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November 17, 1977

Steve Cowper
D-2 Steering Council
Nerland Building, Suite D
Fairbanks, Alaska 99701

Dear Steve:

Pursuant to your request, I am enclosing a memorandum prepared by Bob Price dealing with Alaska native subsistence hunting and fishing rights. Mr. Price's analysis leads him to the conclusion that there may be some constitutional difficulty with the action proposed by most of the current D-2 bills under consideration.

However, if the council is desirous of a strong subsistence provision, the memorandum also outlines the means most likely to avoid any constitutional pitfalls.

With best wishes,

Cordially,

BIRCH, HORTON, BITTNER & MONROE

Michael R. Spaan

MRS/kpo
Enclosure
cc: Members of Steering Council

COMMENTS ON PROPOSED LEGISLATION DEALING WITH ALASKA NATIVE SUBSISTENCE HUNTING AND FISHING RIGHTS

ROBERT E. PRICE

November, 1977

INTRODUCTION

The purpose of this memorandum is to discuss several of the questions raised by the proposed enactment by Congress of legislation relating to "d 2" lands insofar as they affect subsistence hunting and fishing by Alaska Natives. In the course of the preparation of this memorandum I have reviewed several papers on this subject. They are the following: (1) The Alaska Natives and Their Subsistence Rights: A Discussion of the Constitutional Questions, by Stewart L. Udall, July, 1977. (2) Legal Issues in Federal Protection for Subsistence on the Proposed National Interest Lands, by Dennis D. Kelso, December, 1976. (3) Testimony of Donald C. Mitchell, Alaska Legal Services Corporation before the Subcommittee on General Oversight and Alaska Lands, Committee on Interior and Insular Affairs, U. S. House of Representatives, July, 1977.

I.

DO THE ALASKA NATIVES HAVE SUBSISTENCE HUNTING AND FISHING RIGHTS UNDER FEDERAL LAW SINCE THE ENACTMENT OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT?

The question has been raised whether or not there are Alaska Native subsistence hunting and fishing rights under Federal law since the enactment of ANSCA. I have not seen a legal analysis of the position that there are such rights, and, therefore, I must speculate on the precise nature of such an argument. The Udall memorandum assumes that such rights have been extinguished and, at page 8, proposes

"that there can be no subsistence program worth the paper it is written on unless the Congress uses its power under the U. S. Constitution and grants such rights to the Alaska Natives." (emphasis added). The Kelso memorandum, at page 9, takes the same position: "Second, I assume that ANCSA effectively extinguished Native rights to hunt, fish, or gather on lands not granted to regional or village corporations where such right is based on aboriginal use or occupancy." Footnote 23 to this conclusion refers to What Can be Done to Salvage Subsistence Hunting and Fishing in Rural Alaska After the Alaska Native Claims Settlement Act? by D. Getches, 1975, as suggesting an argument for federally recognized property rights in hunting and fishing that survived ANCSA's purported extinguishment of aboriginal rights. Kelso comments on the Getches position as follows: "No Court has adopted such a position, however, and both historical background and judicial decisions indicate that Congress could validly extinguish such rights."

The language of ANCSA is quite clear on the question of extinguishment of aboriginal hunting and fishing rights. Section 4 of ANCSA, 43 U.S.C. 1603(b) provides: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist,

are hereby extinguished." (emphasis added)

The legislative history of ANCSA also supports the clear extinguishment language. The Conference Committee Report, Report No. 92-746, at page 37, stated that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority.... The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." (emphasis added) This congressional directive to the executive branch of government by the Conference Committee was made because section 4 had extinguished any aboriginal hunting and fishing rights and because the Conference Committee had not accepted the Senate provisions on subsistence resources. Section 21 of S.35, 92d Congress, 1st Session, directed the Secretary of the Interior to classify certain public lands for subsistence use by local residents. The Conference Committee Report did not discuss the question in terms of "rights" but instead used the language of "interests" and "needs". If the Conference Committee had accepted the Senate version on subsistence, there would have been "rights" created by statute but, even in that case, S. 35 dealt with "residents" and not "Alaska Natives".

United States of America v. Atlantic Richfield Company, No. A 75-215 Civil, U. S. District Court, District of Alaska

(1977) held that ANCSA extinguished any trespass claims which Alaska Natives may have had against third parties. Although aboriginal hunting and fishing rights were not the question to be decided in that action, the court, at p. 43, stated: "The former, including claims of traditional fishing rights, were extinguished." One of the bases of the court's conclusion, which would be pertinent in a discussion of subsistence rights which might have survived ANCSA, is set out at p. 49, as follows: "Thus, Congress has expressly directed that the language of the Settlement Act be broadly construed to effectuate a comprehensive settlement of all Native claims based on aboriginal use and occupancy of land in Alaska and to bar any litigation based on such claims." (emphasis added) Accordingly, United States of America v. Atlantic Richfield Company supports the conclusion that subsistence hunting and fishing rights of the Alaska Natives were extinguished by ANCSA.

II.

MAY CONGRESS ESTABLISH PREFERENTIAL SUBSISTENCE HUNTING AND FISHING RIGHTS FOR ALASKA NATIVES?

I would like to emphasize at the outset of this discussion that there is no definitive holding of the U. S. Supreme Court based on hunting and fishing of American Indians that is squarely in point on this question. I emphasize this point because the proponents of the protection of the subsistence

rights for Alaska Natives have broadly construed the decisions of the U. S. Supreme Court to support their position. I do not mean that the U. S. Supreme Court might not uphold federal legislation establishing preferential subsistence hunting and fishing rights for Alaska Natives, but that the Supreme Court decisions are not wholly clear on the question. The recent decisions of the U. S. Supreme Court on American Indian decisions have been tightly worded decisions. "At the outset, we reject -- as did the state court -- the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise 'whether the enterprise is located on or off tribal land.' The conceptual clarity of Mr. Chief Justice Marshall's view in Worcester v. Georgia, 6 Pet 515,556-561, 8 L Ed 483 (1832) has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L Ed 2d 114,119 (1973).

Morton v. Mancari, 417 U. S. 535, 41 L Ed 290 (1974) deals with the authority of the U. S. Congress to legislate on matters dealing with American Indians. In that case, the court upheld the Indian employment preference provisions within the Bureau of Indian Affairs contained in section 12

of the Indian Reorganization Act, 25 U.S.C. 472. It held that the preference was not racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The court, at 552,301, noted that the authority of the Congress under Article I, sec. 8, cl. 3 of the Constitution to "regulate Commerce... with the Indian Tribes" "singles Indians out as a proper subject for separate legislation." The crux of the court decision is set out at 554-555, 302-303: "Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination'. Indeed, it is not even a 'racial' preference.[24] (24. The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians'. In this sense, the preference is political rather than racial in nature....) Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constitutent groups.... The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.... The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented

by a blanket exemption for Indians from all civil service examinations.... As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgment will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." (emphasis added) The Mancari decision stands for the following proposition. Congress may enact special legislation for Indians when this legislation deals with matters relating to Indian tribal self-government within the context of the Bureau of Indian Affairs. The Court wrote a very narrow opinion for the obvious reason that it was concerned with the question of racial discrimination. There is general language, of course, which may be cited to uphold such special legislation as federal subsistence rights for Alaska Natives but the citation of such general language should be exercised with caution. The Court did not even suggest the outer parameters of "special treatment" which "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." United States v. Antelope, 45 L.W. 4361 (1977) upheld the constitutionality of the Major Crimes Act insofar as it applies to enrolled members of an Indian tribe on an Indian reservation. The court, at 4363, noted that it was not dealing with "tribal self-regulation" but with "federal regulation of criminal

conduct within Indian country implicating Indian interests." The Court also cited Mancari in support of its approach. The Court restricted its holding to enrolled tribal members and stated at 4363 that "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe." Subsistence hunting and fishing is not directly related to self-government of the Alaska Natives, or to Indian country, and it will be necessary for the advocates of such legislation to argue from the general language of the Mancari decision rather than rely upon the specific holding itself.

Morton v. Ruiz, 415 U.S. 199, 39 L Ed2d 270 (1974) is another instance of the current tendency of the Supreme Court to write a narrow opinion on American Indian questions. The decision required the BIA to extend its general assistance benefits to Indians living not only on reservations but off, although near, reservations. The Court based its decision on a particular construction of federal legislation and declined to discuss the constitutional question. "We emphasize that our holding does not... make general assistance available to all Indians 'throughout the country'." At .237, .295.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L 2d 114 (1973) is of special interest in an attempt to

conjecture the attitude of the Supreme Court in American Indian cases. The six justices represented by the majority opinion are still on the Court whereas one of the dissenters, Justice Douglas, has been replaced on the Court. The Court upheld the authority of New Mexico to collect a gross receipts tax on a ski resort operated by the Mescalero Apache Tribe off reservation lands but developed pursuant to the Indian Reorganization Act. The basis of the decision was that the Indian Reorganization Act did not extend tax immunity to "off reservation" activities. The dissent construed the Indian Reorganization Act favorably to the Indians and would have exempted the tribe from the tax. It refused to find the "off reservation" distinction of the majority significant. "There is no magic in the word 'reservation'." At p. 161, p. 127.

I believe that the recent decisions of the Supreme Court suggest that exclusively Alaska Native subsistence hunting and fishing legislation enacted by the Congress may encounter constitutional problems. The Court does not want to broaden the concept of distinctive American Indian rights beyond the traditional ones of tribal self-government, reservations and treaty rights. The Court has carefully looked for ways to avoid the constitutional question of racial discrimination through statutory construction, and, in the decisions which dealt with that question, it stated that it was not "racial discrimination"

that was being dealt with in the opinions. It may be that the Bakke decision may have language in it that will be of guidance in an evaluation of the subsistence question because the Court, even though it is dealing with the affairs of the American Indians under the Indian commerce clause of the Constitution, will not allow racial discrimination in the conduct of American Indian activities.

A possible distinguishing factor in proposed legislation dealing with Alaska Native subsistence hunting and fishing rights is its association with ANCSA. The constitutionality of the land grant provisions of ANCSA would be upheld as a reasonable classification permissible under the Fifth Amendment because of the extinguishment provisions contained in ANCSA. There was a quid pro quo. The aboriginal rights, or the claim of such rights, which were extinguished were held only by Alaska Natives. Therefore, the land grant provisions may be restricted to Alaska Natives. It would seem that other rights, such as preferential subsistence hunting and fishing rights, might also fall within the permissible classification since aboriginal hunting and fishing rights were also extinugished by ANSCA. Section 17(d) (2) of ANCSA is the provision which is the impetus for the present "d 2" legislation, part of which is to deal

with subsistence rights. A grant of Alaska Native subsistence rights which is closely tied to ANCSA, by legislative history and perhaps by phrasing such a grant as an amendment to ANCSA, would appear to stand a better chance of meeting constitutional objections.

There is one further question which relates to the federal grant of subsistence rights on federal lands which is not a Fifth Amendment question but which should perhaps be noted in a discussion of the subject. This is the authority of Congress to legislate on matters relating to resident fish and wildlife on federal lands within a state. The question was resolved in Kleppe v. New Mexico, 49 L Ed 2d 34 (1976), which upheld the authority of Congress to regulate and protect wildlife on federal lands under the Property Clause and the Supremacy Clause of the Constitution.