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99:15

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Legal History of the Subsistence Issue: A Chronological Overview

In order to understand the subsistence preference issue, one must examine the legal history behind it. This outline will provide a concise road map to that history, and will summarize the development of the legal issues.

I. Alaska Constitution: Adopted and ratified by the people of Alaska in 1956, the Alaska Constitution specifically addressed ownership and use of Alaska's fish, wildlife and other resources.

A. Article VIII, § 3 states that fish and wildlife in their natural state are reserved for the *common use* of the people.

B. Article VIII, § 4 requires that all of the state's replenishable resources are to be managed on a sustained yield principle, subject to preferences among beneficial uses.

C. Taken together, these provisions mean that the state cannot grant any group of *people* preferential use of fish and wildlife resources; the only legally acceptable preferences are between beneficial *uses*. *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

II. Alaska Statehood Act: The Alaska Statehood Act was a compact between the people of the State of Alaska and the United States of America providing for Alaska's admission to the Union as a state. It was passed by Congress and ratified by the people of Alaska in 1958, and Alaska was formally admitted as a state by a proclamation of President Eisenhower in 1959.

A. The Statehood Act is not just a law; it's a *compact* between the people of the state and the United States, just like the U.S. Constitution is a compact between the people and the federal government. This is important because it means that Congress cannot unilaterally pass any law that contradicts or violates the terms of the compact. In other words, the Statehood Act takes precedence over other federal laws if there is a conflict.

B. The Statehood Act specifically accepted and ratified the Alaska Constitution as the governing document for the new state, including those provisions reserving fish and wildlife for common use of all Alaskans. (Alaska Statehood Act, § 1)

C. The Act also transferred management of Alaska's fish and wildlife resources to the state, except for special refuges or reservations set apart for wildlife protection.

III. Alaska Native Claims Settlement Act: The Native Claims Settlement Act of 1971 was a full and final settlement of all claims to any rights, title, interest or privilege by people of Native origin in the state of Alaska, and extinguished any claims of Alaska Natives to special hunting or fishing rights. This Act is a legal settlement in the nature of a treaty; it therefore takes precedence over any previous or subsequent laws of Congress.

A. Declaration of Congressional Policy in § 1 states that "the settlement should be accomplished . . . *without establishing any permanent racially defined institutions, rights, [or] privileges . . .*"

B. The settlement provided for payment by the federal government to Alaska Natives of \$462,500,000.00 in cash payments, and another \$500,000,000.00 in assignments of mineral royalties and lease payments received by the State of Alaska. It also granted title to millions of acres of land to regional and village Native corporations established under the Act.

C. In exchange, the Native peoples of the state specifically waived forever any and all aboriginal claims based on previous use or occupancy (in other words, traditional use), or based on any previous statute or treaty. These forfeited claims include claims to any right, title, use or occupancy in or to land and water areas of the State of Alaska:

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and *including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.*

Alaska Native Claims Settlement Act, § 4(b),(c)) (emphasis added).

IV. Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act: In 1980, Congress passed this Implementing Act which contains a number of clarifications and refinements of procedural and administrative issues relating to implementation of the Native Claims Settlement Act and the Statehood Act.

A. Also establishes a new "Alaska Land Bank" program which authorizes holders of large tracts of land to place their land in a federal land bank for a ten year period, renewable in five year increments.

B. A participating landowner agrees (among other things) to manage fish and wildlife on the land in accordance with federal or state management plans, if any.

In exchange, the federal government provides the owner with technical assistance in fish and wildlife management, as well as other benefits. The Act does not transfer management duties to the federal government, however.

V. Alaska National Interest Lands Conservation Act: This Act, passed by Congress in 1980, is often referred to as "ANILCA", and imposes a preference for uses of Alaskan fish and wildlife by "rural residents".

A. Rural or bush residents are granted preference under ANILCA in the taking of fish and wildlife. (16 USC § 3114). While the Act tries to mask its racial preference agenda by granting the preference to rural subsistence users rather than to Natives, the true intent of Congress is revealed in § 3111 where Congress invokes its constitutional authority over "Native affairs" to preserve the "economic, traditional and cultural existence" of "Native and non-Native" rural subsistence users and attempts to "fulfill[] the policies and purposes of the Alaska Native Claims Settlement Act."

B. Defines the preferential "subsistence uses" as "customary and traditional uses" of fish and wildlife (16 USC § 3113). This is exactly the type of claims of aboriginal hunting or fishing rights based on previous use that were "extinguished" by the Native Claims Settlement Act.

C. The Act does not authorize the federal government to manage fish and game in accordance with this subsistence preference; it only authorizes federal judicial intervention if a subsistence user feels that he or she isn't receiving preferential treatment under the state's management plan.

VI. Important Court Cases:

A. In *McDowell v. State*, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court ruled that the Alaska Constitution, which was ratified and approved by Congress in the Statehood Compact, prohibits granting a rural subsistence preference.

B. In 1984, the 9th Circuit Court of Appeals issued an important ruling in two consolidated cases: *Inupiat Community v. U.S.*, 746 F.2d 570 (9th Cir. 1984) and *People of the Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984). The Court stated that Alaska Natives' claims of subsistence hunting and fishing rights had been forever extinguished with the Native Claims Settlement Act. The United States Supreme Court refused to hear the one of the two cases when the Native communities appealed, and in the other case bypassed the issue of extinguishment of Native rights by holding that neither the Native Claims Settlement Act or ANILCA applied to the outer continental shelf. *Gambell v. Clark*, 480 U.S. 531 (1991).

C. These cases clearly hold that any and all claims by Alaska Natives to

subsistence hunting and fishing preferences *cannot stand* under the Alaska Constitution, the Alaska Statehood Act, and the Alaska Native Claims Settlement Act. Yet the federal government has taken over the management of fish and wildlife on federal lands in Alaska in order to forcibly implement ANILCA's unlawful subsistence preference scheme. It was this federal management of Alaska's fish and wildlife resources--which is not authorized in any statute, and which flagrantly violates Alaska's statehood compact with the federal government--that was challenged challenged in the Babbit lawsuit.