation decisions are so complex and multi-faceted that they are not amenable to analysis under such a test.

³⁴ While we stated in Gilbert that "to satisfy the uniform application clause of article VIII, state fish and game regulations creating nonuniform classifications must" have a legitimate and important purpose and "[t]he means used to further the important state purpose must be carefully drawn and designed for 'the least possible infringement on article VIII's open access values,'" Gilbert 803 P.2d at 399, we did not use this test in Gilbert. We went on to state that allocation "decisions are within the power of the Board, so long as they are not arbitrary and unreasonable and are 'consistent with and reasonably necessary to the conservation and development of Alaska fishery resources,'" id. (quoting McDowell, 785 P.2d at 10; Kenai Peninsula, 628 P.2d at 903), and reviewed the allocation decision in question under this standard.

In this case, the court did not reach the question of whether the joint Boards acted unreasonably or arbitrarily in creating the Anchorage/MatSu/Kenai nonsubsistence area. Instead, the court ruled that the statute was invalid on its face using a least restrictive alternative test. Given the proximity of the domicile Tier II requirement, use of this test was not error, for that requirement erected a bar to admission to a user class. However, with this requirement stricken from the statute, this test no longer applies.

Alaska Statute 16.05.258(c), as it stands without the domicile proximity requirement, contains no characteristics implicating the equal access clauses of article VIII. It bars no Alaskan from participating in any fish or game user class. As these clauses formed the basis for the superior court's decision and no alternative grounds for upholding the court's decision have been argued, the decision must be reversed.

IV. CONCLUSION

The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live. The statutory section mandating the creation of nonsubsistence areas does not violate these sections. The judgment of the superior court is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

ORDER AWARDING FEES AND COSTS

File No. S-6162

Under Appellate Rules 508(e) and (f)(1), attorney's fees of \$1,000. are awarded to appellant, and appellant shall serve and file with this court by May 19, 1995 an itemized and verified bill of costs in compliance with Appellate Rule 508(d).

Entered at the direction of Justice amathews on May 9, 1995.

CLERK OF THE SUPREME COURT



Catherine Bourdeau
Deputy Clerk

Sam E. McDOWELL, Dale E. Adurant, Ronald Mahle and Harold Eastwood, Appellants,

v.

STATE of Alaska, Alaska Department of Fish and Game, Alaska Board of Fisheries, Alaska Board of Game and Don W. Collinsworth, Commissioner of Fish and Game, Appellees,

The Alaska Federation of Natives, Protectors of the Land d/b/a Numan Kitlutisti, Tony Vaska and Walter Charley, on behalf of himself and all other persons similarly situated, Interveners/Appellees.

No. S-2732.

Supreme Court of Alaska.

Dec. 22, 1989.

Rehearing Denied March 2, 1990.

Action was brought challenging constitutionality of fish and game preference statute. The Superior Court, Third Judicial District, Anchorage, Douglas J. Serdahely, J., granted summary judgment for State, and appeal was taken. The Supreme Court, Matthews, C.J., held that statute granting preference to rural residents to take fish and game for subsistence purposes violates Alaska constitutional provisions prohibiting exclusive or special privileges in the taking of fish and wildlife.

Reversed and remanded.

Compton and Moore, JJ., concurred and filed opinions.

Rabinowitz, J., dissented and filed opinion.

Fish ⇄3

Game ⇄1

Statute granting preference to rural residents to take fish and game for subsistence purposes violates Alaska constitutional provisions prohibiting exclusive or special privileges in the taking of fish and

1. For ease of reference, citations to chapter 52 SLA 1986 in this opinion will be to the appropriate

wildlife. Const. Art. 8, §§ 3, 15, 17; AS 16.05.258(c), 16.05.940(25, 30).

Cheri C. Jacobus, Ross, Gingras, Bailey & Miner, P.C., Anchorage, for appellants.

Larri Irene Spengler, Asst. Atty. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellees.

Donald Craig Mitchell, Anchorage, for intervenors/appellees.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Chief Justice.

INTRODUCTION

This case challenges chapter 52 SLA 1986 which grants a preference to rural residents to take fish and game for subsistence purposes. The only requirement to be met by a subsistence fisherman or hunter is residency in a rural area of the state.

The rural preference is challenged under several provisions of the Alaska Constitution: the common use clause, article VIII, section 3; the no exclusive right of fishery clause, article VIII, section 15; the uniform application clause, article VIII, section 17; the equal rights clause, article I, section 1; and the due process clause, article I, section 7. In addition, violation of the equal protection and due process clauses of the United States Constitution is claimed. For the reasons that follow, we hold that the rural preference violates article VIII, sections 3, 15 and 17 of the Alaska Constitution.

FACTUAL AND PROCEDURAL SETTING

The 1986 act¹ defines subsistence fishing and hunting as activities which can be undertaken only "by a resident domiciled in a rural area of the state...." Subsistence

ate section of the Alaska Statutes where that act is codified.

uses are also defined in terms of residency in rural areas:

"Subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption.

AS 16.05.940(30). A "rural area" is defined as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05.940(25).

Appellants are Alaska residents who have engaged in subsistence hunting and fishing in the past and wish to continue to do so. Under the 1986 act, they are disqualified as subsistence users because they reside in areas classified as non-rural by the joint Boards of Fisheries and Game. Appellants McDowell and Mahle reside in Anchorage, Bondurant resides in Cooper Landing, and Eastwood resides in the community of McKinley Park.

The 1986 act requires the Board of Fisheries and the Board of Game to decide what portion of each fish stock and game population can be harvested consistent with the principle of sustained yield. Next the Boards must determine how much of the harvestable portion is needed to satisfy subsistence needs. If the harvestable portion of any stock or population is not sufficient to accommodate all consumptive uses—sport, personal use, and commercial—then subsistence uses

shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the Boards may provide

for other consumptive uses of the remainder of the harvestable portion.

AS 16.05.258(c). If the harvestable portion of a stock or population is insufficient to satisfy all subsistence needs, all non-subsistence uses are barred, and the Boards are required to distinguish among subsistence users by applying three criteria: "(1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources." *Id.*

This case was brought in 1983 as a challenge to the 1978 subsistence statute, chapter 151, section 4 SLA 1978. The 1978 statute established that subsistence hunting and fishing had priority over other uses of fish and game stocks. Like the 1986 statute, it provided for two tiers of subsistence users. In the first tier were those who could take fish or game for subsistence purposes when populations were adequate to satisfy all subsistence needs. The second tier was limited to those who could take fish and game for subsistence purposes when populations were inadequate to supply all subsistence needs. The 1978 statute distinguished the second tier of subsistence users from the first tier on the basis of the same three factors utilized in the 1986 statute, namely, customary and direct dependence, local residency, and availability of alternative resources. *Id.* However, unlike the 1986 statute, the 1978 statute did not impose a rural residency requirement as a condition to becoming a first-tier subsistence user.

The appellants' initial complaint challenged the second-tier subsistence priority of the 1978 statute. The complaint was amended several times to expand on the original theory and add challenges to various regulations. All parties submitted motions for summary judgment. The superior court granted some of these motions and deferred others on October 24, 1984. Before the deferred motions could be ruled on, this court decided *Madison v. Alaska Department of Fish and Game*, 696 P.2d 168 (Alaska 1985), which struck down, as inconsistent with the 1978 statute, subsist-

ence fishing regulations which imposed a rural residency requirement on first-tier subsistence users. *Id.* at 178.

The next event of significance was the passage in 1986 of chapter 52 SLA 1986, which, as noted, provides that only rural residents can be first- or second-tier subsistence users. Following passage of this act, the appellants again amended their complaint, challenging the rural preference on constitutional grounds. Both the appellants and the state moved for summary judgment. The superior court granted the motion of the state and denied the motion of the appellants. Judgment was entered on the basis of this ruling.

The setting of this case would not be complete without mention of the Alaska National Interest Lands Conservation Act (ANILCA), enacted by Congress in 1980.² Section 3114 of this act requires that on federal public lands in Alaska, subsistence uses are to be given priority over the taking of fish and wildlife for other purposes. Under ANILCA, only rural Alaska residents are entitled to a subsistence priority.³ ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority.⁴ However, federal management may be supplanted by the state so long as the state enacts and implements subsistence laws "which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA.⁵

2. 16 U.S.C.A. §§ 3101-3233 (West 1985).

3. ANILCA § 804, 16 U.S.C.A. § 3114, states:

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

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

After this court's *Madison* decision, the Secretary of the Interior notified the state that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 314 (9th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989). With the passage of the 1986 act, the Interior Department has stated that Alaska is once again in compliance with ANILCA. *Id.*

After final judgment was entered by the superior court, the 9th Circuit Court of Appeals ruled that the definition of "rural" in the 1986 act does not comply with § 3113 of ANILCA. *Id.* 860 F.2d at 318. "Rural," in ANILCA, according to the court, refers to "sparsely populated" areas; "rural is the antonym of urban and includes all areas in between cities and towns of a particular size." *Id.* at 316-17. The court referred to Census Bureau standards under which "the urban population consists of people living in communities of 2,500 or more, while the rural population comprises everyone else." *Id.* at 317. Thus, the 1986 act's subsistence-oriented definition was held inconsistent with ANILCA.

Bondurant and Eastwood both reside in rural areas as *Kenaitze* has interpreted ANILCA's use of that term. They are thus probably entitled to injunctive relief under ANILCA, 16 U.S.C.A. § 3117(a).⁶

ANILCA § 803, 16 U.S.C.A. § 3113, defines the term "subsistence uses" as used in ANILCA to mean

the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

(Emphasis added.)

4. 16 U.S.C.A. § 3115(c).

5. 16 U.S.C.A. § 3115(d).

6. Such relief has not been requested in this case, and the question whether the § 3117(a) remedy

However, the *Kenaitze* decision does not change the issues presented in this appeal because the 1986 statute remains fully applicable to all non-federal lands.

*Background and Purpose of the
1986 Statute*

Prior to 1978, urban residents could engage in subsistence hunting and fishing. However, there was no statutory preference given to subsistence over sport or commercial fishing or sport hunting. With the enactment of chapter 151 SLA 1978, subsistence hunting and fishing was given such a priority. *Madison*, 696 P.2d at 174 n. 12. The 1978 statute did not bar urban residents from eligibility as first-tier subsistence users. *Madison*, 696 P.2d at 176. However, a regulation adopted by the Board of Fish and Game did exclude urban residents. 5 AAC 01.597. *Madison* held that this regulation violated the 1978 statute. *Id.*

In 1985 the Alaska House of Representatives adopted a letter of intent which accompanied the bill that became the 1986 subsistence act. 1985 House Journal 1246. The letter explained the rural preference of the 1986 act as follows:

This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependent upon participation by the residents of these communities in the taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.

Id. at 1229-30. In making this determination, the legislature sounded a theme that was also expressed by Congress in enacting ANILCA. The House Committee on

is available only in federal courts has not been briefed.

7. Senator Fisher, a member of the Senate Resource Committee, noted in the Senate floor debate: "[T]his legislation will provide the

Interior and Insular Affairs determined that:

After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of federal, state, academic, and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. Reliable evidence was given to the Committee demonstrating that fifty percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40 percent of such families spend an average of 6 to 7 months of the year in subsistence activities....

H.R.Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978). The intervenors in this appeal similarly expressed the purpose of the rural preference as follows:

If village access to fish and game is overwhelmed by competition from the tens of thousands of sportsmen who Alaska's fortuitous oil wealth has drawn to the urban centers, the effect on the rural village economy would be adverse, and the effect on the health and welfare of rural residents would be even more so.

An additional purpose of the 1986 subsistence law is to retain state management of fish and game on federal lands by meeting the requirements of ANILCA.⁷

Urban-Rural Subsistence Patterns

Appellants' basic objection to the 1986 act is that by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, the act unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing. Appellants claim, in other words, that the urban/rural criterion is both unfairly

boards the tools to solve the problems in harvest disruption that followed *Madison*, and will assure the state will retain management of fish and game throughout Alaska by meeting the requirements of the federal subsistence law."

under-inclusive, because it excludes deserving urban residents, and over-inclusive, because it includes undeserving rural residents. Appellants instead suggest that the right to subsistence should depend upon individual needs and traditions, not on one's place of residence.

The record supports the appellants' claim that there are substantial numbers of urban subsistence users. A state study of subsistence use patterns⁸ found that of some 255 holders of subsistence salmon permits for the 1980 Tanana River fishery, approximately 20% exhibited the attributes commonly associated with a traditional subsistence lifestyle, even though they all resided in the urban Fairbanks area. The report states:

Despite their residence in or near populated areas of the Fairbanks North Star Borough, these households generally participated in the wage economy on a seasonal basis and had longer histories of participation in the fishery, lower cash incomes, and somewhat larger household sizes than the majority of users. Some of these households have longstanding cultural ties to the subsistence fishery. For these more intensive users, fishing in sub-district Y-6C was less a recreational outing than an integral component of their way of life in Interior Alaska. Their residence in an area which is currently defined by regulation as urban, coupled with escalating demands upon the resource base, however, raise questions about whether these more intensive uses can continue in the future.

Study at 12. Similarly, in the city of Homer, an urban area under the regulations,⁹ the study reports that 38.2% of the city residents obtained at least one-half of their meat and fish supply from personal hunting and fishing activities. *Id.* at 162.

Likewise, the study documents the fact that numerous Alaskans who live in areas classified by the regulations as rural do not

engage in subsistence activities. For example, in the City of Sitka, which is classified as rural, although it has a population of 7,803, some 26% of the households sampled did no hunting and 7% did no fishing. *Id.* at 235. Similarly, in the City of Nome, population 3,249, which is also rural under the regulations, *id.* at 93, some 5% of all households use no locally taken fish or game. *Id.* at 111.

The study also amply supports the critical importance of subsistence hunting and fishing to residents of the numerous small and remote villages of our state. For example, in the Wade Hampton census area of Western Alaska, the average annual per capita cash income was only \$2,737 (1979),¹⁰ *id.* at 30, and the average household harvested 4,597, dressed weight, pounds of fish and game each year. *Id.* at 42.

The Article VIII Clauses—History and Analysis

A.

Section 15 of article VIII of the Alaska Constitution provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 3 of article VIII provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter

8. R.J. Wolfe and L.J. Ellanna *Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities*, Technical Paper Number 61, Alaska Department of Fish and Game, Division of Subsistence, Juneau, March, 1983 (her inafter "Study").

9. 5 AAC 99.014.

10. The 1979 statewide average was \$11,152. Study at 30.

and purpose to be served by the law or regulation.

Although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited. Section 15 states this explicitly with respect to fisheries. The proceedings of our Constitutional Convention show that the same meaning was intended with respect to sections 3 and 17.

A memorandum of the Constitutional Convention Committee on Resources expresses the view that the common use clause has as one of its purposes a prohibition on exclusive grants or special privileges. The memorandum states: "The expression 'for common use' implies that these resources are not to be subject to exclusive grants or special privileges as was so frequently the case in ancient royal tradition." Alaska Constitutional Convention Papers, Folder 210, Papers Drafted by Committee on Resources, entitled "Terms."

The Committee on Resources commentary with respect to the uniform application clause states:

This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state.

6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).

In *Owsichuk v. State*, 763 P.2d 488 (Alaska 1988), we observed that the article VIII provisions were designed to ensure to the public the broadest possible access to wildlife. We noted that "the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." *Id.* at 495 (emphasis added). "[A] minimum requirement of this duty is a prohibition against any . . . special privileges." *Id.* at 496. In *State v. Ostrosky*, 667 P.2d 1184, 1191 (Alaska 1983), we observed that the common use and no exclusive right of fishery clauses reflected "anti-exclusionist values."

Appellants contend that the rural residency requirement amounts to an exclusive or special privilege prohibited explicitly by

section 15 and implicitly by sections 3 and 17. They focus on *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231 (1951), a case which interpreted section 1 of the White Act, former 48 U.S.C. §§ 220-224 (1941), under which Alaska fisheries were regulated before statehood. In *Hynes*, the Supreme Court held that the White Act prohibited granting a preferential right to fish to Native residents of the Karluk Reservation. *Id.* at 123, 69 S.Ct. at 989. This case is of precedential importance, they contend, because section 15 was based on section 1 of the White Act.

In response, the state agrees that the first sentence of section 15 is based on section 1 of the White Act. However, the state distinguishes *Hynes* on the grounds that the exclusive right to fish there was available to "a closed class." In contrast, it argues there is no closed class here because "people may become eligible to participate in subsistence uses by establishing their domicile in a rural area." Further, the state relies on *Kenai Peninsula Fishermen's Cooperative Association v. State*, 628 P.2d 897, 904 (Alaska 1981) which held that section 15 does not bar differential treatment between commercial, sport, and subsistence fishermen. The intervenors' argument in response relies exclusively on this case.

The parties correctly agree that the no exclusive right of fishery clause is based on section 1 of the White Act. The commentary concerning the exclusive right of fishery clause prepared by the Committee on Resources of the Constitutional Convention states:

This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that Act the purposes sought by it are given expression in a prohibition of exclusive right or special privileges of any person to the fisheries of the state.

6 Proceedings of the Alaska Constitutional Convention Proceedings at 87 (Alaska Legislative Council).

The language of the White Act, for which the no exclusive right clause is meant to be a substitute, is as follows:

Provided, that every such regulation made by the Secretary of the Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

Act of June 6, 1924, ch. 272, § 1, 43 Stat. 464.

The appellants' reliance on *Hynes* as an explanation of the meaning of the bar on exclusive rights and special privileges is apt. At issue in *Hynes* was a regulation of the Secretary of the Interior¹¹ prohibiting commercial salmon fishing in all waters within 3,000 feet of the shores of the Karluk Reservation. 337 U.S. at 92, 69 S.Ct. at 973. The Secretarial Order made an exception which allowed Natives residing on the Reservation and their licensees to fish in these waters. *Id.* The Supreme Court held that this exception in favor of the Native residents and their licensees violated section 1 of the White Act. The court stated:

[W]e think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by Natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those Natives are or are not residents on a reservation. We find nothing in the White Act that authorizes

11. Regulatory jurisdiction over the administration of the White Act was transferred from the Department of Commerce to the Department of the Interior, effective July 1, 1939; *Hynes*, 337 U.S. at 92 n. 4, 69 S.Ct. at 973 n. 4.

12. We do not agree with Justice Rabinowitz's statement in dissent that the limitation struck down in *Hynes* was predicated solely on the fact that the users were Indians. *Infra* at 18. Both ethnic status and local residency were required as the regulation in question applied to "natives in possession of [the Karluk] reservation." 337

the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights....

"Exclusive," as used in Section 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people. The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in § 1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations.

337 U.S. at 122, 69 S.Ct. at 988.¹²

As noted above, the state seeks to distinguish *Hynes* on the ground that *Hynes* involved a closed class of recipients of a special privilege, whereas the 1986 subsistence law does not because anyone who wants to hunt and fish for subsistence purposes can move to a rural area. We find this argument unpersuasive. If it were valid, virtually any discrimination based on residence would be justified—the residents of the disfavored area could simply move. Such a rationale is inconsistent with the prevailing approach in territorial discrimination cases, which is to subject territorial classifications to scrutiny under the equal protection clause. *Gilman v. Martin*, 662 P.2d 120, 125 (Alaska 1983); Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U.Pa. L.Rev. 261, 274-75 (1987).

The state's and the intervenors' reliance on *Kenai Peninsula* is also off the mark. That case merely affirmed what article VIII, section 4¹³ says explicitly—that preferences among beneficial uses of fish and

U.S. at 92, 69 S.Ct. at 973. In any case, the quote in the text makes it clear that if the exception had been based solely on residence, rather than on residence and race, it would also have been struck down.

13. Article VIII, section 4 of the Alaska Constitution provides:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

game may be legislatively or administratively established. We stated in *Kenai Peninsula*:

While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species must also be

14. The foregoing also answers Justice Rabinowitz's contention that our interpretation of the equal access clauses of article VIII is in conflict with article VIII section 4. We have consistently taken the position that limits on admission to user groups are subject to scrutiny under the article VIII equal access clauses. See *State v. Ostrosky*, 667 P.2d 1184, 1189 (Alaska 1983); *Owsichuk v. State*, 763 P.2d 488, 492 (Alaska 1988).

15. The legislative history of the White Act is in accord. Congressional debate at the time the White Act was proposed demonstrated concern that Alaska residents and non-residents alike were being excluded from Alaska fisheries. The debate also demonstrated Congress' desire that Alaska fisheries be equally accessible to everyone:

Mr. Robinson. The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan water, and out of this attempt to give exclusive rights to fish, thus depriving a large number of the people the right to pursue their usual vocation, great complaint arose. This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and *requires him to give everyone equal rights within the areas where fishing is permitted.*

Mr. Jones of Washington. The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce. . . . Within the two reservations [of restricted fishing areas] that were created by Executive Order a year or two ago the Secretary of Commerce has seen fit to make regulations under which outsiders might not go in order to fish. In other words, those who are already located there, if [the Secretary] thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.

Mr. King: They were given exclusive rights. Mr. Jones of Washington. They may be called exclusive rights, but I want to say this in justice to the Secretary of Commerce:

allowed, would be to go far beyond the purpose of the section.

628 P.2d at 904 (footnote omitted). The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group.¹⁴

Section 1 of the White Act guaranteed equal access to fisheries regardless of residence. The language of the Act and *Hynes* make this clear.¹⁵ Alaska's constitutional

When I came back this fall, and came down here, and we were considering matters of this kind, the Delegate from Alaska and I talked over the matter with reference to those exclusive rights, and I saw the Secretary of Commerce, and the Secretary of Commerce himself said that he would be glad to have that discretion taken away, that certainly he was not in favor of that policy, but those who were on the ground and who had been dealing with the matter especially and who might be considered to be experts had recommended and urged that that policy be pursued. I will say, in justice to him, that he said frankly that he would prefer not to have that absolute power, so I can say for him that he is glad that this provision is put in the bill prohibiting him from granting exclusive rights within the fishing areas up there.

Mr. Robinson. I have been unable to find any authority for [the Secretary] to grant exclusive rights of fishery. It was about that alleged abuse of authority that most of the complaints arose; namely, that the Secretary in some instances had created reservations, and in others had granted in certain waters the exclusive right to fish, usually to large corporations or packing concerns, which deprived the fishermen of the opportunity to pursue their occupations; and they desired very much *the provision that is in this bill, which secures to every citizen of the United States the right to fish in Alaskan waters upon equal terms and without discrimination.* The bill deprives the Secretary of any power . . . to grant exclusive rights to fish in Alaskan waters.

65 Cong.Rec. 9520-21 (1924) (emphasis added).

Based in part upon the Congressional debate identified above, *Hynes* concluded that

[T]he legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.

Hynes, 337 U.S. at 120, 69 S.Ct. at 987 (footnote omitted).

framers were aware of *Hynes*.¹⁶ As noted, section 15 of article VIII was meant to be a substitute for section 1 of the White Act and to further its purposes.¹⁷ It follows that section 15 likewise was meant to ensure an equal right to participate in fisheries, regardless of where one resides.

Although section 15 pertains only to fisheries, the prevention of grants of exclusive or special privileges with respect to fish and game is also one purpose of the common use and the uniform application clauses.¹⁸ It follows that the grant of special privileges with respect to game based on one's residence is also prohibited.

We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.¹⁹

B.

The conclusion we have reached does not mean that everyone can engage in subsistence hunting or fishing. We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons. We hold only

16. A memo of the Committee on Resources defining terms states the following under "White Act Provisions 48 U.S.C.A. 222:"

That every such regulation made by the Secretary shall be of general application within the particular area to which it applies, and that no exclusive or general right of fishery shall be granted therein, nor shall any citizen of the U.S. be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary.... The word "exclusive" forbids not only a grant to a single person or corporation, but to any special group or number of people. (*Hynes-Grimes Karluk Reservation*)

Alaska Constitutional Convention Papers, Folder 210.

17. Commentary on Article on State Lands and Natural Resources, 6 Proceedings of the Alaska Constitutional Convention at 87.

18. See *supra* pages 5 and 6.

19. Justice Rabinowitz states in his dissenting opinion that he does not interpret the statute to

that the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional.

We are not called upon in this case to rule on what selection criteria might be constitutional. It seems appropriate, however, to note that any system which closes participation to some, but not all, applicants will necessarily create a tension with article VIII. In such cases, assuming that the exclusionary criterion is not per se impermissible, our decisions suggest that demanding scrutiny is appropriate.

We alluded to this in *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983) in discussing the interplay between the constitutionally allowed limited entry system, which was permitted by amendment to article VIII, section 15, and the common use and no exclusive right of fisheries clauses. We stated:

[S]ince the common use clause of section 3 and the no exclusive right of fishery clause of section 15 remain in the constitution, the premise of the argument is that whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, en-

mean that "eligibility to participate in subsistence uses is determined solely with reference to where an individual lives." *Infra* at 17. That, however, clearly is the case with respect to first-tier subsistence users. Urban resident may not be subsistence users because subsistence uses are by definition limited to rural residents. AS 16.05.940(30), quoted *supra* at pp. 1-2. Yet all rural residents may be first-tier subsistence users without regard to their individual characteristics. The regulation on which Justice Rabinowitz relies, 5 AAC 99.010(b), defines customary and traditional uses but does not state that first-tier subsistence rights can be limited to customary and traditional users. As we stated in *Madison* "the phrase 'customary and traditional' modifies the word 'uses' ... it does not refer to users." 696 P.2d at 174. The state acknowledges that only in the second-tier subsistence context may individual characteristics separate those rural residents who may be second-tier subsistence users from those who are ineligible. Brief of Appellees, p. 8. The state also notes that the need for a second-tier limitation has, to date, not arisen. *Id.*

tails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause. The argument concludes that free transferability does not entail the least possible impingement on the anti-exclusionist values which these provisions reflect.

... [T]he premise of this argument is logical.

Id. at 1191. We expressed the same theme in *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256 (Alaska 1988) concerning the obligation of the Commercial Fisheries Entry Commission to establish an optimum number of entry permits. We stated in *Johns*:

In [*Ostrosky*], we noted that there is a tension between the limited entry clause of the state constitution and the clauses of the constitution which guarantee open fisheries. We suggested that to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation. *Ostrosky*.... The optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes. Without this mechanism, limited entry has the potential to be a system which has the effect of creating an exclusive fishery to ensure the wealth of permit holders and permit values, while exceeding the constitutional purposes of limited entry. Because this risk of unconstitutionality exists, the [Commercial Fisheries Entry Commission] should not delay in embarking on the

20. Another expressed purpose is to aid communities whose residents are dependent on subsistence, as distinct from aiding the individual residents. This is not a purpose separate from aid to individual community members where the aid goes directly to the individuals. As we stated in *State v. Enserch*, 787 P.2d 624, 634 (Alaska 1989): "It would not make sense to conclude that a statute may not discriminate between residents of two areas in order to aid the residents of the more disadvantaged area, but that such a statute could discriminate between residents of

optimum number process, except where there is a substantial reason for doing so. *Id.*, 758 P.2d at 1266 (footnote omitted).

Most recently in *Owsichuk*, we suggested that section 17 of article VIII, the uniform application clause, "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources" *Owsichuk*, 763 P.2d at 498 n. 17 (quoting *Gilman v. Martin*, 662 P.2d 120, 126 (Alaska 1983)). We also cited with approval Justice Rabinowitz's dissent in *Ostrosky*, 667 P.2d at 1196 which employs a least restrictive alternative approach in view of the "highly important interest running to each person within the state" by virtue of the common use clause. 763 P.2d at 492 n. 10.

In reviewing legislation which burdens the equal access clauses of article VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values. *Ostrosky, supra* at 1191, *Johns, supra* at 1266.

We employ this method of analysis in the present case as an alternative ground of decision. Using this approach, we conclude that the rural-urban residency criterion is unconstitutional for the reasons that follow.

One purpose of the 1986 act is to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so. This is an important interest.²⁰ However, the means used to accomplish this purpose are extremely crude. There are, as noted above, substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsist-

two areas in order to aid the communities in the more disadvantaged area. The communities are merely the collective sum of the residents."

A third purpose is to comply with ANILCA in order to retain state fish and game control on federal lands. It is difficult to view this as a sufficiently important purpose. ANILCA does not require state compliance. State control merely for the sake of control is a questionable goal when the terms infringe upon the open access values of article VIII.

ence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural who have no legitimate claims. A classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion.

We note that several other jurisdictions have struck down intrastate residential preferences in fish and game statutes. These authorities support our view that the equal access clauses of article VIII, which are a special type of equal protection guaranty, bar the residential discrimination imposed in this case.²¹ *Lewis v. State*, 110 Ark. 204, 161 S.W. 154 (1913) contains an excellent historical statement:

When it becomes necessary for the propagation and preservation of wild game and fish for the use of the public, the people acting in their sovereign capacity, through their lawmaking power, may pass laws to regulate the right of each individual which he enjoys in common with every other member of the community to use of same. But when the sovereign undertakes to regulate or restrain the individual in its right as a member of the community to enjoy the right to take and use this common property of all, it must do so upon the same terms to all members of the community alike. The common right, which one individual of the whole community is entitled

to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, *ferae naturae*, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. "The rights," says Green, "which the barons claimed for themselves they claimed for the nation at large." Green's History of the English People, vol. 4, pp. 252-254.

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people. See *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643. Also *Geer v. Conn.*, 161 U.S. 519, 16 Sup.Ct. 600, 40 L.Ed. 793; *Martin v. Waddell*, [41 U.S.] 16 Pet. 367, 10 L.Ed. 997. The only justification for a law regulating and restricting the common right of individuals to take wild

21. See *State v. Bryan*, 87 Fla. 56, 99 So. 327, 330 (1924) (state law levying \$10 and \$50 license tax on state residents who are non-residents of certain counties, as a prerequisite to hunting in those counties, when residents of those counties pay only \$1 or \$1.25, violates equal protection); *State v. Barkley*, 192 N.C. 184, 134 S.E. 454, 455 (1926) (state law levying \$3 hunting fee on non-resident hunters in the county, and a \$1 fee on residents of the county, held invalid in that it taxed inhabitants unequally); *Harper v. Gallo-way*, 58 Fla. 255, 51 So. 226, 229 (1910) (state law that required citizens of the state of Florida who were not residents of Marion County to give a previous notice of intention to hunt and to pay a special license tax for the privilege of hunting game in Marion County, while no notice or license tax was required of residents of Marion County, denied equal protection of the laws); *Bruce v. Director, Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 276 A.2d 200, 208

(1971) (statutes prohibiting crabber from crabbing in waters of county other than his county of residence and prohibiting oystermen from going to waters of another county invalid); Power, *More About Oysters Than You Wanted To Know*, 30 Maryland L.Rev. 199, 218 (1970) ("A county non-resident represents no peculiar threat to the fishery but merely the same threat as represented by a county resident.").

But see *Commonwealth v. Hilton*, 174 Mass. 29, 54 N.E. 362, 364 (1899) (selectmen of a town may prohibit the digging of clams by nonresidents of the town); *State v. Norton*, 335 A.2d 607, 615 (Me.1975) (state had compelling governmental interest in conservation of its clams and its attempt to achieve that purpose by, in part, authorizing municipalities to apply a resident-nonresident standard in licensing shell fisheries did not unconstitutionally discriminate against nonresidents).

game and fish is the necessity for protecting the same from extinction, and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had from time immemorial. While the state, holding the title to game and fish, so to speak, in trust for every individual member of the community, may pass laws to regulate the rights of each individual in the manner of taking and using the common property, yet, as we have already stated, this must be done, under the Constitution, upon the same terms to all the people. No special privileges or immunities can be conferred.

Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; *but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation.* *Hayes v. Territory*, 2 Wash.T. 286, 5 Pac. 927. In the cases of *State v. Higgins*, 51 S.C. 51, 28 S.E. 15, 38 L.R.A. 561, and *Harper v. Galloway*, 58 Fla. 255, 51 South. 226, 26 L.R.A. (N.S.) 794, 19 Ann.Cas. 235, the question here involved was considered and determined in accord with the doctrine we have announced.

Id. 161 S.W. at 155-156 (footnote omitted, emphasis added).

CONCLUSION

Our disposition of this case makes it unnecessary to discuss the other grounds advanced by appellants. For the above reasons, the judgment of the superior court is reversed. This case is remanded to the superior court with instructions to issue a declaratory judgment that the rural preference of ch. 52 SLA 1986 is unconstitutional and to take such further action as may be appropriate.

REVERSED and REMANDED.

COMPTON and MOORE, JJ.,
concurring.

RABINOWITZ, J., dissenting.

COMPTON, Justice, concurring.

I agree with Part A of the opinion, holding that this preferential scheme violates art. VIII, sections 3, 15 and 17 of the Alaska Constitution.

I express no opinion regarding Part B as it is superfluous to the decision.

MOORE, Justice, concurring.

The court correctly concludes that chapter 52, SLA 1986 ("the Act") violates the Alaska Constitution. I write separately to explain my understanding of the court's holding in part B of the section entitled "The Article VIII Clauses—History and Analysis," which I join, and because I disagree with the court's analysis in part A.

Equal Protection

The Act is motivated by a compelling purpose, ensuring that persons who are dependent upon subsistence hunting and fishing have access to wildlife. However, the Act's geographical classification scheme is only loosely related to that purpose. This is an equal protection case, and an easy one at that.

Article I, section 1 of the Alaska Constitution provides that "all persons are ... entitled to equal rights, opportunities, and protection under the law...." We have decided many cases interpreting this provision, most recently, *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624 (Alaska 1989). The Alaska Constitution has a similar clause specifically concerning natural resources. Article VIII, section 17, the uniform application clause, provides that "[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

When applying the equal protection clause of article I, we determine the impor-

tance of the individual interest affected by the enactment. The importance of the individual interest determines the level of scrutiny we apply to both the state's interest in the enactment and the nexus between that interest and the enactment. *Enserch*, 787 P.2d at 631-632; *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984). Without explicitly acknowledging it, the court's opinion employs the same analysis under the uniform application clause of article VIII. See *supra* pp. 10-11. Since the principle of equality underlies both clauses, the use of our equal protection analysis in the uniform application context is proper.

I believe that the individual interest impaired by the Act, access to wildlife for subsistence purposes, is a species of the important right to engage in economic endeavor at issue in *Enserch*, at 632-633. See also *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980). The challenged enactment therefore should receive close scrutiny.¹ The Act then at least must be closely related to an important state interest. *Enserch*, at 633.

The state's interest, ensuring that those who must engage in subsistence hunting and fishing are able to do so, is undoubtedly important. Indeed, I believe it is compelling. However, the Act's classification scheme for deciding who is entitled to engage in subsistence hunting and fishing and its implementing regulations are not closely related to the purpose of the Act. As the court's opinion describes, large numbers of residents of areas classified as urban under the Act are dependent upon subsistence hunting and fishing. Conversely, some of the state's larger cities, where many people are not dependent upon subsistence hunting and fishing, are classified as rural. *Supra* pp. 4-5. There is only a modest correlation between the

set of people who reside in areas designated as rural under the Act and the set of people who are dependent upon subsistence hunting and fishing. The fit between the Act and the state's interest does not even approach that required to withstand close scrutiny. Therefore, the Act violates the equal protection and uniform application clauses of the Alaska Constitution.

This is not to say that all subsistence preference laws would be unconstitutional. I simply believe that for such a law to pass constitutional muster, it must be closely related to its compelling purpose. A law providing for individual determinations of eligibility would in my view be sufficiently tailored to the state's interest to withstand a constitutional challenge.

Common Use and Exclusive Right of Fishery

The court's holding in Part A of the section entitled "The Article VIII Clauses—History and Analysis" is not altogether clear. I agree with the court to the extent that it holds that an intrastate geographical preference for the taking of wildlife violates sections 3 and 15 of article VIII of the Alaska Constitution. I reject any implication that all preferences, especially all subsistence preferences, would violate these sections. I do not believe that the court can find a violation of article VIII, section 17 without a full equal protection analysis. I do not join part A of the court's opinion, but I concur in its result.²

Section 15 of article VIII provides that "[n]o exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State." Alaska Const., art. VIII, § 15 (emphasis added). Section 4 of article VIII provides that the use of resources shall be "subject to preferences among beneficial uses." On the surface, there appears to be some conflict between these provisions. To the greatest

1. *Enserch*, at 633; *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988). It may be that the enactment should receive even greater scrutiny under the uniform application clause; however, the court has not decided that question. *Owsichuk v. State*, 763 P.2d 488, 498 n. 17 (Alaska 1988).

2. I would not, however, reach this question, because I believe that such geographical preferences violate the equal protection and uniform application clauses of the Alaska Constitution.

extent possible, we must interpret the provisions of Article VIII consistent with each other. See *Abrams v. State*, 534 P.2d 91, 95 (Alaska 1975).

Section 4 clearly authorizes some preferences based upon uses. The court recognized a parallel exception to section 15 in *Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State*, 628 P.2d 897 (Alaska 1981), where we wrote that section 15 "was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen." 628 P.2d at 904. The Act distinguishes subsistence uses from commercial and sport uses in name only. As discussed above, its classification is in fact a fairly arbitrary one based upon residence. It is not the type of classification we have previously held permissible under section 15.

We are left with the question whether geographical preferences are permissible under section 15. For the reasons given in the court's opinion, see *supra* pp. 6-8, I believe that reliance upon *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231 (1949), which interpreted the federal statute upon which section 15 was based, is appropriate. In *Hynes*, the Court invalidated regulations prohibiting fishing off the shores of the Karluk Reservation. While I do not believe that *Hynes* is determinative since it involved an exclusive right to fish in a particular area and not a mere preference, 337 U.S. at 92, 69 S.Ct. at 973, section 15 proscribes "special privileg[e]s" as well as exclusive rights. Like the court, I do not read *Hynes* as being based on the fact that the exclusive right was granted to Natives rather than some other group. Nor do I believe that *Hynes* can be distinguished by the ability of people to move to rural areas and thus qualify under the Act. See *supra* pp. 7-8 & n. 12. For these reasons, I agree with the court that geographical preferences for the taking of fish are not permissible under section 15. The Act thus violates section 15. Although section 15 is facially applicable only to fishing,

I would have no difficulty finding a corresponding prohibition of geographical hunting preferences in the common use clause of article VIII, section 3. See *supra* p. 9.

RABINOWITZ, Justice, dissenting.

I dissent from the court's holding that ch. 52 SLA 1986 is unconstitutional.¹ In my view Alaska's subsistence laws are not violative of either section 3 ("common use"), section 15 ("no exclusive right of fisheries"), or section 17 ("equal application of laws") of article VIII of the Alaska Constitution.

Article VIII, section 4 explicitly provides for "preferences among beneficial uses." In *Kenai Pen. Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 904 (Alaska 1981), we said in part: "[w]hile section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sport, and subsistence fishermen." The subsistence laws at issue here do not exclude individuals from access to wildlife; rather, wildlife resources are allocated on a preferential basis. Nor do these laws create an exclusive right of fishery in any class. Rather, the effect of these laws is to provide for a subsistence preference among beneficial users of the resource. No exclusive, monopolistic, or otherwise closed classes of resource users are established.

I would further hold that ch. 52 SLA 1986 is not violative of the equal protection provisions of the Alaska Constitution (article I, section 1, article VIII, section 17). In my view adoption of the strict scrutiny and least restrictive alternative standards is inappropriate. Given the nature of the interest at stake I would apply a lesser standard for purposes of equal protection analysis. This subsistence legislation is substantially related to legitimate legislative goals. I conclude that the fit between the legislature's goal of furthering the health and welfare of subsistence users, and the subsistence preference system it devised to carry out this objective, is sufficiently close

1. Hereinafter state subsistence laws.

to withstand scrutiny under Alaska's equal protection provisions.

INTRODUCTION.

In response to the impact the state's population growth has had upon subsistence lifestyles, Congress in 1980 enacted the Alaska National Interest Lands Conservation Act (hereinafter ANILCA or federal subsistence law).² ANILCA was designed to protect subsistence hunting and fishing by giving such uses priority over commercial and sport uses in rural areas.³

The federal subsistence law specified that subsistence uses must be "customary and traditional uses by rural Alaska residents." ANILCA § 803; 16 U.S.C. § 3113 (emphasis added). Thus, under ANILCA, eligibility for subsistence permits was dependent in part upon one's geographic place of residence. ANILCA § 804; 16 U.S.C. § 3114.⁴

ANILCA authorized the state to continue managing fish and game inhabiting Alaska's federal lands and waters if the state established regulations maintaining the definition of and preference for subsistence uses articulated in the federal subsistence law. ANILCA § 805(d); 16 U.S.C. § 3115(d). The state legislature complied, and thereby retained managerial control over federal lands located within the state by authorizing the Joint Boards of Fish and Game to promulgate regulations defining "rural" use.

2. Pub.L. No. 96-187, 94 Stat. 2371 (1980); 16 U.S.C. §§ 3101-3233 (West 1985). Congress prefaced Title VIII of ANILCA with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska ... is essential to Native physical, economic, traditional, and cultural existence..." 16 U.S.C. § 3111(1).

3. See 16 U.S.C. §§ 3111-3126 (1982 & Supp. IV 1986).

4. "Rural" areas are those with sparse populations, and the term "rural" as used in ANILCA is not a term of art. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir.1988), cert. denied, — U.S. —, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989), (term "rural" is to be given its ordinary significance, meaning "sparsely populated").

5. 1985 House Journal 1246.

In enacting ch. 52 SLA 1986 the Alaska House of Representatives adopted a letter of intent.⁵ The letter articulated the subsistence-rural preference of the act in the following terms:

This limitation of the definition of "subsistence uses" recognizes that Alaska is unique, and unlike any of the other forty-nine states, the economy of many rural communities in rural areas in Alaska is significantly dependent upon participation by the residents of the communities in the taking of fish stocks and game populations for personal and family consumption. Further, the legislature finds that the general health and welfare of these citizens is significantly tied to their participation in these activities.⁶

The subsistence statutes challenged here define "rural area" as "a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area." AS 16.05-940(25).

Appellants' basic contention here is that "by excluding from eligibility as subsistence users all urban dwellers and by including all rural dwellers, it unfairly excludes some urban residents who have lived a subsistence lifestyle and desire to continue to do so, while needlessly including numerous rural residents who have not engaged in subsistence hunting and fishing." The

6. See also the House Committee on Interior and Insular Affairs Report issued in conjunction with the passage of ANILCA.

After consideration of the testimony at the subcommittee's hearings and town meetings throughout Alaska and review of studies done by a variety of federal, state, academic, and other agencies and groups, the Committee has no doubt about the importance of subsistence uses to the rural people of Alaska. Reliable evidence was given to the Committee demonstrating that fifty percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40% of such families spend an average of 6 to 7 months of the year in subsistence activities....

H.R.Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

linchpin of this dispute, then, is whether the challenged subsistence law constitutes an unconstitutionally imperfect attempt to fulfill the legislature's purpose of protecting subsistence uses.

I. DO ALASKA'S SUBSISTENCE LAWS VIOLATE ARTICLE VIII OF THE ALASKA CONSTITUTION?

Appellants challenge the constitutionality of the state subsistence laws under three clauses of article VIII of the Alaska Constitution, sections 3 ("common use"), 15 ("no exclusive right of fisheries"), and 17 ("equal application of laws").⁷ The court attributes a "shared meaning" to these three constitutional provisions: that "exclusive or special privileges to take fish and wildlife are prohibited." The court then concludes that the subsistence statute's preference for rural residents violates each of the aforementioned clauses and offends the shared meaning of article VIII. I disagree.

A. Section Three: The "Common Use" Clause.

Article VIII, section 3 (the "common use" clause) is derived from laws designed to guarantee the common citizen participation in wildlife harvest, and to divest the Crown of exclusive entitlement to those

7. Section 3 of article VIII provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 15 of article VIII provides:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17 of article VIII provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

8. In *Lewis v. State*, 110 Ark. 204, 161 S.W. 154 (1913), the court described the history of the common use principle in the following terms:

resources.⁸ It is said that this "public trust" doctrine⁹ "impose[s] upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." *Owsichek v. State*, 763 P.2d 488, 495 (Alaska 1988) (citations omitted); see also *Mettlakatta Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962); *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1003 (Alaska 1977).

In *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), *reh'g denied*, 468 U.S. 1204, 104 S.Ct. 3572, 82 L.Ed.2d 871 (1984), we accepted the view that the common use clause reflects "anti-exclusionist values." *Id.* 667 P.2d at 1191. Thereafter, in *Owsichek v. State*, 763 P.2d 488 (Alaska 1988), a case involving an exclusive right to conduct guided hunting in particular areas of wilderness, we reiterated this theme stating that section 3 is fundamentally "anti-monopoly" in its thrust. *Id.* at 493 ("Because an EGA [exclusive guide area] is clearly a type of monopoly ... [legislative] history strongly suggests that the statutes at issue here are unconstitutional."). Critical to our holding that the guide licensing system at issue in *Owsichek* was unconstitutional under the common use clause were the following characteristics of the scheme: it per-

[A]lthough at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John.

* * * * *

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to use from the laws of England and may be regarded as a common heritage of the English-speaking people.

Id. at 155 (citations omitted).

9. The public trust doctrine maintains that government holds untaken wildlife in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary. See *Owsichek v. State*, 763 P.2d 488, 493-95 (Alaska 1988).