

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2155 SCOMM 81: . . . SPECIAL SESSION (SUBSISTENCE), June 1992/HB 601

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tion which governs the discharges themselves and is not an indication of title. In fact, the Clean Water Act, 33 U.S.C. § 1251(g), was specifically not intended to abrogate or supersede the authority of the separate states over the allocation of waters within the states.^{4/}

Nothing in the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed with savings clause, 43 U.S.C. § 1617(e), confers or vests title in the United States to the waters of the Copper River or Tanada Creek, or otherwise changes the general rule that no one holds a title interest in the water column of those streams.

Accordingly, to the extent that plaintiffs allege in their First and Second Causes of Action that the waters of either or both the Copper River or Tanada Creek are public lands for purposes of the subsistence use priority (i.e., contend that the United States holds title to these waters), plaintiffs have failed to state a claim upon which relief can be granted.

I. PLAINTIFFS' CLAIM THAT THE COPPER RIVER
AND TANADA CREEK ARE NOT NAVIGABLE
MUST BE DISMISSED FOR FAILURE TO JOIN AN
INDISPENSABLE PARTY-THE STATE OF ALASKA

As alleged in the Complaint ¶17 at 10, the Federal Subsistence Board has determined that both the Copper River and Tanada Creek are "navigable in the vicinity of Batzulnetas." Plaintiffs then allege, id. at 11: "On information and belief,

^{4/} The ownership of ground and surface waters is determined according to state law. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677 (D. Alaska 1979).

neither the Copper River nor Tanala Creek are navigable waters in the vicinity of Batzulnetas." The significance of navigability is set forth in State of Alaska v. Ahtna, Inc., 891 F.2d 1401, 1404 (9th Cir. 1989), cert. denied sub. nom., 110 S.Ct. 1949 (1990), and Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677 (D. Alaska 1979). If these waters are navigable, the lands thereunder have generally been conveyed to the state.^{5/} Those lands are thus not public lands as defined in 16 U.S.C. § 3102(3). Therefore, to the extent that plaintiffs seek a determination that these waters are not navigable, plaintiffs are contending that the State of Alaska does not have title to the lands under those waters.

For the reasons set forth below, the State of Alaska should be deemed an indispensable party to this action. Plaintiffs should be required to join the State of Alaska as a party to this action. If they fail to join the State, this action should be dismissed.

Rule 19(a), Federal Rules of Civil Procedure, describes the class of persons who are considered necessary to the maintenance of any suit. It states in relevant part:

(a) Persons to be Joined if Feasible: A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the

^{5/} Excepted from such a conveyance are lands reserved or retained by the United States at the time the State entered the union. United States v. City of Anchorage, 437 F.2d 1081, 1084 (9th Cir. 1971); United States v. State of Alaska, 423 F.2d 764, 767-68 (9th Cir. 1970), cert. denied, 400 U.S. 967 (1970).

action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

See also Puvallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1255 (9th Cir. 1983), cert. denied, 465 U.S. 1049, reh'g denied, 466 U.S. 954 (1984).

If joinder is not feasible, the court is to determine "whether in equity or good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19(b). In making this determination, the court is to consider, id.:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The State of Alaska clearly has an interest relating to the subject matter of this action which would likely be impaired or impeded by the State's absence. If the waters involved are navigable, the State has a claim of title to the lands under the waters.

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By contending that the waters involved are not navigable, plaintiffs are also contending that the State has no title or interest in those lands. Thus, the State clearly has an interest in the land involved, which can be adversely affected by this action. That interest clearly could be impaired if the court should determine that the Copper River and Tanada Creek were not navigable at the location involved herein.

The United States also faces a substantial risk of incurring inconsistent obligations if the State of Alaska is not joined as a party to this action. Should the court determine in this case that the waters involved herein were not navigable, that same issue could be relitigated by the State in a quiet title action brought by the State pursuant to 28 U.S.C. § 2409a. If not made a party to this action, the State would not be bound by any of the determinations made in this case. That leaves the possibility that the State could obtain decisions that would be different from and contrary to those which might be entered in this case. Nevertheless, any judgment entered in this case which would reverse the determination that the waters involved were navigable would be inconsistent with and place a cloud over any claim of title by the State to these lands. Certainly while the State of Alaska would not be technically bound by that judgment, as a practical matter, its interests would be substantially impaired by such a determination.

There would also appear to be no means by which any relief could be fashioned in this case which could lessen or

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avoid the prejudice which might be suffered by either the United States or the State of Alaska. On the issue of whether the waters involved are or are not navigable, any ruling that the waters were not navigable would prejudice the interests of the State of Alaska.

Joinder has generally been required in situations like those presented in this case. Joinder of absent landowners is required in a quiet title action. United States v. Wood, 466 F.2d 1385, 1388-89 (9th Cir. 1972); McShan v. Sherrill, 283 F.2d 462, 463-64 (9th Cir. 1960). Similarly, holders of interests in federal mineral leases are parties necessary to the maintenance of a suit designed to undue those agreements. Sierra Club v. Hathaway, 579 F.2d 1162, 1166 (9th Cir. 1978); Lomavaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), cert. denied sub nom., Susenkewa v. Kleppe, 425 U.S. 903 (1976).

In Puyallup Indian Tribe v. Port of Tacoma, joinder of the State of Washington was not required in a quiet title action. The Ninth Circuit explicitly distinguished that case from the situation present herein, however. The court noted that action was essentially one to eject the Port of Tacoma from possession and did not affect the right of the State to claim title in itself. 717 F.2d at 1255. The Ninth Circuit specifically noted that joinder of an absent party is required if the judgment would cast a cloud on the absent party's title. 717 F.2d at 1256 n.4. Here the judgment that the waters involved were not navigable

would effect just such a cloud on any claim of title by the State of Alaska.

Accordingly, the State of Alaska should be deemed a party whose presence is necessary for any adjudication of the navigability of the Copper River and Tanada Creek. If plaintiffs fail to join the State, this claim should be dismissed for failure to join that party.

III. PLAINTIFFS' THIRD CAUSE OF ACTION
MUST BE DISMISSED FOR FAILURE
TO EXHAUST REMEDIES.

Plaintiffs' Third Cause of Action is entirely separate and distinct from their first two causes of action. In paragraphs 24 and 25 of their Complaint, plaintiffs allege:

24. On information and belief, the Defendants, through the National Park Service, have precluded plaintiffs from obtaining reasonable access to Batzulnetas via the Batzulnetas trail. This action was taken on the ground that no deviation from the existing Batzulnetas trail may be made no matter how adverse trail conditions may be. This is in spite of the defendants' duty to manage the Park in such a manner as to cause the least possible adverse impact on subsistence uses and as required by §§ 811 and 1101(a) of ANILCA; 16 U.S.C. §§ 3121, 3170.

25. Defendants' refusal to allow reasonable access to Batzulnetas is inconsistent with ANILCA's mandate favoring access and is thus unlawful and is contrary to the Alaska Allotment Act.

A. Access To The Batzulnetas Site For
Subsistence Purposes Is Not Restricted

As will be shown below, ANILCA and the regulations implementing it only potentially limit plaintiffs' surface access to Batzulnetas if plaintiffs seek to use motorized access for

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recreational purposes. Since plaintiffs allege that they have been precluded "from obtaining reasonable access to Batzulnetas via the Batzulnetas trail", Complaint ¶24, it is surface access that is at issue herein.^{6/}

The Wrangell-St. Elias National Park and Preserve was established by ANILCA on December 2, 1980. 16 U.S.C. § 410hh(9). In so doing, Congress provided that: "Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with the provisions of subchapter II of chapter 51 [16 U.S.C. §§ 3101-26] of this title."^{7/} Id. Accord 36 C.F.R. § 13.41. Pursuant to 16 U.S.C. § 3121(a), "rural residents engaged in subsistence uses shall have reasonable access to subsistence resources on public lands." The Secretary is also to "permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such

^{6/} The use of aircraft for access for the purpose of taking fish and wildlife for subsistence purposes is prohibited, 43 C.F.R. § 36.11(f)(1), except as provided in 36 C.F.R. § 13.45.

^{7/} Pursuant to regulations issued by the Park Service, subsistence uses are allowed by local rural residents who has his or her permanent home within a designated resident zone or has been issued a subsistence use permit. 36 C.F.R. § 13.42(a), (b). The communities within the resident zone for the Wrangell-St. Elias National Park and Preserve are listed in 36 C.F.R. § 13.73(a). Any person whose permanent home is not within the defined resident zone may apply for a subsistence permit pursuant to 36 C.F.R. § 13.44.

The phrase "local rural residents" is defined to include both those whose permanent homes are within the defined resident zone and those individuals granted a subsistence permit pursuant to 36 C.F.R. § 13.44. 36 C.F.R. § 13.42(a).

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purposes by local residents, subject to reasonable regulations."

16 U.S.C. § 3121(h).

The regulations issued by the Park Service specifically provide:

Notwithstanding any other provision of this chapter, the use of snowmobiles, motor-boats, dog teams, and other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses is permitted within park areas except at those times and in those areas restricted or closed by the Superintendent.

36 C.F.R. § 13.46(a). Thus all forms of surface access are authorized if the means was "traditionally employed." The Park Service has determined that off-road vehicles were traditionally employed for subsistence uses in the Wrangell-St. Elias National Park and Preserve. Declaration of Jay F. Wells ¶ 5, attached as Exhibit No. 2 hereto. Thus motorized access to the Batzulnetas site via the Batzulnetas trail by all terrain vehicles is authorized for subsistence purposes. Id.

In addition to the access provided for subsistence purposes, to the extent the individual named plaintiffs hold allotments within the park, Complaint ¶¶ 4-5, these allotments constitute what are known as inholdings within the Park.^{8/} Adequate and feasible access to these inholdings is guaranteed by 16 U.S.C. § 3170(b).^{9/} If adequate and feasible access to these

^{8/} "Inholding" is defined in 43 C.F.R. § 36.10(a)(3).

^{9/} "Adequate and feasible access" is defined in 43 C.F.R. § 36.10(a)(1).

inholdings is not otherwise provided, application can be made for a right-of-way permit for access. 43 C.F.R. § 36.10(b).

B. Plaintiffs' Third Cause Of Action Is Both Premature And/Or Fails To State A Claim Upon Which Relief Can Be Granted.

As indicated in the Declaration of Jay F. Wells ¶ 5, motorized access for subsistence purposes to the Batzulnetas site via the Batzulnetas trail is authorized. The Batzulnetas trail is in fact the only reasonable access route to the Batzulnetas site. Id. ¶ 8. Further, as indicated in Mr. Well's declaration, no application has been made for access to the Batzulnetas site via a route other than the Batzulnetas trail or which requests to deviate from the Batzulnetas trail in accessing the Batzulnetas site. Id.

Therefore, to the extent that plaintiffs contend that they do not have adequate access to the Batzulnetas site, that action fails to state a claim upon which relief can be granted in that ANILCA and its implementing regulations provide adequate access for subsistence purposes to the Batzulnetas site. To the extent that plaintiffs alleged that access to the Batzulnetas site is inadequate because "no deviation from the existing Batzulnetas trail" is permitted, plaintiffs action is premature because no request has been made to deviate from that trail.^{10/}

^{10/} To the extent that access may be sought to inholdings pursuant to 43 C.F.R. § 36.10, that claim is also premature as no application for such an access permit has been made. Declaration of Jay F. Wells ¶ 9.

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Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990): "Under the ripeness doctrine, an agency must have taken 'final' action before judicial review is appropriate."

CONCLUSION

For the foregoing reasons, plaintiffs' Complaint must be dismissed in its entirety.

RESPECTFULLY SUBMITTED this 28TH day of January, 1991
at Anchorage, Alaska.

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, DORIS CHARLES,
and MENTASTA VILLAGE COUNCIL,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
MANUEL LUJAN, in his official
capacity as Secretary of the
United States Department of the
Interior and CLAYTON K. YEUTER,
in his official capacity as
Secretary of Agriculture,

Defendants.

Case No. A90-484 Civil

BRIEF IN SUPPORT OF
MOTION TO DISMISS

STATEMENT

Plaintiffs, in their Complaint for Declaratory and Injunctive Relief (Complaint) filed December 6, 1990, present what they have denominated as three separate causes of action. For the reasons which will be stated herein, each of those cause of action fails to state a claim upon which relief can be granted, or in the situation of the Third Cause of Action is also not ripe for judicial review. The First and Second Causes of Action must also be dismissed for failure to join an indispensable party--the State of Alaska.

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Each of the specific causes of action will be discussed in more detail in the argument which follows. The essence of plaintiffs' alleged causes of action is that the actions of the defendants have failed to provide plaintiffs with the subsistence use priority required by 16 U.S.C. §§ 3113, 3114, at a site within the exterior boundaries of the Wrangell-St. Elias National Park and Preserve referred to as the Batzulnetas. Complaint ¶2. The first and second causes of action allege that the Copper River and Tanada Creek are public lands (Complaint ¶15) and thus subject to the subsistence priority set forth in 16 U.S.C. §§ 3113, 3114.^{1/} The third cause of action alleges that plaintiffs have been denied reasonable access to the Batzulnetas.

ARGUMENT

I. THE FIRST AND SECOND CAUSES OF ACTION MUST BE DISMISSED AS THE COPPER RIVER AND TANADA CREEK ARE NOT PUBLIC LANDS FOR SUBSISTENCE PURPOSES

There is no dispute that lands owned by the United States excepting those set forth in 16 U.S.C. § 3102(3)(A), (B), and (C), which are within the exterior boundaries of the Wrangell-St. Elias National Park and Preserve are public lands as defined in the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3102(3). The allegation in plaintiffs' first and second causes of action is, however, that the waters which flow in the Copper River and Tanada Creek at their con-

^{1/} The subsistence use priority was enacted as part of Title VIII of the Alaska National Interest Lands Conservation Act of December 2, 1980, Pub. L. No. 96-489, 94 Stat. 2371, 2422-30, which is codified as Subchapter II of Chapter 51 of Title 43 of the United States Code at 43 U.S.C § 3111-3126.

fluence at Batzulnetas are themselves public lands for purposes of 16 U.S.C. §§ 3113, 3114, irrespective of who owns the beds of those waters. Plaintiffs contend that these waters are public lands for purposes of the subsistence use priority because either the United States or the individual plaintiffs have a reserved right to at least a portion of those waters or they are public lands as a result of the navigational servitude retained by the United States.^{2/} For the reasons which follow, that allegation must be rejected as a matter of law, and plaintiffs' first and second causes of action dismissed accordingly.

A. ANILCA's Subsistence Use Priority
Extends Only To Public Lands AS
Defined In The Statute

The starting point in this inquiry must be the language of the statute. Blum v. Stenson, 465 U.S. 886, 896 (1984); United States v. Hoflin, 880 F.2d 1033, 1037 (9th Cir. 1989). If a statute is not ambiguous, the plain language of the statute is controlling. United States v. Hoflin. Absent clearly expressed legislative intent to the contrary, the language of the statute should be regarded as conclusive. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). When the statutory language is clear, only the most extraordinary showing of contrary intent justifies altering the plain meaning of a statute. Garcia v. United States, 469 U.S. 70, 75 (1984). As the

^{2/} Plaintiffs also allege that "neither the Copper River nor Tanada Creek are navigable waters in the vicinity of Batzulnetas." Complaint ¶17 at 11. For the reasons stated in part II infra, this court must dismiss any claim based on this allegation for failure to join an indispensable party, the State of Alaska.

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court of appeals has most recently restated in Pyramid Lake Paiute Tribe v. United States Department of the Navy, 898 F.2d 1410, 1417 (9th Cir. 1990):

In construing a statute, this court first looks to the plain meaning of the language in question. If the language is unambiguous, its plain meaning controls unless Congress has "clearly expressed" a contrary legislative intent. (Citations omitted.)

In this instance there can be no dispute that the applicable language is that found in Section 804 of ANILCA, 16 U.S.C. § 3114, which provides as follows:

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.)

The crucial phrase in this provision is "public lands". If the waters involved herein are not "public lands", then the subsistence use priority set forth in 16 U.S.C. §§ 3313, 3314 does not apply. The phrase "public lands" is specifically defined in ANILCA. 16 U.S.C. § 3102(3). This definition is arrived at through a three step process.

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First, Congress defined the term "land" to mean "lands, waters, and interests therein." 16 U.S.C. § 3102(1). The word lands thus includes for purposes of ANILCA waters and interests therein. However, Congress did not stop there but proceeded to define the phrase "federal lands" in 16 U.S.C. § 3102(2), to mean "lands the title to which is in the United States after December 2, 1980." (Emphasis Added) Thus the waters and interests therein that are involved herein are "federal lands" only if the United States holds "title" to those interests.

Finally, Congress proceeded to define the crucial phrase "public lands" by referencing the definition of "federal lands." 16 U.S.C. § 3102(3):

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

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

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

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

In so defining these terms, Congress was also very explicit that

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these definitions were to be applicable to the entirety of ANILCA except for Titles IX and XIV thereof. 16 U.S.C. § 3102:

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

As clearly set forth in 16 U.S.C. § 3102(3), for the waters or interests therein involved in plaintiffs' first and second causes of action to qualify as public land for purposes of ANILCA (except in Titles IX and XIV which are not involved herein), the United States must hold the title to those waters or interests therein.

It must also be remembered that it was Congress which defined and limited the scope of the subsistence use priority on public lands in Alaska. Congress having done so, this court may not exceed those limitations. Kidd v. United States Department of the Interior, 756 F.2d 1410, 1412 (9th Cir. 1985): "Congress' constitutional power over the administration and disposition of the public lands is without limitation. Once Congress has acted in that regard, both the courts and the executive agencies have no choice but to follow strictly the dictates of such statutes. (Emphasis added.)" Even if what Congress has so provided appears to be inappropriate, the court must accept what Congress has enacted. Id.:

Although in this case, the statutory requirement borders on nonsense, we cannot ignore history or write around the statutory requirement. We are bound by the plain language of the statute....

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B. The United States Does Not
Hold Title To The Waters Involved.

The reserved water rights doctrine arises out of the appropriations system for water use that came to be adopted in the western United States where water was often a scarce commodity. Arizona v. California, 373 U.S. 546, 555-56 (1963), 460 U.S. 605, 620 (1983). The appropriation system is essentially one in which priority of use is given to the first party who actually puts and continues to use the water for some beneficial purpose. Id. 373 U.S. at 555. Alaska has generally adopted an appropriative system of water distribution. Paug-Vik, Inc. v. Wardy Cove Packing Co., 633 P.2d 1015, 1019-20 (Alaska 1981).

Within this appropriation system, the federal reserved water rights doctrine operates to reserve for the United States (but does not quantify) as of the time of a specific reservation involved the amount of appurtenant water then unappropriated necessary for the purposes for which the reservation was made. United States v. New Mexico, 438 U.S. 696, 698-700 (1978); Capraert v. United States, 426 U.S. 128, 138-41 (1976); Arizona v. California, 373 U.S. at 595-97. It is thus within the context of appropriative water rights system that the court must determine whether the United States holds title to the reserved water which plaintiffs allege the United States holds to the waters of the Copper River and Tanada Creek at the Batzulnetas..

There is no dispute that water rights when acquired by appropriation are interests in property. However, the interest acquired is merely a usufructuary right to use the water so long

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as it is put to beneficial use, and is not a title interest.

Yellen v. Hickel, 352 F. Supp. 1300, 1306-07 (S.D. Calif.

1972):3/

A water right is not as inviolable as a fee simple in land. The holder of a water right does not own any water, he merely holds a right to the "use" of that water. The use of the water, can be, and most always is, subject to state and federally imposed conditions.

* * *

An appropriative water right is a usufructuary right. The holder of the right has the privilege of enjoying a thing (water) the property of which is vested in another (the State). Holders of land patents, on the other hand, have fee simple titles vested in them.

Accord United States v. Tilley, 124 F.2d 850, 861 (8th Cir. 1942), cert. denied sub nom., Scott v. United States, 316 U.S. 691 (1942); Mitchell Irrigation Dist. v. Sharp, 121 F.2d 964, 967 (10th Cir. 1941), cert. denied, 314 U.S. 667 (1941); Ronzio v. Denver & R.G.W. Ry. Co., 116 F.2d 604, 605-06 (10th Cir. 1940); Rank v. Krug, 90 F. Supp. 773, 787 (S.D. Calif. 1950): "Such water rights are 'usufructuary and consist not so much of the fluid itself as the advantages of its uses'." The general rule is also recognized by the treatise writers. 93 C.J.S., Waters § 181 at 944-95 (1956):

[I]t is a well settled general rule that a water right or the right of an appropriator is simply a usufructuary right which gives

3/ Alaska water law is in accord with the similar law adopted by the Pacific coast states. Paug-vik, Inc. v. Wards Cove Packing Co., 633 P.2d at 1019.

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09-17-92 03:17AM FROM SENATOR MURKOWSKI TO 319074654928 P002/003

FRANK H. MURKOWSKI
ALASKA

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SELECT COMMITTEE ON INTELLIGENCE (VICE CHAIRMAN)
ENERGY AND NATURAL RESOURCES
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June 17, 1992

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Honorable Dick Eliason
President of Alaska State Senate
Room 111
State Capitol
Juneau, Alaska 99801-1182

Dear President Eliason:

As the special session of the Alaska Legislature begins this week to once again address the vexing issue of subsistence, I want to take this opportunity to make available to you my view of the current situation and potential problems associated with continued federal management of fish and game on federal lands in Alaska.

My recent conversations with Secretary Lujan have confirmed that the legislative proposal prepared by the Governor's Subsistence Advisory Council does not comply with Title 8 of ANILCA. It is clear that if the Legislature successfully passed this legislation federal management of subsistence under ANILCA would remain. It is also clear from my recent discussions with Secretary Lujan that final regulations setting in motion permanent federal management of subsistence will become effective July 1 and that this effective date can not be temporarily postponed or delayed under any circumstances.

However, these permanent federal regulations provide for a process which allows the State to petition the Secretary of the Interior to review and certify a new state management program which complies with the requirements of ANILCA and thereby enables Alaska to resume management responsibility on federal lands. Therefore, if the objective is to as soon as possible return fish and game management on federal lands to the State of Alaska, the only course of action is for the State to enact a new subsistence law which can be certified by the Secretary as complying with the requirements of ANILCA. All Alaskans have much at risk under permanent federal management and therefore I recommend that this course of action be followed providing Alaskans the opportunity to replace federal management and law with state authority over fish and game on federal lands.

There are many potential problems associated with continued permanent federal management. First, we do not yet know what the outcome of the navigable waters lawsuits in federal court will be. If the court rules that the federal government must regulate subsistence in the state's navigable waters, we will be in for a very difficult time indeed. Federal fish management will be a set back that cuts deeply into the heart of statehood.

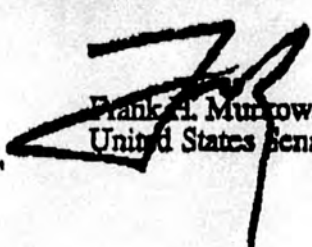
Second, we are now blessed with an Administration in Washington which is on our side and a Secretary of the Interior who is receptive to state management. I believe the Administration will treat Alaska fairly when it petitions under the new regulations for certification of the new Alaska program for compliance with ANILCA. I can not say if this will be the case under another Administration.

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President Eliason

Third, as you well know, once the federal government gets into something, it is difficult to get it out. The institutional fortitude and resistance to state authority of the federal bureaucracy is legendary, and once federal jobs and budgets are institutionalized they will not be easily removed. Further, I am concerned that the longer federal bureaucrats manage fish and game on federal public lands, the more an outside constituency of special interest groups will grow for their continued management, and the harder it will be to shed ourselves of the federal managers and their support groups.

I urge you, and through you, the legislature, to pursue a course of action which will lead to the earliest possible removal of federal fish and game management from federal lands in Alaska. We should not invite the dangers associated with continued federal management.

Sincerely,


Frank R. Murkowski
United States Senator

cc: Governor Hickel

TO: Mr. Eliason
FROM: Senator Murkowski
SUBJECT: Fish and Game Management
DATE: 6/17/92
BY: [illegible]

TO: Mr. Eliason
FROM: Senator Murkowski
SUBJECT: Fish and Game Management
DATE: 6/17/92
BY: [illegible]

TO: Mr. Eliason
FROM: Senator Murkowski
SUBJECT: Fish and Game Management
DATE: 6/17/92
BY: [illegible]

TO: Mr. Eliason
FROM: Senator Murkowski
SUBJECT: Fish and Game Management
DATE: 6/17/92
BY: [illegible]

2/1/92

TO: Mr. Eliason
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(2) Subdistrict 6-B, from the downstream end of Crescent Island to three miles upstream of the mouth of the Totchaket Slough, where salmon may be taken from 6 p.m. Friday until 6 p.m. Wednesday.

(xxvii) During any commercial salmon fishing season closure of greater than five days in duration, salmon may not be taken during the following periods in the following districts:

(A) In District 4, excluding the Koyukuk and Innoko River drainages, salmon may not be taken from 6 p.m. Friday until 6 p.m. Sunday;

(B) In District 5, excluding the Tozitna River drainage and Subdistrict 5-8, salmon may not be taken from 6 p.m. Sunday until 6 p.m. Tuesday;

(C) In Subdistrict 6-A and 6-B, excluding the Kantishna River drainage and that portion of the Tanana River drainage upstream of the mouth of the Salcha River, salmon may not be taken from 6 p.m. Wednesday until 6 p.m. Friday.

(xxviii) In Subdistrict 6-C and that portion of the Tanana River drainage upstream to the mouth of the Salcha River, salmon may not be taken following the closure of the commercial salmon fishing season from 6 p.m. Monday until 6 p.m. Friday.

(xxix) Adjustments may have to be made to the subsistence salmon fishing seasons and fishing periods to protect healthy populations.

(xxx) Pike may not be taken with gill nets in the waters of the Tolovana River drainage from October 15 through April 14.

(xxxi) An Alaska Commercial Fisheries Entry Commission salmon permit holder registered for the set net only locations may not use drift gill nets for the subsistence taking of salmon in Districts 1, 2, and 3.

(xxxii) Commercial salmon fisherman who is registered for Districts 1, 2, or 3 may not take salmon for subsistence purposes in any other district located downstream from Old Paradise Village.

(xxxiii) During any commercial salmon fishing season closure of greater than five days in duration, salmon may not be taken during the following periods in the following districts:

(A) In District 4, excluding the Koyukuk and Innoko River drainages, salmon may not be taken from 6 p.m. Friday until 6 p.m. Sunday;

(xxxiiv) In District 4, commercial fishermen may not take salmon for subsistence purposes during the commercial salmon fishing season by gill nets larger than six inch mesh after a date specified by emergency order issued between July 10 and July 31.

(xxxv) In Districts 4, 5 and 6, salmon may not be taken for subsistence purposes by drift gill nets, except as follows:

(A) In Subdistrict 4-A, upstream from the mouth of Stink Creek king salmon may be taken by drift gill nets from June 21 through July 14, and chum salmon may be taken by drift gill nets after August 2;

(B) No person may operate a drift gill net that is more than 150 feet in length during the seasons described in this section.

(xxxvi) In Subdistricts 5-A, 5-B, 5-C, and that portion of Subdistrict 5-D downstream from Long Point, no person may possess salmon taken for subsistence purposes during a commercial fishing period unless the dorsal fin has been immediately removed from the salmon. A person may not sell or purchase salmon from which the dorsal fin has been removed.

(xxxvii) In addition to the subsistence fishing permit conditions, permits issued for the taking of salmon in Subdistricts 6-A and 6-B must also contain the following requirements:

(A) Salmon may be taken only by set gill net or fishwheel. No household may operate more than one fishwheel.

(B) Each person subsistence fishing shall keep accurate daily records of his/her catch, the number of fish taken by species, location and date of the catch, and other information that the Alaska Department of Fish and Game may require for management or conservation purposes.

(C) In that portion of Subdistrict 6-B three miles or more upstream of the mouth of Totchaket Slough, each permittee shall report the number of salmon taken to the Alaska Department of Fish and Game once each week, or as specified on the permit. In the remainder of Subdistrict 6-B and in Subdistrict 6-A, each permittee shall report the total number of salmon taken to the Alaska Department of Fish and Game no later than October 31.

(xxxviii) Subsistence fishermen taking salmon in Subdistrict 6-C shall report their salmon catches at designated Alaska Department of Fish and Game check stations by the end of each weekly fishing period. Immediately after salmon have been taken, catches must be recorded on a harvest form provided by the department.

(xxxix) The annual possession limit for the holder of a Subdistrict 6-C subsistence salmon fishing permit is 10 king salmon and 75 chum salmon for periods through August 15 and 75 chum and coho salmon for periods after August 15.

(xl) Subsistence salmon harvest limits in Subdistrict 6-C are 750 king salmon and 5,000 chum salmon taken through August 15 and 5,200 chum and coho salmon combined taken after August 15. When either the king or chum salmon harvest limit for periods before August 16 has been taken, the subsistence salmon fishing season in Subdistrict 6-C will close. A later season will open after August 15 to allow the taking of the harvest limit for periods after August 15. If the chum salmon harvest limit has not been obtained through August 15, the remaining harvest will not be added to the chum salmon harvest level for periods after August 15.

(xli) Subsistence salmon fishing seasons and weekly fishing periods for Subdistrict 6-C are as follows:

(A) Salmon may be taken at any time except salmon may not be taken for 24 hours before the opening and after the closing of the commercial salmon fishing seasons and during closed weekly commercial salmon fishing periods;

(B) Weekly subsistence salmon fishing periods that follow closures of the commercial salmon fishing seasons will be established by emergency order;

(C) The annual harvest limit for the holder of a Subdistrict 6-A or 6-B subsistence salmon fishing permit is 60 chinook salmon and 500 chum salmon for the period through August 15 of a year, and 2,000 chum and coho salmon combined for the period after August 15. Upon request, permits for additional salmon may be issued by the department.

(D) Unless otherwise provided, from June 20 through September 30, open subsistence salmon fishing periods are concurrent with open commercial salmon fishing periods. During closures of the commercial salmon fishery, open subsistence salmon fishing periods are as specified in 5 Alaska Administrative Code 05.367.

(E) In the Kantishna River drainage, the open subsistence salmon fishing periods are seven days per week.

(F) In Subdistrict 6-B from the downstream end of Crescent Island to a line three miles upstream from the mouth of the Totchaket Slough, the open subsistence salmon fishing periods are from 6 p.m. Friday through 6 p.m. Wednesday.

(4) Kuskokwim Area. Federal subsistence regulations for the subsistence harvest of fish are in effect for all waters on Nunivak Island and within one mile of its shorelines and all waters within the Old Kuskokwim Wildlife Refuge as defined by boundaries established prior to 1959. In the remainder of the Kuskokwim area

(19) Southeastern Alaska Area. At this time Federal subsistence fishing regulations only apply to non-navigable waters on Federal lands in the

Southeastern Alaska Area, with the exception of Glacier Bay National Park which is closed to the subsistence uses.

(i) Unless restricted in this section or under the terms of a subsistence fishing permit, fish may be taken in the Southeastern Alaska Area at any time.

(ii) Salmon, trout, char and herring spawn on kelp may be taken only under authority of a subsistence fishing permit.

(iii) No person may possess subsistence-taken and sport-taken salmon on the same day.

(iv) The Alaska Department of Fish and Game shall not issue a permit for the taking of steelhead trout, but steelhead trout taken incidentally by gear operated under the terms of a subsistence permit for salmon are legally taken and possessed for subsistence purposes. The holder of a subsistence salmon permit must report any steelhead trout taken in this manner on his or her permit calendar.

(v) Salmon, trout, or char taken incidentally by gear operated under the terms of a subsistence permit for salmon are legally taken and possessed for subsistence purposes. The holder of a subsistence salmon permit must report any salmon, trout, or char taken in this manner on his or her permit calendar.

(vi) Subsistence fishermen shall immediately remove the dorsal fin of all salmon when taken.

(vii) Coho salmon may be taken from Salt Lake and Mitchell Bay from August 1 through October 31.

(viii) Fish may be taken by gear previously listed except as may be restricted under the terms of a subsistence fishing permit and except as follows:

(A) In District 13, Redoubt Bay, gillnet or seine gear may not be used to take salmon in any waters of the bay closed to commercial salmon fishing.

(B) Set gill nets may not be used to take salmon except in the mainstream and side channels, but not the tributaries, of the Chilkat River from the terminus to one mile upstream of Wells Bridge.

(C) Beach seines and gaffs only may be used to take coho salmon during the season and including coho salmon which may be taken from Salt Lake and Mitchell Bay from August 1 through October 31.

(ix) The following waters are closed to subsistence salmon fishing: in District 15, saltwaters of Lynn Canal including Chilkat, Chilkoot and Lutak Inlets, during the closed period of the commercial salmon net fishery in the

district, except that salmon may be taken in saltwaters of Lutak Inlet on the Saturday before any period that the commercial salmon net fishery is open in the inlet to the terminus of the Chilkoot River.

(x) Permits will not be issued for taking chinook or coho salmon, except for coho salmon as provided in Salt Lake and Mitchell Bay from August 1 through October 31, but chinook or coho salmon taken incidentally by gear operated under terms of a subsistence permit for other salmon are legally taken and possessed for subsistence purposes. The holder of a subsistence salmon fishing permit must report any chinook or coho salmon taken in this manner on his or her permit calendar.

(xi) From July 7 through July 31, sockeye salmon may be taken in the waters of Klawock Inlet enclosed by a line from Klawock Light to the Klawock Oil Dock, the Klawock River, and Klawock Lake only from 8 a.m. Monday until 5 p.m. Friday.

(xii) In the Chilkat River, the subsistence fishing permit holder shall be physically present at the net while it is fishing.

(xiii) Before July 4, subsistence salmon fishing permits may be operated in Sitkoh Bay only by residents of Angoon. On and after July 4, subsistence salmon fishing permits may be operated in Sitkoh Bay by residents of both Angoon and Sitka.

(xiv) Subsistence salmon fishing permits for the fishery provided for Salt Lake and Mitchell Bay will be issued only to those persons domiciled in Angoon and only one permit will be issued for a household. The number of coho salmon that may be taken on a permit will be specified by the Alaska Department of Fish and Game after it has assessed the level of effort that will be involved in that fishery.

(xv) In the waters of the Klawock Inlet enclosed by a line from Klawock Light to the Klawock Oil Dock, no person may subsistence salmon fish from a vessel that is powered by a motor of greater than 35 horsepower.

(xvi) Finfish may be taken for subsistence purposes only as provided in this section:

(A) Klukwan. Only those residents domiciled west of the Haines highway between Mile 20 and Mile 24 and east of the Chilkat River may take herring, herring spawn, and bottomfish in waters of Section 15-A; and salmon and smelt in all waters of the Chilkat River and Chilkat Inlet north of the latitude of Glacier Point, and in the Chilkoot River, Lutak Inlet, and Chilkoot Inlet north of the latitude of Battery Point, excluding

waters of Taiya Inlet north of the latitude of the tip of Taiya Point.

(B) Haines. Only those residents domiciled in the City and Borough of Haines, excluding residents domiciled in the village of Klukwan and in the drainage of Excursion Inlet, may take herring, herring spawn, and bottomfish in waters of Section 15-A; and salmon and smelt in all waters of the Chilkat River and Chilkat Inlet north of the latitude of Glacier Point, and in the Chilkoot River, Lutak Inlet, and Chilkoot Inlet north of the latitude of Battery Point, excluding waters of Taiya Inlet north of the latitude of the tip of Taiya Point.

(C) Hoonah. Only those residents domiciled in the City of Hoonah and in Chichagof Island drainage on the eastern shore of Port Frederick from Gartins Creek to Point Sophia may take herring, herring spawn, and bottomfish in waters of District 14 east of the longitude of Point Dundas; and salmon, smelt, and dolly varden char in waters of section 14-B and 14-C, in District 13 in waters along the western shore of Yakobi Island east of a line from Cape Spencer Light to Surge Bay Light, and in District 12 in waters of Basket Bay inside a line from 57°39'50" N. lat., 134°53'12" W. long. to 57°39'17" N. lat., 134°53'53" W. long.

(D) Angoon. Only those residents domiciled in the City of Angoon and along the western shore of Admiralty Island north of the latitude of Sand Island, south of the latitude of Thayer Creek, and west of 134°30' W. long., including Killisnoo Island, may take herring, herring spawn, and bottomfish in waters of District 12 between the latitude of Parker Point and the latitude of Point Caution, and in Section 13-C east of the longitude of Point Elizabeth; and salmon and dolly varden char in waters of District 12 south of a line from Fishery Point to South Passage Point and north of the latitude of Point Caution and in waters of Section 13-C east of the longitude of Point Elizabeth.

(E) Sitka. Only those residents of the City and Borough of Sitka domiciled in drainage which empty into Section 13-B north of the latitude of Dorothy Narrows, except those domiciled in the U.S. Coast Guard base on Japonski Island, may take herring and herring spawn in waters of Section 13-B north of the latitude of Aspid Cape; and sockeye salmon in waters of Section 13-A south of the latitude of Cape Edward, in waters of Section 13-B north of the latitude of Redfish Cape, and in waters of Section 13-C.

(F) Kake. Only those residents domiciled in the City of Kake and in

managed for the purpose of protecting their suitability for wilderness designation pending revision of the initial plans; and

(4) unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Alaska for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.

TITLE VIII—SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that—

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

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

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

43 USC 1601
note.

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

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

POLICY

16 USC 3112.

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

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized

scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante. p. 2377.

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

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

DEFINITIONS

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

16 USC 3113.

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3113.

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

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

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

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

Regional advisory council, authority.

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

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

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

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

Annual report to Secretary.

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

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

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

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

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

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

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

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

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

Implementation

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

Reimbursement
to States.

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

Report to Con-
gress.

FEDERAL MONITORING

Sec. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as

Report to con-
gressional com-
mittees.
16 USC 3116.

he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

Hearing.

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

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

PARK AND PARK MONUMENT SUBSISTENCE RESOURCE COMMISSIONS

16 USC 3118.

Subsistence
hunting pro-
gram.

SEC. 808. (a) Within one year from the date of enactment of this Act, the Secretary and the Governor shall each appoint three members to a subsistence resources commission for each national park or park monument within which subsistence uses are permitted by this Act. The regional advisory council established pursuant to section 805 which has jurisdiction within the area in which the park or park monument is located shall appoint three members to the commission each of whom is a member of either the regional advisory council or a local advisory committee within the region and also engages in subsistence uses within the park or park monument. Within eighteen months from the date of enactment of this Act, each commission shall devise and recommend to the Secretary and the Governor a program for subsistence hunting within the park or park monument. Such program shall be prepared using technical information and other pertinent data assembled or produced by necessary field studies or

investigations conducted jointly or separately by the technical and administrative personnel of the State and the Department of Interior, information submitted by, and after consultation with appropriate local advisory committees and regional advisory councils, and any testimony received in a public hearing or hearings held by the commission prior to preparation of the plan at a convenient location or locations in the vicinity of the park or park monument. Each year thereafter, the commission, after consultation with the appropriate local committees and regional councils, considering all relevant data and holding one or more additional hearings in the vicinity of the park or park monument, shall make recommendations to the Secretary and the Governor for any changes in the program or its implementation which the commission deems necessary.

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

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

Program and
recommendation
implementation.

COOPERATIVE AGREEMENTS

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

16 USC 3119.

SUBSISTENCE AND LAND USE DECISIONS

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

16 USC 3120.

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

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

Hearing.

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

Notice and hearings.

42 USC 4332.

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

48 USC note prec. 21.

43 USC 1601 note.

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

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

ACCESS

16 USC 3121.

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

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

RESEARCH

16 USC 3122.

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

PERIODIC REPORTS

Submission to Speaker of House and President of Senate.
16 USC 3123.

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

- (1) an evaluation of the results of the monitoring undertaken by the Secretary as required by section 806;
- (2) the status of fish and wildlife populations on public lands that are subject to subsistence uses;
- (3) a description of the nature and extent of subsistence uses and other uses of fish and wildlife on the public lands;

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

(5) comments on the Secretary's report by the State, the local advisory councils and regional advisory councils established by the Secretary or the State pursuant to section 803, and other appropriate persons and organizations;

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

(7) such other recommendations the Secretary deems appropriate.

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

Publication in
Federal Register

REGULATIONS

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

16 USC 3124.

LIMITATIONS, SAVINGS CLAUSES

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

16 USC 3125.

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

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

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

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

Aid in Fish Restoration Act (64 Stat. 430; 16 U.S.C. 777-777K), or any amendments to any one or more of such Acts.

CLOSURE TO SUBSISTENCE USES

16 U.S.C. 1129

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

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

Publication in
Federal Register

TITLE IX—IMPLEMENTATION OF ALASKA NATIVE CLAIMS SETTLEMENT ACT AND ALASKA STATEHOOD ACT

SUBMERGED LANDS STATUTE OF LIMITATION

43 USC 1631.

43 USC 1601
note.

Sec. 901. (a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this

OPINIONS

AG

MEMORANDUM

State of Alaska

Department of Law

TO: McKie Campbell
Office of the Governor

DATE June 14, 1992

FILE NO.

TEL NO 276-3550

SUBJECT Potential Impact of
Subsistence Bill on Current
and Recent Subsistence
Litigation

FROM: Lance B. Nelson ^{BN}
Assistant Attorney General
Natural Resources-Anchorage

Several legislators have asked about how the subsistence legislation introduced by the governor would impact recent cases of subsistence litigation. I will use the most recent summary of subsistence and state-federal lawsuits to explain the impact. A copy of Assistant Attorney General Sarah E. Gay's April 15, 1992 is attached for your reference.

1. Bobby v. State: The new legislation would not have any actual impact on this case since it has already been decided (except for attorney fees appeal); however, it is very likely that had the new legislation been law at the time, that the Board of Game's decision would have been more easily defended, both because the board would have had better statutory guidance and the court would have less discretion.

2. Peninsula Marketing Ass'n v. State: The legal and factual subsistence issues in this case are nearly identical to those raised in the recent Elim case. The basic challenge is to the allowance of any mixed-stock fisheries. A ruling favorable to plaintiffs could potentially devastate commercial fisheries across the state and would probably even wreak havoc upon the management of subsistence fisheries. The new bill would probably help guard against such challenges.

3. Payton v. State: While this case has also run its course, the new bill would probably have had an affirmative impact because the board would have had clearer guidance and its decision would have been even more defensible.

4. Morry v. State: The new bill would have a very clear impact on this case. The "all-Alaska" issue would disappear. The other part of the court's ruling defining "reasonable opportunity" to require "least adverse impact" on the customary and traditional character of hunting would be overruled by the new legislation. That ruling was unreasonable and should be overruled.

5. Tanana Fish and Game Association v. State: The plaintiffs' arguments in this case would be precluded by the new bill. The new bill defines customary trade to prevent commercial

fishing under the guise of subsistence, which is exactly what the plaintiffs are arguing for in this case.

6. John v. State: The new bill would have no actual impact on this case because it has been resolved. The issues would have been clarified by the new bill and the court should reach a more conclusion more favorable to the state in a similar future decision. However, we have very little faith in future decisions of the federal district court.

7. Kitka v. State: The new bill would provide better guidance, in clearer standards, to the Board of Fisheries.

8. Kwethluk IRA Council v. State: Although this case would not be impacted because it has already been resolved, the decision against the Board of Game might have been precluded by the new definition of "sustained yield" in the new bill.

9. Coy v. State: The new bill should make the board's decision more defensible. The new statutory definition of "reasonable opportunity" would clarify the board's duty and prevent this kind of challenge.

10. Ketzler v. State: This case is almost identical to Coy and the same comments apply.

11. Interior Fish and Wildlife Ass'n v. State: The arguments in this case are "off the wall", but the new bill would make the board decisions even easier to defend.

12. Nanana v. State: The issues in this case boil down to the same arguments as in Interior Fish.

13. Sorenson v. State: The new bill would drastically reduce the number of Tier II hunts around the state and eliminate lawsuits like this one.

14. Kluti Kash v. State: This case involves a Federal vs. State territorial management issue and the new bill won't affect the outcome unless it leads to resolution of the ANILCA conflict and subsequent elimination of these kinds of issues.

15. John v. U.S.: Same basic issue as Kluti Kash, but fish at stake.

16. Sleetmute v. State: Under the new bill, it is likely that the board's decision would have been more satisfactory to the plaintiffs and more easily defended against challenges.

17. Sumner Strait Advisory Committee v. State: The new bill would probably strengthen the board's decision.

18. United Cook Inlet Drift Ass'n v. State: This case would go away under the new bill. First of all, there would not be any subsistence fishery in the Kenai/Soldotna area, and second, the "all-Alaskan" policy would disappear under the new bill.

19. Kluti Kaah v. State: In this case, the board would have had much better statutory guidance in determining "reasonable opportunity" under the new bill. The result would have been a more defensible decision and less likelihood of lawsuits after the decision.

20. Kluti Kaah Appeal: The supreme court has since reversed Judge Katz' decision on preliminary injunction. There will be no impact on this particular appeal.

21. Cantwell v. State: Same as Kluti Kaah No. 19 above.

22. Ketzler v. State (Federal Court): Related to John No. 15 and Kluti Kaah No. 14 above.

23. Kenaitze Indian Tribe v. State: This is another "all-Alaskan" case that would go away under the new bill.

24. U.S. v. Didrickson: The new law would eliminate these blatant "commercial" subsistence fishing ventures.

25. Native Village of Tookook Bay v. State: While some of the issues have been mooted by the Board of Fisheries' decision on reconsideration, the mixed stock vs. subsistence issue is still technically alive (although it now appears that there is a strong herring run in the plaintiff communities this year. The new bill would make the board decision more defensible.

26. Shepherd v. State: No impact on this case.

27. Native Village of Elim v. State: We were successful in obtaining a denial of injunctive relief after a long hearing this past week. While we won this round, it would have been much easier under the new bill.

The rest of the case on the list do not deal with subsistence.

MEMORANDUM

State of A
DepartmentHonorable Carl Rosier
Commissioner

June 12, 1992

Alaska Department of Fish and Game TEL NO 661-92-0716

TEL NO 269-5241

SUBJECT: Concerns re constitutional
subsistence provisions;
ANILCA amendmentLance B. Nelson *
Cheri L. Jacobus
Assistant Attorneys General - Anchorage

In a memorandum dated April 30, 1992, you requested an opinion on the impact of a subsistence preference amendment to the Alaska Constitution. Since that time your department has also raised the question of an appropriate amendment to the subsistence provisions of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. Sections 3111 -- 3126. This opinion addresses those concerns. Because of time pressures it is not as comprehensive as we would have liked, but we hope it will be of some help.

There have been various proposals¹ put forward for an amendment to the state constitution that would enshrine a subsistence preference for the taking of fish and game. In reviewing these, written comments from fish and game attorneys in the Department of Law were solicited. Uniformly, the attorneys expressed concern that these constitutional amendments may eliminate the legislature's flexibility to respond to evolving public needs and priorities. A constitutional amendment creating a subsistence

¹ For example:

"Subsistence uses are given priority over all other consumptive uses."

or

"The subsistence use of fish and game shall be accorded a preference among beneficial uses."

or

"The Legislature shall provide for the identification of fish stocks and game populations subject to subsistence use and for the preference of subsistence use over other consumptive uses of those stocks and populations."

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preference would effectively transfer significant legislative power from the legislature to the courts. In addition, the majority of these proposals have the potential to obstruct future development of other resources, such as lumber, minerals, oil, and gas. *

On the other hand, if every proviso necessary to preserve legislative discretion is included in a proposed constitutional amendment, the amendment may only authorize what the legislature already has the power to do.² It is inappropriate to use the state constitution to legislate.

In addition, the scenarios being proposed uniformly tie the effective date of the amendment to passage of an amendment to ANILCA which would establish Alaska's statutory scheme as complying with the requirements of ANILCA.³ There does not appear to be any case law directly on point that would establish the legal effectiveness of such an approach. However, the more significant legal effect of compliance with ANILCA is that it would bring Alaska's fish and game regulations into federal court oversight pursuant to section 807 of ANILCA. *

² The following language has been suggested:

"Consistent with the sustained yield principle, the legislature shall/may provide for the subsistence uses of fish and wildlife. The legislature shall provide for the identification of fish stocks and game populations to be subject to subsistence uses, and may provide the exemption of fish stocks and game populations from subsistence uses. In determining participation in subsistence use of fish and wildlife, the legislature may distinguish among residents on the basis of use of fish and wildlife, direct dependence on the resource, proximity to the resource, availability of alternative resources, and presumptions based on community characteristics."

³

"This amendment to the Alaska State Constitution shall take effect when the U.S. Congress amends Title VIII of ANILCA to specify that Alaska Session Law XX, 1992, complies with the requirements of Title VIII."

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* Finally, fish and game attorneys in our department are extremely dissatisfied with federal court decisions on subsistence regulations. It is, therefore, not appropriate to merely return to compliance with ANILCA. Section 807 of ANILCA should also be changed as part of any constitution/ANILCA resolution. Failure to make this part of a package that includes a constitutional amendment would be a fatal flaw.

* 1. Inhibition of development of other resources. There is a risk that a subsistence preference enshrined in the constitution would be interpreted to inhibit or prevent development of other resources, such as logging, mining, oil, etc. Even though the amendment does not purport to give subsistence a preference over uses of other resources, the fact that it is expressly mentioned in the constitution as a constitutionally preferred use while other uses are not may have an adverse impact on other resource development. As the supreme court stated in Owsichuk v. State, 763 P.2d 488, 492 (Alaska 1988):

[S]ince the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state.

(Emphasis added.) Once a highly important interest has been expressed in the constitution, the state would have to demonstrate a compelling state interest before it could infringe on that right, even if there is clear general authority in the constitution for the legislature to address other resources and uses.

In McDowell v. State, 785 P.2d 1, 10-12 (Alaska 1989), the court indicated that, where constitutional rights are implicated, legislation would be subjected to close scrutiny even if the legislation implements authority clearly delegated to the legislature by another constitutional provision. The courts may decide that, in some cases, the express constitutional right to subsistence hunt and fish outweighs otherwise authorized development that might adversely affect those subsistence uses. By elevating subsistence uses to a constitutional right, the supreme court could find that the state would have to demonstrate a compelling state interest before it could infringe on that right. In other words, all other resource development could be held captive to subsistence much the same as section 810 of ANILCA has impacted federal decisions. As explained below, court interpretations of constitutional provisions are not easily corrected.

2. Federal court oversight. It is of significant concern that section 807 of ANILCA provides that anyone dissatisfied with

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state subsistence regulations may bring an action in the federal district court to obtain, among other things, injunctive relief⁴ to provide for a particular subsistence use. This particular provision raises traditional Eleventh Amendment⁵ issues and clearly implicates the state's sovereign right to resist suits by its citizens in federal court. The state's actual experience as a defendant in federal court has been awful.

For example, the federal court has ruled that any limitations on traditional use patterns are unreasonable and has struck down seasons and bag limits in certain areas. This has directly implicated the state's continued ability to manage fish and game effectively. It has ruled that "customary trade" includes some rather straightforward commercial practices. It has ordered hunts in areas where the Alaska Board of Game had previously ruled the game was so depleted that no hunting should be allowed, to ensure the biological viability of the herd and to allow the herd to be restored. Finally, the review standard applied by the federal court to the regulations the Alaska Boards of Fish and Game enact is significantly different from that applied by the state courts. The state courts are constrained from substituting their judgement for that of the boards. On the other hand, the federal courts do not give great weight to the boards' decisions and frequently judge the correctness of those board decisions.

As long as the state was in compliance with ANILCA (prior to McDowell), the federal court relied on section 807 to justify its direct review and interpretation of state law and its failure to defer to state court interpretation of state law.⁶ Based on those interpretations, the federal court would then order preliminary relief. As a result, so long as the state was in compliance with ANILCA, each aggrieved litigant had two potential tribunals - state

⁴ In addition, unlike litigants in other federal litigation, section 807 specifically provides attorneys fees to the litigant. The fees obtained by litigants in federal courts have been extraordinarily high.

⁵ The Eleventh Amendment protects the state from being forced into federal court without its consent to be sued. This amendment has been successfully raised as a defensive measure in numerous suits and is a basic attribute of state sovereignty.

⁶ The traditional rule has always been that the federal court would defer to the state judiciary for interpretations of state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874).

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and federal court. The aggrieved subsistence user could and did file litigation in both the federal court and in the state court. In the past, when the state was in compliance with the requirements of ANILCA, there were inconsistent rulings; some state court judges incorrectly assumed the state court was bound by the federal court interpretations of state law and rulings.

A return to compliance with ANILCA without amending section 807 would reopen state law to federal review and would again create the potential for inconsistent rulings. Submitting state fish and game regulations and laws for federal review, interpretation, and oversight is a clear sovereignty issue.

Therefore, this office recommends that, at a minimum, any amendments to ANILCA include removing the state from federal court oversight, at least to the extent that the federal court's role be limited to whether state law complied with ANILCA. No preliminary or injunctive relief should be authorized. This is necessary to ensure that state fish and game management is retained by the state and that its sovereign interests are protected. Attached is a proposed amendment to accomplish that.

3. Court interpretation of constitutional provisions. A constitutional preference rather than a statutory one means that the court would have a fairly free hand in its interpretations. The court's role in statutory interpretation is to carry out the intent of the legislature. Otherwise, the court would violate the separation-of-powers doctrine. Furthermore, when a court's interpretation of a statute conflicts with legislative intent, the court's interpretation can be corrected by legislative amendment of the statute. Correction of a court interpretation of a constitutional provision is extremely difficult to attain. Amendments require a two-thirds vote of each house and a majority popular vote at a bi-annual general election. Alaska Const. article XIII, § 1.

4. Subsistence defense in criminal prosecutions. Currently, under the ruling in State v. Eluska, 724 P.2d 514 (Alaska 1986), and AS 16.05.259, a subsistence hunter or fisher who violates subsistence regulations may not claim a defect in the regulation as a defense, because there is no constitutional or statutory right to hunt or fish absent a specific and express statute or regulation. This ruling has been held inapplicable to defenses based on constitutional rights. Hebert v. State, 803 P.2d 863 (Alaska 1990). Therefore, the benefit of the Eluska decision and AS 16.05.259 will be probably be lost to the state with a constitutional preference in place.

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5. Blanket application to all fish and game. There is a consensus in the administration that it is critical for the legislature to be able to exclude certain fish and game from application of the subsistence preference. The current bill exempts urban fish and game and requires an affirmative finding that the stock or population is subject to subsistence use before the statutory preference applies.

A constitutional amendment which simply states that subsistence is the preferred use of fish and game would preclude the legislature from excluding any particular fish stock or game population from the preference, including fish and game in urban areas, hatchery stocks, bison, musk ox, rainbow trout, etc.

If the amendment contains a provision that the legislature may exempt certain stocks from subsistence use, there will be an assumption that all stocks are subject to the subsistence preference unless expressly exempted by the legislature. If there is a provision that the legislature must identify which fish and game is subject to subsistence, the likely interpretation would be that the legislature's role is simply that of a factfinder, and once the legislature determines that a stock has been subject to subsistence use, the preference attaches forever. Unless we are satisfied with these interpretations, it is imperative that the legislature's authority be clearly spelled out in the language of the amendment. A provision for designation of subsistence stocks followed by the power to exempt any particular stock would be much better than either provision by itself.

CJ/LBN:ss0

cc: McKie Campbell
Governor's Office

JUN 12 92 15:49 No.003 P.07

PROPOSED AMENDMENT TO SECTION 807 OF ANILCA, 16 U.S.C. § 3117

§ 3117. Judicial enforcement

- (a) Exhaustion of administrative remedies; civil action; parties; preliminary injunctive relief; other relief; costs and attorney's fees

Local residents and other persons and organizations aggrieved by a failure of [the State or] the Federal Government to provide for the priority for subsistence uses set forth in section 3114 of this title [for with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 3115(d) of this title] may, upon exhaustion of any [State or] Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. [In a civil action filed against the State, the Secretary may be joined as a party to such action.] The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. [In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 3114 of this title: when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue.] Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Subsection (c) should be repealed.

[(c) Section as sole Federal judicial remedy

This section is the sole Federal judicial remedy created by this subchapter for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 3114 of this title.]

A new Subsection (c) should be adopted.

(c) Federal Court Review of State Law for Compliance with the purposes of ANILCA.

Local residents and other persons and organizations may challenge the Secretary's determination that the State has fulfilled the requirements of section 3115(d) of this title and may file a civil action in the United States District Court for the District of Alaska for a declaratory judgment.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 27, 1992

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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The Honorable Lyman F. Hoffman
Senate Bush Caucus Chair
P.O. Box V
Juneau, Alaska 99811

The Honorable Georgianna Lincoln
House Bush Caucus Chair
P.O. Box V
Juneau, Alaska 99811

Re: Subsistence Legislation, Senate Bill 443, House
Bill 552

Dear Senator Hoffman and Representative Lincoln:

In your letter of March 16, 1992 to Attorney General Cole, you raised several concerns about the constitutionality of the provisions of the subsistence legislation drafted by the Governor's Subsistence Advisory Council and introduced by Governor Hickel as Senate Bill 443 and House Bill 552. Attorney General Cole asked me to respond to your letter.

Our department has reviewed the fish and game subsistence bill and it is our opinion that the bill is consistent with the constitutions of the United States and the State of Alaska. We do not believe that a constitutional amendment will be necessary to implement the provisions of this bill. The bill does raise several possible constitutional issues that have not been fully resolved by the courts, but we are prepared to fully defend the bill and expect favorable results. We have briefly analyzed below what are likely to be the most controversial issues, including those raised in your letter.

Community-Based Presumptions

One potential issue is whether the presumptions based on where a user lives, as outlined in the proposed AS 16.05.268(h), are consistent with the Alaska Constitution's provisions for equal access to fish and game. We believe that they are.

In subsections (f), (g), and (h), the new subsistence statute establishes presumptions based on community characteristics.

Under subsection (f), every area and community in the state will be classified into one of three categories.¹ Small communities that are subsistence dependent will be in category 1. Medium sized communities that are subsistence dependent will be in category 2. All other communities, large cities and suburbs or smaller and medium sized communities that are not subsistence dependent, will be in category 3. Subsection (g) lists factors the boards will use to determine subsistence dependence.²

¹ Subsection (f) states:

(f) The boards shall, by regulation, for the state, jointly identify and delineate areas, using game management units, portions of game management units, or communities, into the following categories:

(1) category 1, an area where the human population of each community in the area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area;

(2) category 2, an area that consists of a single community that has a human population of 2,500 to 6,999, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community;

(3) category 3, an area that

(A) is an urban area or a single community where the human population is 7,000 or greater; or

(B) 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.

² Subsection (g) states:

(g) In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area under (f) of this section, the boards shall jointly consider the relative importance of subsistence compared to the totality of the following socio-economic characteristics of the area:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and 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;

Subsection (h) establishes administrative presumptions about the qualifications of individuals living in the communities in the categories.³ Only those who qualify under the individual

(3) the extent and 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;

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

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

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area 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;

(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 hunt and fish;

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

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

³ Subsection (h) states:

(h) Participation in a subsistence harvest in a subsistence use area is limited to persons whose taking and use of fish and game in that subsistence use area meets the requirements for qualification under (i) of this section, with the following presumptions and requirements:

(1) a person who is domiciled in the subsistence use area in an area identified under (f)(1) of this section, and who intends to take fish for game for subsistence purposes is presumed to meet the requirements for qualification under (i) of this section for that subsistence use area; this presumption may be rebutted only by clear and convincing evidence, and the boards may not require a permit or filing of a statement affirming that the person meets the requirements for qualification under (i) of this section;

(2) a person who is domiciled in the subsistence

requirements in (i) are authorized to subsistence hunt and fish, but (h) establishes presumptions about individual users based on where they live. Those who live in category 1 areas are presumed to individually qualify for subsistence hunting and fishing for the subsistence use area in which they live, but not for any other subsistence use area. They will not be required to submit any application or signed statement before hunting or fishing. The presumption is not conclusive and can be challenged by the state, but they will be allowed to subsistence hunt and fish in the subsistence area in which they live unless and until the state demonstrates, by clear and convincing evidence, that they are not qualified.

Those persons living in category 2 communities who choose to subsistence hunt and fish must first sign a statement in a form to be supplied by the department averring that they meet the individual qualifications standards of (i). Once they sign such a statement they are rebuttably presumed to qualify to subsistence hunt and fish in the subsistence use area in which they live, but not any other subsistence use area. Signing a false statement subjects the signer to prosecution for unsworn falsification. This presumption can be rebutted by the normal civil evidentiary standard: proof by a preponderance of the evidence.

Those persons living in category 3 communities, which will be larger cities or urban areas, smaller communities that do not have a demonstrated dependence on subsistence, or communities outside the subsistence use area, will qualify to subsistence hunt and fish under an individual application procedure outlined in subsection (i). They may not subsistence hunt or fish until their application is approved by the department.

use area in an area identified under (f)(2) of this section, and who intends to take fish or game for subsistence purposes is rebuttably presumed to meet the requirements for qualification under (i) of this section for that subsistence use area upon that person's signing a statement affirming that the person meets those requirements; the department may rebut this presumption by a preponderance of the evidence that the person does not meet those qualification requirements;

(3) a person domiciled in an area identified under (f)(3) of this section or who is domiciled outside of the subsistence use area is qualified to participate in a subsistence fishery or hunt in that subsistence use area only upon certification by the commissioner that the person meets the requirements for qualification under (i) of this section.

This system of differing presumptions amounts to an administrative scheme to focus the state's efforts to weed out unqualified users onto those areas where most of the unqualified reside. Based on the information presented to the legislature, use of the three sets of standards will result in identifying, under (f)(1), communities or areas with a large majority of residents that would individually qualify as subsistence users in the subsistence use area in which they live; under (f)(2), communities with a majority of qualified subsistence users; and under (f)(3), communities with a very a small minority of qualifying individuals. Communities outside the subsistence use area are also expected to have very few people who would qualify. It is expected that the legislature will make statutory findings based upon this information.

The presumptions in this statute are reasonable and have a strong factual basis. The presumptions will not exclude any qualified subsistence user from access to fish and game. Residence in a particular community or state does not determine a person's qualification to subsistence hunt and fish; it does, however, determine the amount of administrative paperwork the person will be required to submit. It will impose a higher administrative burden on those users who are domiciled in areas that have been determined to have no significant dependence on subsistence; but the status of the community will not be determinative of whether an individual finally qualifies as a subsistence user.

While there is some difference in treatment of the individual based on community standards, the actual access to fish and game for subsistence is equal. No qualified user will be excluded. All those who actually and substantially rely on subsistence uses of fish and game in a particular area will receive the subsistence preference. All those who are similarly situated with respect to the fish and game resources in an area are given equal opportunity to take that fish and game.

The legislation generally requires that qualifying dependence be current. This will mean that some people that have had reliance in the past, but have not recently relied on fish and game in a subsistence use area, will not qualify for the preference. This does not present a constitutional problem. The situations of these people with respect to the fish and game are not similar to the situation of those who have a current reliance. See Article VIII, section 17 of the Alaska Constitution. Of course, once the past user demonstrates a current reliance, he qualifies for the preference.

We believe that this statutory scheme satisfies the concerns expressed in McDowell v. State, 785 P.2d 1 (Alaska 1989). In that case, the supreme court of Alaska held that qualification for a subsistence preference based conclusively and solely on an individual's residence in a rural area violated the provisions of the

Alaska Constitution requiring equal access to natural resources. In Part A of the decision, three justices of the Alaska Supreme Court ruled that sections 3, 15, and 17 of article VIII of the Alaska Constitution⁴ prohibited the grant of exclusive or special privileges based on the characteristics of the community in which a user resides. Id. at 9.

We think that the new subsistence legislation is consistent with the principles laid out in the McDowell decision. The critical right in McDowell was the "equal right to participate in [hunts and] fisheries, regardless of where one resides." Id. Under the new subsistence legislation, the right to participate in subsistence hunts and fisheries is the same for all people who actually and substantially rely on fish and game for subsistence purposes. The differentiation in treatment based on residence does not involve the right to hunt or fish; no qualified person will be excluded. The only difference in treatment comes in the extent of paperwork required of residents in different kinds of communities.

The McDowell decision also found fault in the old law because it limited admission to a user group based on residence. 785

⁴ Section 3 of article VIII of the Alaska Constitution 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.

P.2d at 8. With the new legislation, admission to the subsistence user group is not limited by residence.

Section 17 of article VIII of the Alaska constitution requires equal treatment of "all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Under the new legislation, all those who actually and substantially rely on the fish and game in an area will qualify for the subsistence preference. In McDowell, that was not the case. Urban users were excluded even though their reliance on fish and game may have been as substantial as that of rural users.

The difference in paperwork requirements for residents of different kinds of communities does not violate the equal access provisions. First of all, the paperwork requirements are not determinative of access to fish and game. Nor are any of the requirements so burdensome as to be an effective obstacle to access. The right affected by the discrimination under the new law is not the right of access to fish and game as was the case in McDowell and Owsichuk v. State, 763 P.2d 488 (Alaska 1988), but only the right to equal treatment under the law common to all equal protection issues. An individual's right to equal paperwork requirements is certainly not as important as the equal right to take fish and game, and is probably not an "important" interest in the context of equal protection analysis.

The Alaska courts use a "uniform-balancing" test for reviewing equal protection challenges under the state constitution. The "uniform balancing" test places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984). The minimum burden that the state must meet is the substantial relationship test: the state must show that the classification is reasonable and not arbitrary and is based on some ground of difference having a fair and substantial relation to the object of the legislation. State v. Ensearch Alaska Construction, Inc., 787 P.2d 624, 632 n.12 (Alaska 1990). In this case the right to equal paperwork, unlike the right to access to fish and game, is probably not an important individual right. The classification would, therefore, only have to meet the substantial relationship test.

The classification for purposes of paperwork requirements based on residence meets the substantial relationship test. The requirements are more burdensome for category 2 residents than category 1 residents and more burdensome for category 3 residents than the other two categories. But this graduated burden is fairly and substantially related to the purpose of the requirements: to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and

substantial reliance. The lighter burden on category 1 residents is based on the fact that a large majority will qualify. The heavier burden on category 2 residents is based on the fact that a high percentage of category 2 residents are not qualified. The even heavier burden on category 3 residents and residents of communities outside the subsistence use area is directly related to the fact that an extremely high percentage of category 3 residents are certainly not qualified. A tougher standard for category 2 and 3 residents will result in preventing the highest number of unqualified persons from subsistence hunting and fishing. The discrimination in the paperwork requirements bears a fair and substantial relationship to the object of the requirements: preventing subsistence hunting and fishing by the most clearly unqualified users. We, therefore, believe that these provisions would pass constitutional muster should the bill become law.

Limitations to Subsistence Use Areas

Under the provisions of the bill, the entire state would be divided up into subsistence use areas. Every fish stock and game population would be within a subsistence use area. There is no danger that someone would be precluded from subsistence use of fish or game because it was not within a subsistence use area. It is true that fish and game within a category 3 community located in a particular subsistence use area would not be subject to the subsistence preference. Section 2, Line 11, SB 443. That was also the case with the 1986 subsistence law. AS 16.05.258(a) states:

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.

(Emphasis added). The McDowell court did not strike down this provision; it struck down the priority to rural users, not the limitation of the subsistence preference to rural animals.⁵ The

⁵ Upon remand of the McDowell case, superior court judge Beverly Cutler, in ruling on the question of severability, did state, in an unfortunate diversion from the issues:

The parties do not address whether the boards now should identify any such stocks or populations anywhere in the state, not merely in rural areas. That the boards should make these determinations anywhere in the state appears to be a logical result of the supreme court's holding in McDowell

Alaska Supreme Court has never required that regulation of seasons, bag limits, methods and means, etc., be uniform for every species throughout the state. There is no constitutional requirement that if a particular kind of use is allowed in one area of the state, the same kind of use must be allowed in all other areas. This point was later clarified by the court in Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

What the constitution does require is that if a use is allowed, all persons that are similarly situated with respect to the resource and the purpose of the law be treated equally. Article VIII, section 17 of the Alaska Constitution. Gilbert, 803 P.2d at 399. There is no requirement of equal treatment of resources, rather than users of those resources.

There is also no constitutional requirement that once a person qualifies for a subsistence use in one area, she be entitled to a subsistence preference in another area. A person reliant on fish and game in Area A must be treated the same as all others similarly reliant on Area A fish and game; but that person need not be treated the same with respect to fish and game in Area B. Only those who have similar reliance on Area B fish and game must receive equal treatment. The new bill is not significantly different from the 1986 subsistence bill in this respect. Under that law, only residents of communities that had demonstrated customary and traditional uses of a particular fish stock or game population were granted a subsistence preference. See former 5 AAC 99.010 and 5 AAC 99.025. There was no statewide subsistence preference. Nor is there a statewide preference under the federal ANILCA regulations. Temporary Subsistence Management Regulations For Federal Public Lands In Alaska (1991-92). A statewide subsistence preference in state law would, itself, create a conflict between state law and ANILCA.

The Governor's Subsistence Advisory Council did not intend to prefer the reliance of a user who, for example, might take red salmon on the Copper River, king salmon on the Kenai River, chum salmon on the Tanana River, moose in the Innoko River area, deer on Kodiak Island, and caribou on the North Slope. In the advisory

McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 8 (Alaska Super. Ct. June 20, 1990). The obvious reason that the parties did not address the issue on remand is because it was not an issue on appeal. We do not believe that the Alaska Supreme Court would agree with Judge Cutler's ruling on this issue. See Gilbert v. State Dep't of Fish and Game, 803 P.2d 391, 398-99 (Alaska 1990).

council's eyes, that kind of reliance was not as deserving of a preference to fish and game in one of those areas as hunting and fishing that is concentrated in that area. It seems obvious that in deciding who should have a preference in a particular area, the user that gets all or most of his fish and game from the area should rank higher than one who gets only a smaller portion from that particular area. We believe the courts would decide that these two users are not similarly situated with respect to the resource and the purpose of the law. See article VIII, section 17 of the Alaska Constitution. We also believe that, as between a person who has demonstrated reliance on fish and game in Area A and one who has such reliance in another area that is suffering from shortages of fish and game, the person with demonstrated reliance in Area A may be properly preferred over the other user because they are not similarly situated with respect to the resource in Area A and the purpose of the bill.⁶

The Twelve Month Qualification Period

Under the proposed AS 16.05.268(i) and (o), qualifying activity must occur within the preceding twelve months. While it may be technically possible to qualify in as little as four months (taking fish or game in four different months is the longest determinative durational minimum requirement, proposed AS 16.04.268(i)(4)), it is generally anticipated that many users will require closer to the full twelve-month period to qualify. This provision does not create constitutional problems.

At first blush, the twelve-month provision might seem to create a durational residency problem. It does not. Several points must be kept very clear. Under this bill, residence in a particular area is never required for qualification. Residence in the subsistence use area is not required. To the extent that the user's presence, as opposed to residence, in the area is required, those requirements meet "durational residency" standards. Hicklin v. Orbeck, 565 P.2d 159, 162-65 (Alaska 1977) rev'd on other grounds, 437 U.S. 518 (1978).

The twelve-month period is closely related to the patterns of use and fish and game in Alaska and is the only reasonable period for the demonstrations of actual and substantial reliance on fish and game. The goal of the legislation is to give a preference to those who currently, actually, and substantially rely on fish and game in particular areas of the state. It is not the goal to give

⁶ This is the situation posed by George Utermohle of the Legislative Legal Affairs Agency in his March 16, 1992 letter to Senator Lyman Hoffman at page 5, note 7.

There must necessarily be some kind of test to identify actual and substantial reliance on that fish and game. To avoid spurious claims of reliance based on very short-term or only sporadic use, some time requirements are necessarily included. In deciding what time period would make the most sense, the advisory council looked at the patterns of fish and game use in Alaska. Most uses are seasonal. For example, salmon are generally only available during a certain time-span during the year. With game, hunting is generally limited to one or two seasons to get the best quality of meat or to avoid interference with species reproduction. In any case, patterns of use are tied to yearly cycles. If the qualifying time was less than the preceding 12 months, persons in certain areas might be disadvantaged because of the seasonal availability of fish and game. If the time period was longer than twelve month you would expect to see duplication of activity which would be less probative of current reliance. The twelve-month period is obviously the most appropriate for this particular test. It is necessary to identify the kind of use of fish and game the bill is intended to prefer. It is the "least drastic means" to achieve the ends of the statute. Hicklin, 565 P.2d at 165. It is a necessary test of bona fide reliance.

Certainly, the twelve-month provisions, as explained above, meet substantive due process standards that legislative enactments be reasonable and not arbitrary. Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

Tier II Criteria

In the proposed AS 16.05.268(b)(4)(B), subsistence use of game populations or fish stocks insufficient to provide for all subsistence uses would be authorized by ranking users by applying three criteria. One of the criteria would be "the proximity of the domicile of the subsistence user to the stock or population". Proposed AS 16.05.268(b)(4)(B)(ii); SB 443, Section 2 at page 4, lines 14-15. The question of the constitutionality of this provision was raised at one meeting of the Senate Resources Committee. We believe that the provision is probably constitutional.

First, it should be noted that the current subsistence law contains a very similar provision expressed simply as "local residency". AS 16.05.258(c)(2). This phrase has been interpreted by the Joint Boards of Fish and Game to mean that those who "live closest to the resource" would be given maximum protection. 5 AAC 99.010(f)(1). "Local residency" is also the language used in ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local

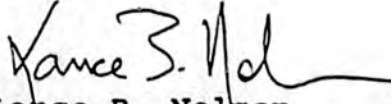
ANILCA. 16 U.S.C. Sec. 3114(2). The language of the new legislation is not intended to represent a change from existing law or from ANILCA, but is intended to more clearly state how "local residency" will be measured. If the Tier II provision of the subsistence legislation did not contain a "local residency/proximity to the resource" criterion it would be in conflict with Section 804 of ANILCA, 16 U.S.C. Sec. 3114(2).

While the Alaska Supreme Court ruled in McDowell that the subsistence preference could not be awarded on the basis of the characteristics of the community in which an individual user resided, there is nothing in that opinion to indicate that the location of an individual's residence in relation to the fish or game could not be a constitutional criterion, especially in the times of extreme shortages envisioned under the Tier II provisions. Upon remand of that case to the superior court, Judge Beverly Cutler ruled that the Tier II provisions did not violate the standards in McDowell.⁷ When there is not enough fish or game to satisfy all qualified subsistence users, further ranking of these users becomes mandatory. Assuming that two users are equal as to the two other criteria of dependence and the ability to obtain other food, it would seem that proximity to the resource would not be an unreasonable way to distinguish between the two otherwise similar users.

If you have further questions about issues raised by the subsistence legislation, we would be happy to discuss these matters with you at your convenience.

CHARLES E. COLE
ATTORNEY GENERAL

By:


Lance B. Nelson
Assistant Attorney General

⁷ Judge Cutler ruled that the Tier II "local residency" criterion did not violate the supreme court's holding in McDowell. McDowell v. State, Memorandum of Decision Severing Unconstitutional Portions of Statute from Remainder of Statute at 7 (Alaska Super. Ct. June 20, 1990).

TO: McKie Campbell
Office of the Governor

DATE: June 18, 1992

FILE NO:

TEL. NO: 269-5240

SUBJECT: Concerns re: Judicial
Enforcement Provisions of
ANILCA's Sec. 807

FROM: Lance B. Nelson *LBN*
Assistant Attorney General
Natural Resources-Anchorage

During the current special session on subsistence, we have had several inquiries from legislators about the role of the federal courts in ruling on the validity of state fish and game regulations under the Alaska National Interest Lands Conservation Act ("ANILCA"). In this memorandum I will address that role and our serious concerns about federal judicial enforcement.

Under the provisions of ANILCA, the Secretary of the Interior must provide a priority to rural Alaskans for the taking of fish and game for subsistence on federal public lands in Alaska. Sections 802 -- 804 of ANILCA, 16 U.S.C. Secs. 3112 -- 3114. However, if the State of Alaska passes a law that establishes this same rural preference on all land (not only federal public land) in the state, the Secretary may not adopt his own regulations, and the state regulations will apply. Section 805(d) of ANILCA, 16 U.S.C. Sec. 3115(d). While these sections appear to give the state power to manage fish and game for subsistence on all lands in Alaska, that power is subject to the mandates of ANILCA. While the role of the Secretary of the Interior becomes fairly passive while the state is in compliance with these sections, the role of the federal courts becomes very intrusive into the day-to-day management decisions of the state.

Under Section 807 of ANILCA, 16 U.S.C. Sec. 3117, the federal district courts have the power to hear and rule on challenges to any fish and game regulation. Section 807 states, in pertinent part:

(a) Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 3114 [Sec. 804] of this title (or with respect to the State as set forth in a State law of general applicability if the state has fulfilled the requirements of section 3115(d) [Sec. 805(d)] of this title) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States

District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 3114 [Sec. 804] of this title; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

Under this section, the federal district courts have the power to review any and all regulations that affect subsistence use of fish and game anywhere in the state. The discretionary powers of the court are extremely broad. If they are not satisfied that a particular aspect of a regulation is consistent with the state subsistence law or ANILCA, they may order the Board of Fisheries or the Board of Game to change that regulation. If the new regulation is not satisfactory to the court, then the court may invalidate the regulation and order the board to make more changes, and this process may go on as long until the court is content. If the state or the plaintiff is unhappy with the federal district court's decision, they may appeal the decision to the Ninth Circuit Court of Appeals.

While the federal district court judges are all Alaskans, unlike state court judges, they are appointed for life terms and are not ever subject to confirmation votes by the people of Alaska. If the district court decisions are appealed, the appeals will be decided by circuit court judges of the Ninth Circuit. The chance of getting the Supreme Court of the United States to review a Ninth Circuit decision are very remote, so the Ninth Circuit will generally be the final arbiter of the validity of state fish and game regulations in Alaska. The Ninth Circuit is based in San Francisco, California. Only one of the 28 judges of the Ninth Circuit is from Alaska; 14 are from California, 3 are from Washington, 3 from Arizona, 3 from Nevada, 2 from Oregon, and 2 from Idaho.

The two major subsistence law decisions that have been

issued by the Ninth Circuit have both been authored by Alex Kozinski of Pasadena, California. U.S. v. Alexander, 938 F.2d 942 (9th Cir. 1991); Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312 (9th Cir. 1988), reh'g and reh'g en banc denied, Jan. 4, 1989, cert. denied, 491 U.S. 905 (1989). I have attached copies of both decisions for your review. No Alaskan judge was ever on the panel. On the Kenaitze decision, the other two judges besides Kozinski were from San Diego and San Francisco. On the Alexander decision, the other two judges were from Portland, Oregon and Los Angeles. There is no requirement that circuit court judges ever have to set foot in Alaska before ruling on appeals from Alaska.

A couple of examples from these two decisions illustrate the attitude and understanding of the Ninth Circuit on Alaskan issues. In the Kenaitze decision, Judge Kozinski, in deciding what the term "rural" meant in relation to subsistence use, wrote:

The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to areas of the country that are sparsely populated, where the economy centers on agriculture or ranching.

860 F.2d at 316-17. The Alexander decision is filled with cavalier puns about fishing and sarcastic comments about the efforts of the prosecution.¹ Both of these decisions reject the notion of giving the slightest deference to state legislature or agency interpretations of law. Kenaitze, 860 F.2d at 315-16; Alexander, 938 F.2d at 946 n.6. Both of these decisions reflect condescending and patronizing treatment of what are, to Alaskans, critically important issues, issues about which the judges obviously know very little.

While Section 807 of ANILCA did not rule out regulatory challenges in state courts, after decisions like Kenaitze, the federal courts quickly became the forum of choice of for subsistence plaintiffs. Furthermore, while state courts have issued some decisions that have been less than well reasoned, we have been able to obtain reversals in the Alaska Supreme Court on some of these decisions and we at least know these issues are being decided by Alaskan judges who stand for confirmation votes on a regular basis. Even if state courts come up with different decisions on similar facts, the federal courts are not expected to defer to state court decisions since they claim to be interpreting the requirements of ANILCA, a federal law.

¹ Judge Fernandez did, however, file a dissenting opinion that set the facts straight. 938 F.2d at 949-51.

In summary, it is clear that state compliance with ANILCA, as it now stands, means that state legislative and regulatory decisions will be subject to review, interpretation, and revision by the federal judges over whom the state has no control or influence. While the state is out of compliance with ANILCA as it now stands, it does not have the power to regulate subsistence uses of fish and game on federal public lands. On the other hand, the state is free from interference from the federal courts with the regulatory authority it does have. State regulatory decisions may still be challenged under state law in state courts, but are not subject to any federal court oversight at all.

OPINIONS

LEGAL

MEMORANDUM

June 16, 1992

SUBJECT: Constitutional issues raised by the Governor's subsistence bill (SB 484/HB 599)

TO: Senator Jay Kerttula

FROM: George Utermohle *GU*
Legislative Counsel

You have asked whether the Governor's subsistence bill (SB 484/HB 599) is consistent with the Alaska Constitution.

SHORT ANSWER

One, SB 484/HB 599 provides for the establishment of dozens of subsistence use areas. The mandatory minimum eligibility standards for subsistence hunting and fishing proposed by SB 4484/HB 599 establish each subsistence use area as a separate use area and limit admission to the user group for that area to only those persons who have a history of recent and extensive use in the area. The mandatory minimum eligibility standards pose a significant infringement on the open access values of the Alaska Constitution. There is a substantial risk that the mandatory minimum eligibility standards are unconstitutional, however the risk of unconstitutionality of these provisions can be overcome by amending the constitution to permit the establishment of such user groups.

Two, under SB 484/HB 599, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into fish and game user groups, they may inhibit equal and open access to fish and game resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

Three, numerous provisions of SB 484/HB 599 establish fixed standards or criteria to determine whether a person is eligible to engage in subsistence hunting and fishing or establish the conditions under which the person may apply for subsistence privileges or may engage in subsistence hunting and fishing. Each of these provisions

is potentially subject to challenge on equal protection grounds by a person who is adversely affected by that standard or criteria. The legislature can enhance the ability of the state to defend SB 484/HB 599 against such challenges by developing a record of careful consideration of each element of the bill to demonstrate that the element was adopted for specific reasons and not arbitrarily, and by paying particular attention to the goal that the legislature is seeking to achieve in each element of the bill and the means that it chooses to achieve the goal.

DISCUSSION

SB 484/HB 599 relates to the subsistence use and allocation of fish and game resources. The bill establishes an intricate system for controlling entry into subsistence user groups and for limiting the activities of those user groups to certain areas of the state. The bill provides that persons with a recent history of dependence on and use of fish and game resources will be able to continue their subsistence activities while leaving an opportunity for new persons to qualify for subsistence activities. Minimizing the administrative burden on the individual subsistence user and the Department of Fish and Game is also an important element of the bill.

The bill provides for subsistence use of fish and game resources under the legislature's authority to provide for the utilization, development, and conservation of natural resources.^{1/} Subsistence is not a constitutionally mandated or protected use of fish and game resources. As a statutorily created use of fish and game resources, any system for management of subsistence use or for allocation of fish and game for subsistence use must be consistent with the Alaska Constitution. Of particular relevance to the subsistence use of fish and game are the "open access" provisions of the Alaska Constitution: common use section^{2/}, no exclusive right of fishery clause^{3/}, and uniform application section^{4/}. Although the ramifications of

^{1/} Article VIII, sec. 2:

GENERAL AUTHORITY. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

^{2/} Article VIII, sec. 3:

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

^{3/} Article VIII, sec. 15, in relevant part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .

these provisions are varied, they share at least one meaning: exclusive or special privileges to take fish and game are prohibited. The no exclusive right of fishery clause states this explicitly with regard to fisheries. The proceedings of the Alaska Constitutional Convention show that this same meaning was intended with respect to fish and game under the common use section and the uniform application section. McDowell v. State, 785 P.2d 1, 6 (Alaska 1989).

The bill avoids creating an obviously closed class of subsistence users like the rural resident preference that the Alaska Supreme Court struck down in McDowell. Instead, the bill establishes a system in which any person may engage in subsistence use of fish and game provided that the person satisfies the prescribed eligibility criteria.

ELIGIBILITY CRITERIA FOR SUBSISTENCE

SB 484/HB 599 proposes seven fundamental considerations for determining who is eligible to engage in subsistence hunting and fishing. SB 484/HB 599, Sec. 2, Sec. 16.05.268(i); page 6, line 31 - page 7, line 29. The Board of Fisheries and the Board of Game are to jointly establish the actual criteria and a concomitant point system for determining eligibility based on the seven fundamental considerations. Though the boards jointly develop the actual eligibility criteria, four of the fundamental considerations in SB 484/HB 599 are in fact specific mandatory minimum standards that a person must satisfy in order to qualify for subsistence hunting and fishing:

(1) the quantity of fish and game consumed by the person in the preceding 12 months, with a mandatory minimum of 125 pounds consumed in that period;

(2) the number of species and groups of species of fish and game from the subsistence [use] area used by the person in the preceding 12 months, with a mandatory minimum number of species, or groups of species, as determined jointly by the boards by regulation; the mandatory minimum number, and any grouping of species, may vary by geographical region of the state, based on the diversity of species in a region;

(3) the number of days in the preceding 12 months that the person engaged in the taking of fish or game in the subsistence use area, or the processing of that fish or game, with a mandatory minimum of 30 days in that period;

^{4/}(...continued)

^{4/}Article VIII, sec. 17:

UNIFORM APPLICATION. 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.

(4) the number of months in the preceding 12 months in which the person engaged in the taking of fish or game in the subsistence use area, with a mandatory minimum of four months in that period;

SB 484/HB 599, Sec. 2, Sec. 16.05.268(i)(1) - (4); page 7, lines 9 - 21.

Notably, three of the four mandatory standards (Sec. 16.05.268(i)(2) - (4)) set specific minimum requirements on the number of species of fish and game consumed and the number of days and months engaged in hunting and fishing activities (at least a total of 30 days during any four months) and requires that each of the three standards be satisfied in a single subsistence use area during the preceding 12 months.^{5/} Once an applicant for subsistence privileges satisfies these mandatory minimum standards in a subsistence use area and the other criteria adopted by the boards, the applicant is then eligible to participate in subsistence hunting and fishing in that subsistence use area. If an applicant wants to engage in subsistence hunting and fishing in an additional subsistence use area or to move subsistence activities to a new subsistence use area, the applicant must then satisfy the three mandatory standards in the new area as well as the other criteria established by the boards. The applicant can satisfy the three mandatory standards in the new subsistence use area by engaging in sport or personal use fishing or sport hunting in the area, taking the prescribed number of species in the area, and spending the required amount of time fishing and hunting in the area or processing fish and game taken in the area.

By combining standards for eligibility to engage in subsistence hunting and fishing with a requirement that the standards be satisfied in the subsistence use area in which the applicant wishes to use for subsistence hunting and fishing, the three mandatory standards establish each subsistence use area as a separate subsistence hunting and fishing area open only to certain persons and closed to all others. In fact the standards establish separate user groups for each subsistence use area and then limit admission to the user group to those persons who have a history of recent and extensive use in the area. An otherwise qualified subsistence user does not have the freedom to choose which subsistence use area the person will hunt or fish in. The person is confined to that subsistence use area in which he has established the requisite history of use.^{6/} All other persons are barred from using the area for

^{5/} A subsistence use area is the subunit of a game management unit together with the contiguous game management subunits, unless a board describes a different subsistence use area for a particular fish stock or game population. SB 484/HB 599, Sec. 2, Sec. 16.05.268(d) and (e). There are currently 69 game management subunits in the state and thus a possible 69 different subsistence use areas.

^{6/} For example, a subsistence user in Kotzebue who moves to Tok must continue to return to Kotzebue to engage in subsistence hunting and fishing, until the user establishes the prerequisite
(continued...)

subsistence hunting and fishing. Each subsistence use area becomes an exclusive use area open for subsistence use by only a few eligible persons and as such confers a "special privilege" to use the fish and game in the area on those persons.

A system for determining eligibility for engaging in subsistence hunting and fishing which opens participation for some and closes participation for others "will necessarily create tension with article VIII." McDowell, 785 P.2d at 9. Limits on admission to user groups are subject to scrutiny under the article VIII equal access provisions (State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichuk v. State, 763 P.2d 488, 492 (Alaska 1988)), because the provisions of article VIII were intended to guarantee the broadest possible access to and use of fish and game (Owsichuk, 763 P.2d at 492 - 93) and to prohibit exclusive or special privileges to take fish and game (McDowell, 785 P.2d at 6). "The history of the common use clauses, . . . , reveals anti-monopoly intent to prevent 'exclusive grants' and 'special privilege[s],' wholly apart from the limits imposed by other constitutional provisions." Owsichuk, 763 P.2d at 496.

In Owsichuk, the Alaska Supreme Court struck down exclusive guide areas and joint use areas, because these areas were grants of monopolies or special privileges based on a guide's previous use, occupancy, and investment in the area. "To grant such a special privilege based on seniority runs counter to the notion of 'common use'." Owsichuk, 763 P.2d at 496. In McDowell, the Alaska Supreme Court struck down the rural residency requirement for subsistence because it amounted to an exclusive or special privilege prohibited by the open access provisions of the Alaska Constitution. McDowell, 785 P.2d at 9. In lieu of the rural residency requirement for determining eligibility for subsistence use of fish and game, SB 484/HB 599 uses the three mandatory minimum requirements to require recent and extensive use in the subsistence use area as a precondition for eligibility. Just as the rural residency requirement precluded nonrural residents from engaging in subsistence activities, the recent and substantial use requirement of SB 484/HB 599 precludes all other persons who are similarly situated but who do not have a recent and substantial history of use in the area from engaging in subsistence hunting and fishing in the subsistence use area. The fact that any nonrural resident could move to a rural area and thus qualify for subsistence was ineffective in saving the former rural residency requirement from

②(...continued)

history of use in the Tok area. (This assumes that the state does not deny the person's right to continue to engage in subsistence hunting and fishing in the Kotzebue area, because travelling from Tok to Kotzebue no longer satisfies the economical and efficient requirement for subsistence activities.)

For example, if a tier I subsistence user is closed out of his/her area because of a resource shortage that user may not move his/her subsistence activities to another subsistence use area, even though the person has a continuing need to engage in subsistence hunting and fishing.

invalidity. McDowell, 785 P.2d at 7. Likewise, the ability of an otherwise qualified person to establish a history of recent and extensive use of a new or an additional subsistence use area does not prevent the requirement for such a history of use as, a condition precedent to use of the new area, from being an excessive infringement on open access provisions of the Alaska Constitution.

Review of the three mandatory standards according to the equal protection analysis applied under the uniform application section requires the following procedure. First, the three mandatory standards must have a legitimate purpose. The purposes of SB 484/HB 599 that seem relevant to the mandatory standards are protection of healthy fish stocks and game populations and allowing participation in the subsistence taking of fish and game by those who actually and substantially depend on subsistence use of fish and game. SB 484/HB 599, Section 1(b). These purposes are legitimate purposes. Owsichuk, 763 P.2d at 496 - 97; McDowell, 785 P.2d at 13 (concurring opinion). Second, the importance of the individual interest involved must be determined. The individual interest in equal access to fish and game is a highly important interest running to each person within the state. McDowell, 785 P.2d at 10; Owsichuk, 763 P.2d at 492 n. 10. Third, the importance of the state's purpose must be balanced against the individual interest involved. McDowell, 785 P.2d at 10. The state's purpose must be at least important to overcome the highly important individual interest at stake. Fourth, the means to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values." McDowell, 785 P.2d at 10.

Assuming that the state's purpose underlying the three mandatory standards is sufficiently important to countervail the highly important individual interest at stake, it would appear that the means chosen to achieve the state's purpose is not the least possible infringement on open access to fish and game resources. The three mandatory standards allow otherwise qualified individuals to engage in subsistence hunting and fishing in only those subsistence use areas where the individual has a history of recent and extensive use. The remaining dozens of subsistence use areas are closed to this individual.

In my opinion, there is a substantial and unnecessary risk that the three mandatory standards contained in SB 484/HB 599 are an impermissible infringement on open access to fish and game resources and thus would violate the open access provisions of the Alaska Constitution.

It is the creation of dozens of separate, albeit overlapping, subsistence use areas that are each subject to distinct area specific criteria for access that infringes upon the open access provisions of article VIII. Those persons who ultimately qualify for subsistence hunting and fishing privileges in a subsistence use area receive a "special privilege" that is denied to all other persons. Those persons who are not qualified for subsistence hunting and fishing in the area are denied access to the user group

for that subsistence use area because they have not established the requisite history of use.

The utilization of past use or activities in an area, as criteria for granting or denying access to fish and game resources has been rejected by the Alaska courts in Owsichuk (guide exclusive use and joint use areas) and in Bozanich v. Noerenberg, (Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971; state may not bar entry into a salmon net fishery by requiring prior experience in that fishery).

The primary shortcoming of the three mandatory standards is that they combine determinations on access to a user group with determinations on allocation of the fish and game resource. The Alaska Supreme Court is supportive of the state's power to allocate fish and game resources under the sustained yield section of the Alaska Constitution^{7/} (Gilbert v. State Department of Fish and Game, 803 P.2d 391 (Alaska 1990); Meier v. State, Board of Fisheries, 739 P.2d 172 (Alaska 1987)), provided that the allocations are not arbitrary and unreasonable and are consistent with and reasonably necessary to the conservation and development of fish and game resources (Gilbert, 803 P.2d at 399; Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State, 628 P.2d 897, 903 (Alaska 1981)). However, the authority to make allocation decisions does not imply a power to limit admission to a user group. State v. Hebert, 803 P.2d 863, 866; (Alaska 1990) McDowell, 785 P.2d at 7 - 8;^{8/}

The access and allocation determinations could be separated by eliminating the requirement that the three mandatory standards be satisfied in a single subsistence use area. If the two determinations were separated, a fundamental weakness of SB 484/HB 599 would be avoided and SB 484/HB 599 would better withstand challenges under article VIII of the Alaska Constitution. SB 484/HB 599 can be

^{7/} Article VIII, sec. 4:

SUSTAINED YIELD. 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.

^{8/} The requirement that a person must engage in subsistence activities in a specific subsistence use area is somewhat analogous to the superexclusive fishing districts established by the Board of Fisheries for the Bering Sea herring sac roe fisheries. The board established two superexclusive herring sac roe fishing districts. If a fisherman chose to fish in either of these fisheries, the fisherman could not fish in any other herring sac roe fishing districts. The Alaska Supreme Court upheld the use of the superexclusive use fisheries for the purpose of allocating the harvest of herring between competing groups of commercial fisherman. State v. Hebert, 803 P.2d 863 (Alaska 1990). The court found that superexclusive fishing districts were consistent with the Alaska Constitution because they did not limit admission to a user group; the fisherman was free to choose which fishing district to fish in. Hebert, 803 P.2d at 866.

amended to include criteria for determining where qualified subsistence users may engage in subsistence hunting and fishing or for establishing procedures for allocating fish and game resources among subsistence users. Prior use of a subsistence use area for the taking of fish and wildlife could be among the factors used to determine where a person may engage in subsistence fishing and hunting.

The risk of unconstitutionality can also be avoided by passage of a constitutional amendment authorizing the establishment of separate subsistence use areas in the state and the imposition of restrictions on the subsistence use of fish and game in those areas based on dependence on and prior use of that fish and game.

COMMUNITY BASED PRESUMPTIONS

Though the criteria for establishing eligibility to engage in subsistence activities are relatively uniform, SB 484/HB 599 provides that the proof necessary satisfy the criteria varies significantly depending on where a person lives.

A person who resides in a subsistence use area in a category 1 area^{9/} is presumed to satisfy all eligibility criteria to take fish and game for subsistence use in that subsistence use area without having to establish more than the person's place of residence. The person can engage in subsistence activities in the subsistence use area in which he/she resides until it is proven by clear and convincing evidence that the person is not qualified to engage in subsistence. SB 484/HB 599, Sec. 2, Sec. 16.05.268(h)(1); page 6, lines 14 - 19.

A person who resides in a subsistence use area in a category 2 area^{10/} is presumed to satisfy all eligibility criteria to take fish and game for subsistence use in that subsistence use area and need only sign a document asserting that the person does indeed qualify. SB 484/HB 599, Sec. 2, Sec. 16.05.268(h)(2); page 6, lines 20 - 26. The person may engage in subsistence activities in that subsistence use area until it

^{9/} A category 1 area is an area where the human population of each community in the area is less than 2,500, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the area. SB 484/HB 599, Sec. 2, Sec. 16.05.268(f)(1); page 5, lines 7 - 9.

^{10/} A category 2 area is an area that consists of a single community that has a human population of 2,500 to 6,999, is not part of an urban area, and where dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of the community. SB 484/HB 599, Sec. 2, Sec. 16.05.268(f)(2); page 5, lines 10 - 13.

is proven by a preponderance of the evidence that the person is not qualified to engage in subsistence activities in that area.^{11/}

A person who resides in a category 3 area^{12/}, or who wants to engage in subsistence activities outside of the subsistence use area in which the person resides, must apply for certification for the desired subsistence use area from the commissioner of fish and game. The person may engage in subsistence activities in that subsistence use area only after the person has convinced the commissioner of fish and game that the person satisfies the eligibility criteria adopted by the joint boards for that area. SB 484/HB 599, Sec. 2, Sec. 16.05.268(h)(3), page 6, lines 27 - 30.

Under SB 484/HB 599, a person's place of residence in the state determines the degree of the burden that the person must overcome to establish eligibility to participate in subsistence activities. Because these varying burdens relate to eligibility for entry into the class of subsistence users, they may inhibit equal and open access to subsistence resources and, thus, are at least constitutionally suspect under the open access provisions of the Alaska Constitution.

The rural preference of the former subsistence law was struck down in part because it was an "extremely crude" method to provide for the need to engage in subsistence activities. McDowell, 785 P.2d at 10. The classification scheme inherent in the category 1, 2, and 3 areas is subject to similar criticism. Residents in category 1 areas are presumed to qualify for subsistence activities regardless of their individual characteristics. Even those unqualified residents of a category 1 area who engage in subsistence are not penalized or sanctioned for their activities. An unqualified resident of a category 2 area is at least potentially subject to criminal prosecution for falsely alleging his/her qualifications. It is only the residents of a category 3 area that are evaluated on their individual qualifications. The category 1, 2, and 3 area concept is not the "classification scheme employing individual characteristics" which the McDowell court proposed as being "less invasive of Article VIII open access values." McDowell, 785 P.2d at 11. The category 1, 2, and 3 area concept classifies persons as a group based on where they live in the state.

^{11/} If it is proven that the resident of a category 2 area is not eligible to engage in subsistence activities in the area in which the person resides and that the person was aware of the lack of eligibility at the time the person signed the document, the person is potentially subject to criminal prosecution for unsworn falsification under AS 11.56.210.

^{12/} A category 3 area is an area that is
(A) an urban area or a single community where the human population is 7,000 or greater; or
(B) 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. SB 484/HB 599, Sec. 2, Sec. 16.05.268(f)(3); page 5, lines 14 - 18.

The purpose for this burden on equal access to fish and game resources under article VIII must be, at the minimum, an important purpose. McDowell, 785 P.2d at 10.

The state's purpose in establishing the variable burden for establishing eligibility to engage in subsistence hunting and fishing activities is to simplify the state's task of determining who is eligible to engage in subsistence activities (in essence, promote administrative convenience)^{13/} and "to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and substantial reliance."^{14/} Though administrative convenience is a legitimate purpose for legislation, it is generally not an important purpose. See, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980); Deubelbeiss v. Commercial Fisheries Entry Commission, 689 P.2d 487, 489 (Alaska 1984). Conservation of the state's limited fish and wildlife law enforcement resources is probably a more important purpose than administrative convenience and probably would be accorded more weight in balancing against an individual's interest in equal access to fish and game for subsistence uses.

Assuming that the court does find the purpose behind the category 1, 2, and 3 area classification system to be important, it is then necessary to establish that the classification system is "designed for the least possible infringement on article VIII's open access values." McDowell 785 P.2d at 10. Though the classification system may be better than the rural-urban distinction made by the former law, it is not the system based on individual characteristics that the Alaska Supreme Court was looking for. In light of the purpose of the uniform application clause "to exclude an especially privileged status for any person in the use of natural resources subject to disposition by the state"^{15/} it is possible that the courts will require less disparity among residents of the state based on their place of residence than provided in SB 4484/HB 599.

A challenge to the category 1, 2, and 3 areas classification system under the uniform application section may result in an adverse decision from the courts because the system places different burdens on residents of the state based on where they live and not on their individual qualifications to engage in subsistence hunting and fishing. A system that required all residents to establish their eligibility to engage in subsistence

^{13/} Section-By-Section Description of the Governor's Subsistence Bill, dated February 21, 1992, pp. 10 - 11.

^{14/} Letter from the Alaska Department of Law to Senator Hoffman and Representative Lincoln, dated March 27, 1992, at pp. 7 - 8.

^{15/} Owsichuk, 763 P.2d at 498 n. 17; quoting 6 Proceedings of the Alaska Constitutional Convention, app. V, at 99 (Commentary); emphasis added by court.

in the same manner or that gave all residents the benefit of the same presumptions would provide fewer grounds for judicial challenge and be less susceptible to unanticipated judicial constructions.

OTHER ISSUES

In addition to the specific issues discussed above, several provisions of SB 484/HB 599 may generate challenges on equal protection grounds. Any provision of the bill that establishes a fixed standard or criteria to determine whether a person is eligible to engage in subsistence hunting and fishing or establishes the conditions under which the person may apply for subsistence privileges or may engage in subsistence hunting and fishing is potentially subject to challenge by a person who is adversely affected by that standard or criteria. For the most part, these challenges will be based on either the state equal protection clause (article I, sec. 1) or the state uniform application section (article VIII, sec. 17).

In order to survive such challenges, the state must be able to show that the standard or criteria is reasonable and not arbitrary, bears an appropriate relationship to a sufficiently important state purpose, and bears an appropriate nexus to the state purpose. The ability of the state to make such showings is dependent in large part upon the extent of review and consideration that the legislature accords to each of the standards and criteria. A record of careful consideration of each element of SB 484/HB 599 will provide the evidence necessary to establish that an element was adopted for specific reasons and not arbitrarily. It is also important that the legislature pay particular attention to the goals that it is seeking to achieve in each element of the bill and the means that it chooses to achieve the goal. The closer the relationship between the goal and the means chosen to achieve it, the greater is the likelihood that element of the bill will survive scrutiny under the equal protection clause or the uniform application section.

If I may be of further assistance, please advise.

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MEMORANDUM

June 16, 1992

SUBJECT: Senate Bill 485 (Second Special Session), relating to the taking of fish and game resources for subsistence -- sectional analysis (Work Order No. 7-LS2396/A)

TO: Senator Jalmar Kerttula

FROM: Jack Chenoweth
Legislative Counsel

This memo considers the provisions of Senate Bill 485. The bill is a modified version of HB 592 of the regular session, a measure that was identified as the "AFN subsistence bill."

For ease of explanation, I have opted to present this material topically, rather than sequentially.

Establishment of subsistence regions and regional councils:

Bill section 12 adds new subsections to AS 16.05.260. Subsection (b) directs the Board of Fisheries and Board of Game, meeting jointly, to divide the state into at least six subsistence regions, their number and boundaries to be "sufficient to assure that regional differences in subsistence uses and urban subsistence uses of fish and game are adequately accommodated." Thereafter, within each subsistence region established, the commissioner of fish and game is to establish a regional council. The regional council(s) are to be formed from the chair, or the chair's designee, of each existing advisory committee within the subsistence region.

Establishment of statewide Subsistence Board; description of its membership:

The subsistence regions described immediately above are the geographical basis for the development of the membership of another board, a Subsistence Board, proposed to be established by **bill section 6**. Under the material added in that section, there would be created a Subsistence Board consisting of "one member from each subsistence region." Regional councils are to forward recommended names to the governor, who is to appoint the members within 30 days. Provision is made for

substitution of nominees in the event the governor fails to make the appointment(s) from the initial list. Persons recommended for appointment "must be subsistence users and residents of the region from which . . . appointed." Subsistence board member appointments made by the governor are subject to confirmation. Members serve overlapping three-year terms.

Subsistence regulatory system:

Once established, then, under subsection (c) of **bill section 12**, the regional councils are to make recommendations to the Subsistence Board in two areas: on the criteria applicable for identification of persons who may qualify as urban subsistence users, and on subsistence fishing and hunting regulations. The bill gives the regional councils' recommendations significant weight for, under that subsection (page 10, beginning at line 27), "the [statewide] Subsistence Board shall adopt a recommendation [of a regional council] unless the recommendation is not supported by substantial evidence . . . , violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs." If the Subsistence Board fails to adopt a council's recommendation, it is to return the recommendation to the council with a statement of its reasons. ^{1/}

Persons who may qualify for the subsistence preference:

The measure authorizes subsistence uses by both rural and urban residents, roughly distinguishing between "subsistence uses" or "subsistence users" on the one hand and "urban subsistence uses" or "urban subsistence users" respectively. Under **bill section 7**, the Subsistence Board is to

-- identify by regulation communities and areas of the state that qualify as rural areas, distinguishing among communities of less than 2,500 population and those with population between 2,500 and 7,000, and identify by regulation communities and areas of the state that qualify as urban areas, that is, areas with population in excess of 7,000; the measure sets out the specific characteristics that serve as the basis for that identification process;

-- make decisions relating to the fish stocks and populations that may be taken for subsistence uses and urban subsistence uses;

^{1/} Looking at the language of the bill, it is not clear to me whether the Board has latitude to modify a recommendation brought forward from a regional subsistence board and then to adopt a recommendation as modified; a strict application of the language of the proposed measure would seem to require the statewide Subsistence Board only the choice of adoption or rejection.

-- establish criteria to identify residents who qualify as urban subsistence users through application of the two criteria identified in the measure; and

-- identify residents qualifying for subsistence uses and urban subsistence uses for each fish stock and game population, or portion of stock or population.

Fish stocks and game populations available for subsistence:

The key provision is **bill section 10**, setting out a fish and game allocation system taking into consideration subsistence and urban subsistence uses. If I understand correctly, that allocation system is to operate something like this:

-- Initially, a "combined board"--Subsistence Board plus Fisheries Board for fisheries stocks, and Subsistence Board plus Game Board for game resources--must determine the portion of the fish stocks or game populations available for harvest "consistent with sustained yield";

-- The Subsistence Board alone then determines what portion of the stock or population available for harvest is necessary to satisfy subsistence uses.

-- Under proposed AS 16.05.258(c), when harvestable resources exist, that board then adopts necessary subsistence hunting and fishing regulations for each stock or population. The criterion generally applicable to those regulations is one that recognizes "customary and traditional uses and practices of residents who engage in subsistence use in a manner that will result in the least adverse effect upon those uses." However, if all consumptive uses cannot be accommodated, nonwasteful (rural) subsistence uses are to be given preference over urban subsistence uses. If restriction on fishing or hunting becomes necessary, subsection (c) identifies three criteria by which the board is to distinguish among (rural) subsistence users. Generally, the process of accommodation, relatively rigorous, favors, as may become necessary, (rural) subsistence users over urban subsistence users.

-- Proposed AS 16.05.258(d) recognizes a preference for urban subsistence users when harvestable fisheries stocks or game populations are sufficient to accommodate (rural) subsistence uses plus consumptive uses. Proposed AS 16.05.-258(f) confirms that urban subsistence uses are to receive priority over non-subsistence consumptive uses. As with (rural) subsistence uses, if restriction on fishing or hunting becomes necessary to accommodate urban subsistence activities, subsection (f) identifies three criteria by which the board is to distinguish among urban subsistence users.

-- Proposed AS 16.05.258(e) bars the Boards of Fisheries and Game from authorizing a level of nonsubsistence hunting or fishing that would deny satisfaction of authorized subsistence and urban subsistence uses.

-- Proposed AS 16.05.258(g) affirms the ability of the Subsistence Board to regulate the taking of fish stocks and game populations as to seasons, catch or bag limits, and methods and means.

-- In furtherance of restoration of certain stocks and populations, proposed AS 16.05.258(h) sets out a directive for preparation of cooperative management plans to facilitate recovery of those stocks and populations to minimally harvestable numbers.

Relationship of the changes to the current regulatory authority of the Board of Fisheries and the Board of Game:

Bill section 8 amends AS 16.05.251(a), setting out the responsibilities of the Fisheries Board, by making that board's regulatory decisions subject to authority of the statewide Subsistence Board and by eliminating the Fisheries Board's ability to regulate subsistence fishery activities.

Bill section 9 amends AS 16.05.255(a), setting out responsibilities of the state's Game Board, in like manner, making that board's regulatory decisions subject to the authority of the statewide Subsistence Board and by eliminating the Game Board's ability to regulate subsistence hunting activities.

Bill section 16 shifts from the combined Board of Fisheries and Game to the new Subsistence Board the responsibilities for the oversight of the state's existing subsistence permit program and for monitoring subsistence harvest of fish and game resources by subsistence users and urban subsistence users.

Technical and conforming changes:

Among provisions affecting AS 16.05, the state's Fish and Game Code:

Bill section 1 sets out a series of four findings that relate to or purportedly support the substantive changes of the measure. ^{2/}

^{2/} Significant, in my judgment, in light of the distinction identified in note 3 below, is the contrast asserted in paragraphs (2) and (4) as regards the availability of economic alternatives to rural and urban residents.

Bill sections 2 and 3 make technical changes, adding references to "Subsistence Board" in statutes relating to use of regulations as evidence and to limitations on a Title 16 board's ability to change the amount of a license or fee that is set by law.

The material added and deleted in **bill sections 4 and 5** modify the duties of the Department of Fish & Game's Section of Subsistence Hunting and Fishing (i.e. the Subsistence Division), tying the responsibilities of that unit more closely to the work of the proposed Subsistence Board.

Bill section 11 affects the statute relating to establishment and operation of Advisory Committees by adding the Subsistence Board to the Board of Fisheries and the Board of Game as an entity that may establish one or more advisory board by regulation.

Bill section 13 extends the provisions applicable to the Subsistence Board's general authority (enumerated in bill section 7) as an additional general delegation of board authority to the commissioner of fish and game.

Bill section 14 adds the Subsistence Board to the current statute authorizing joint board meetings, while the change made in **bill section 15** merely rephrases or restates the quorum requirements for joint board meetings, taking into consideration the change made in the preceding bill section.

Bill sections 17 - 22 add to or revise definitions of terms that are used in AS 16.05, some of which are newly-added by this measure.^{3/}

As to the bill sections affecting provisions outside AS 16.05:

^{3/} Interestingly, while the definitions that distinguish between rural and urban elements are, in most cases, parallel and permit members of each group the same use of these resources, the definition of "urban subsistence uses" differs from the definition of "[rural] subsistence uses" in that urban users cannot use wild, renewable resources for commerce in handicraft articles or for customary trade or barter. There may be an inherent equal protection problem in the distinction. As I understand, the provision must pass muster with the "uniform application" section of the Alaska Constitution, article VIII, section 17, under a "strict scrutiny" test. McDowell v. State, 785 P.2d 1 (Alaska 1989), at 10. There is at least a question as to whether place of residence is sufficiently related to a resource allocation or conservation goal or to the purposes for which a person may take fish or wildlife as a basis for determining whether a rural resident may be entitled to assert, while an urban resident may not claim, use of subsistence resources for commerce in handicraft articles or for customary trade or barter.

Bill section 23 is a conforming change applicable to subsistence taking currently allowed within the Yakataga State Game Refuge; the change recognizes regulations of the Subsistence Board as having applicability for the governance of subsistence activities in this state refuge.

Bill section 24 is a conforming change applicable to subsistence taking in critical habitat areas.

Bill sections 25 and 26 make substantially the same changes as regards subsistence activities in the Shuyak Island State Park.

Bill section 27 makes a corresponding change as regards subsistence activities in Point Bridget State Park.

Bill section 28 makes a corresponding change as regards subsistence activities in marine park units in the state park system.

Bill section 29 makes a corresponding change as regards subsistence activities in the Willow Creek state recreation area.

Bill section 30 makes a corresponding change as regards subsistence activities in the Kenai River Special Management Area.

Bill section 31 makes a corresponding change regarding subsistence activities in the Alaska Chilkat Bald Eagle Preserve.

Bill section 32 makes a corresponding change as regards subsistence activities in the Nelchina Public Use Area.

Bill sections 33, 34 and 35 make a corresponding change as regards subsistence activities in the Hatcher Pass Public Use Area.

Bill section 36 makes a corresponding change as regards subsistence activities in the Goldstream Public Use Area.

Bill section 37 makes a corresponding change as regards subsistence activities within an area established as a recreational river.

In the title applicable to management of the state's public resources (AS 41), **bill section 38** adds the Subsistence Board in the general recognition of the power of the boards and the department to manage fish and game in the state.

Bill section 39 provides that the commissioner of fish and game is jointly nominated by the Subsistence Board, the Board of Fisheries, and the Board of Game.

Bill section 40 adds the Subsistence Board to the other two boards as a body that may submit a resolution requesting removal of the commissioner of Fish and Game.

Transitional provision:

Bill section 41 is a transitional provision applicable to the duration of the terms of the initially-appointed members of the Subsistence Board.

Effective date provisions:^{4/}

Bill section 42 keys the effective date of certain key organizational sections of the measure to the voters' adoption of a constitutional amendment "relating to subsistence uses of fish and game" that is approved at the 1992 general election.

Bill section 43 gives the remainder of the bill--the regulatory and participatory provisions--a later effective date linked to the convening of the first meeting of the Subsistence Board.

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^{4/} My view is that these two provisions are substantively important effective date provisions in that they purport to set out a logically phased taking effect of all provisions: the bill's basic organizational provisions are linked to voter adoption of the necessary constitutional amendment, while the regulatory and deliberative provisions follow the coming into effect of the basic organizational provisions. The failure of these effective date sections to gain the required two-thirds vote of each house would leave the coming into effect of the bill extremely muddled.

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Juneau, Alaska 99801-2101

MEMORANDUM

June 16, 1992

SUBJECT: Constitutionality of SB 485, an Act relating to the taking of fish and game for subsistence; and providing for a effective date

TO: Senator Jay Kerttula

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your query as to whether SB 485 is consistent with the Alaska Constitution.

SHORT ANSWER

The rural and urban subsistence uses of fish and game proposed by SB 485 are unconstitutional because they establish closed subsistence users groups that are incompatible with the open access provisions of article VIII of the Alaska Constitution. This defect can be cured by amending the Alaska Constitution to authorize rural and urban subsistence uses of fish and game.

DISCUSSION

SB 485 authorizes subsistence uses of fish and game and establishes a preference for those uses over other consumptive uses. The bill recognizes two kinds of subsistence uses of fish and game: rural subsistence uses and urban subsistence uses. Rural subsistence uses, described in the bill as "subsistence uses", are reserved to rural residents of the state. Urban subsistence uses are a new category of subsistence uses that is reserved for urban residents of the state. Rural subsistence uses of fish and game have a priority over urban subsistence uses.

Because entry into both the rural subsistence user group and the urban subsistence user group is determined by a person's place of residence in the state, the two user groups are not consistent with the open access provisions of the Alaska Constitution:

common use section^{1/}, no exclusive right of fishery clause^{2/}, and uniform application section^{3/}. The rural subsistence user group is the same as that struck down by the Alaska Supreme Court in McDowell, because it violated the open access provisions of the constitution by creating a closed class of users. McDowell v. State, 785 P.2d 1 (Alaska 1989). The court found that "residency criterion . . . which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional." Id. at 9. The urban subsistence user group is likewise unconstitutional because membership in the group is limited to urban residents.

In order to validly use rural and urban residency as a criterion for determining who may engage in rural subsistence uses and urban subsistence uses, it will be necessary to amend the Alaska Constitution accordingly. A constitutional amendment similar to that proposed by HJR 77, HJR 78, HJR 79, SJR 49, or SJR 50 (Seventeenth Legislature) would allow the legislature to enact the rural subsistence and urban subsistence provisions of the proposed legislation.

If I may be of further assistance, please advise.

GU:gc:lmb
92-134.lmb

^{1/} Article VIII, sec. 3:

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

^{2/} Article VIII, sec. 15, in relevant part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .

^{3/} Article VIII, sec. 17:

UNIFORM APPLICATION. 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.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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Juneau, Alaska 99801-2101

MEMORANDUM

June 15, 1992

SUBJECT: Constitutionality of SB 485, an Act relating to the taking of fish and game for subsistence; and providing for a effective date

TO: Senator Al Adams

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your query as to whether SB 485 is consistent with the Alaska Constitution.

SHORT ANSWER

The rural and urban subsistence uses of fish and game proposed by SB 485 are unconstitutional because they establish closed subsistence users groups that are incompatible with the open access provisions of article VIII of the Alaska Constitution. This defect can be cured by amending the Alaska Constitution to authorize rural and urban subsistence uses of fish and game.

DISCUSSION

SB 485 authorizes subsistence uses of fish and game and establishes a preference for those uses over other consumptive uses. The bill recognizes two kinds of subsistence uses of fish and game: rural subsistence uses and urban subsistence uses. Rural subsistence uses, described in the bill as "subsistence uses", are reserved to rural residents of the state. Urban subsistence uses are a new category of subsistence uses that is reserved for urban residents of the state. Rural subsistence uses of fish and game have a priority over urban subsistence uses.

Because entry into both the rural subsistence user group and the urban subsistence user group is determined by a person's place of residence in the state, the two user groups are not consistent with the open access provisions of the Alaska Constitution:

common use section^{1/}, no exclusive right of fishery clause^{2/}, and uniform application section^{3/}. The rural subsistence user group is the same as that struck down by the Alaska Supreme Court in McDowell, because it violated the open access provisions of the constitution by creating a closed class of users. McDowell v. State, 785 P.2d 1 (Alaska 1989). The court found that "residency criterion . . . which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics is unconstitutional." Id. at 9. The urban subsistence user group is likewise unconstitutional because membership in the group is limited to urban residents.

In order to validly use rural and urban residency as a criterion for determining who may engage in rural subsistence uses and urban subsistence uses, it will be necessary to amend the Alaska Constitution accordingly. A constitutional amendment similar to that proposed by HJR 77, HJR 78, HJR 79, SJR 49, or SJR 50 (Seventeenth Legislature) would allow the legislature to enact the rural subsistence and urban subsistence provisions of the proposed legislation.

If I may be of further assistance, please advise.

GU:gc
92-409.glc

^{1/} Article VIII, sec. 3:

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

^{2/} Article VIII, sec. 15, in relevant part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .

^{3/} Article VIII, sec. 17:

UNIFORM APPLICATION. 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.

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MEMORANDUM

June 12, 1992

SUBJECT: Letter of the Department of Law Regarding
Subsistence Legislation: SB 443, HB 552
(Work Order No. 7-LS2386)

TO: Representative Dave Donley
ATTN: Laurie Otto

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your request for my comments on a letter from the Alaska Department of Law to Senator Hoffman and Representative Lincoln regarding subsistence legislation (SB 443 and HB 552) dated March 27, 1992. Cited as Letter.

The Letter discussed the following issues that had been raised by the Governor's subsistence legislation (SB 443 and HB 552): community-based presumptions, limitations to subsistence use areas, the twelve month qualification period, and tier II criteria. This memorandum addresses each of these issues in the same order as presented in the letter.

COMMUNITY-BASED PRESUMPTIONS

In Section 2 of the Governor's subsistence bills, sec. 16.05.268(f), (g), and (h) establish a system for determining how a person establishes his/her qualifications to engage in subsistence hunting and fishing activities.^{1/}

^{1/} Subsection (h)(1) provides that a person who resides in a category 1 area and who intends to engage in subsistence activities in the subsistence use area in which the person resides is presumed to be qualified to engage in subsistence activities in that subsistence use area. Such a person may engage in subsistence activities in that subsistence unit without signing a document asserting that the person is qualified to do so and without having to obtain a permit.

Subsection (h)(2) provides that a person who resides in a category 2 area and who intends to engage in subsistence activities in the subsistence use area in which the person resides must sign a statement
(continued...)

Under subsection (h) the extent of the burden on the privilege of engaging in subsistence activities varies substantially depending on where a person resides. The Department of Law finds this variable burden on access to subsistence hunting and fishing to be consistent with the principles laid out in the McDowell decision, because the variable burden does not preclude any qualified person from engaging in subsistence activities and does not limit access to the subsistence user group based on a person's place of residence. The Department of Law also concludes that the burdens imposed under subsection (h) are not determinative of access to fish and game, thus do not violate the equal access provisions of Article VIII of the Alaska Constitution. Therefore, the procedure established by subsection (h) is subject to review only under the equal protection clause of the Alaska Constitution. Article I, sec. 1. The Department of Law finds that under state equal protection standards the variable burden imposed by subsection (h) is constitutional.

I agree with the Department of Law that the provisions of subsection (h) are not inconsistent with the principles of the McDowell decision. I would also agree with the Department of Law that the procedure imposed by subsection (h) would probably satisfy state equal protection standards. However, I am less certain than the Department of Law that the uniform application section of the Alaska Constitution (article VIII, sec. 17) does not apply.

The uniform application section provides that: "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." It seems that burdens placed on access to a subsistence user group such as those imposed by subsection (h) relate to the use of natural resources and thus would be subject to the requirement that laws governing the use of natural resources "apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law". Id. The uniform application section protects a person from "legislation which burdens the equal access clauses of article VIII . . ." McDowell, 785 P.2d 1, 10 (Alaska 1989).

//(...continued)

asserting that the person is qualified to engage in subsistence activities according to the criteria set out in subsection (i). The person must sign this statement before engaging in subsistence activities in the subsistence use area.

Subsection (h)(3) provides that a person who resides in a category 3 area, or a person who resides in a category 1 or 2 area but who intends to engage in subsistence activities in a subsistence use area in which the person does not reside, must demonstrate to the commissioner of fish and game that the person is qualified to engage subsistence activities in the desired subsistence use area according to the criteria set out in subsection (i). Until the commissioner certifies that the person is qualified to engage in subsistence activities in that subsistence use area, the person may not do so.

Analysis of legislation under the uniform application section is analogous to equal protection analysis, but "may require 'more stringent review' of a statute than does the equal protection clause in cases involving natural resources." Owsichuk v. State, 763 P.2d 488, 498 n. 17 (Alaska 1988); quoting Gilman v. Martin, 662 P.2d 120, 126 (Alaska 1983). To satisfy the uniform application section:

one, the law creating non-uniform standards must have a legitimate purpose;

two, the individual interest in use or disposal of natural resources must be identified;

three, once the legitimate purpose is established the state's interest in achieving its purpose must be weighed against the individual interest involved;

four, the means chosen to achieve the state's purpose must be carefully drawn and designed for the least possible infringement on article VIII's open access values.

Gilbert v. State, 803 P.2d 391, 399 (Alaska 1990); McDowell, 785 P.2d at 10; Owsichuk, 763 P.2d at 492 and 496 - 497.

The state's purpose in establishing the variable burden for establishing eligibility to engage in subsistence hunting and fishing activities is to simplify the state's task of determining who is eligible to engage in subsistence activities (in essence, promote administrative convenience)^{2/} and "to direct the state's enforcement resources to those areas representing the biggest threat to the goal of preferring only actual and substantial reliance."^{3/}

The individual interest at stake under subsection (h) is equal access to fish and game for subsistence uses on equal terms with other persons. "The individual interest in equal access to fish and game resources is a 'highly important interest running to each person within the state'". Gilbert, 803 P.2d at 399; quoting McDowell, 785 P.2d at 10.

The state's legitimate purpose in enacting subsection (h) must be weighed against the individual's interest in equal access to fish and wildlife for subsistence uses on equal terms with other persons. Though administrative convenience is a legitimate purpose for legislation, it is generally not an important purpose. See, Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1266 (Alaska 1980); Deubelbeiss v. Commercial Fisheries Entry Commission, 689 P.2d 487, 489 (Alaska 1984). Conservation of the state's limited fish and wildlife law enforcement resources is

^{2/} Section-By-Section Description of the Governor's Subsistence Bill, pp. 10 - 11.

^{3/} Letter, at pp. 7 - 8.

probably a more important purpose than administrative convenience and probably would be accorded more weight in balancing against an individual's interest in equal access to fish and game for subsistence uses.

The procedure established by subsection (h) does not seem to be carefully drawn and designed for the least possible infringement on open access to state natural resources. Residents of category 1 areas are presumed to be qualified to engage in subsistence activities in their subsistence use area. These persons do not have to establish, or even assert, their eligibility to engage in subsistence activities. Arguably residents of a category 1 area who are not eligible to engage in subsistence activities in their subsistence use area may still engage in those activities until the state rebuts the presumption that they are eligible. Based on the Section-By-Section Description of SB 443/HB 552 and the ambiguous language of SB 443/HB 553, it is not clear that the state could criminally prosecute an ineligible person who resides in a category 1 area for engaging in unauthorized subsistence hunting and fishing in the subsistence use area in which the person resides.

On the other hand, a person who resides in a category 2 area may engage in subsistence hunting and fishing in the subsistence use area in which the person lives only after completing a form, under penalty of unsworn falsification, asserting the person's eligibility. Likewise, a resident of a category 3 area, or a resident of a category 1 or 2 area who wants to engage in subsistence activities outside of the subsistence use area in which the person resides, must complete a detailed application and then be certified by the commissioner of fish and game before engaging in subsistence hunting and fishing activities.

Assuming that it is correct, that the greatest number of unqualified persons who may attempt to engage in unauthorized subsistence activities reside in category 3 areas and that it more efficient to concentrate the state's limited fish and wildlife enforcement efforts on excluding these persons from subsistence hunting and fishing activities, then why are residents of category 1 and 2 areas (where persons are more likely to be eligible to engage in subsistence activities), who want to engage in subsistence activities in a subsistence use area outside of the area where they reside, subjected to the same application and certification procedure as residents of a category 3 area? Requiring residents of category 1 and 2 areas to complete an application and be certified to engage in subsistence hunting and fishing in a subsistence area outside of the area where they reside does not seem to be related to the goal of excluding ineligible residents of category 3 area from subsistence activities. This requirement seems intended to discourage those persons residing in category 1 and 2 areas from attempting to engage in subsistence activities outside of the subsistence use area in which they live.