ALASKA LEGISLATURE COMMITTEE FILES 1985 - 1986 8672
4222.23 SRES SUBSISTENCE LEGAL QUESTIONS (File 2) - (file 3) 1 of

1. Repeal AS 16.05.255(b). This is the most rational and sensible approach, but maybe the least desirable politically. Repealing this provision overturns Madison and moots Eluska, at least for fish violations, and allows rational allocation of fish resources among different user groups.

Repealing this provision will not prevent the Board of Fish from establishing subsistence regulations, but will reestablish the rationally based management allocation scheme that existed before Madison.

Failure to repeal may result in emergency closure of the fishing grounds to commercial interests and tourists.

I strongly recommend repeal, even if the legislature takes up the issue next session.

Repeal should not have any particular effect on the Alaska National Interest Lands Conservation Act (ANILCA) since the waters affected are all state navigable bodies.

Colonel Henderson will speak to the Commissioner who will speak to the Governor about this alternative.

2. Adopt Emergency Fish Regulations.

(a) Alternative 1: Adopt regulations that provide priority for subsistence users. This will satisfy Madison and Eluska, but may have the effect of closing commercial fisheries, at least in some areas (Cook Inlet, Prince William Sound), prohibiting commercial guiding (Kenai River), and prohibiting nonresident sport fishing.

(b) Alternative 2: Adopt regulations for specific areas having particular potential for human conflict and resource impact: Cook Inlet (including river drainages); Susitna and Copper drainages.

The regulations might establish subsistence regulations for king salmon that parallel presently established sport limits, seasons, and waters. Then, either declare certain species as secondary subsistence (reds, pinks) with much higher limits, or set aside subsistence limits for certain species in a number of different areas.

The theory would be to spread the taking of desirable species across a wide area of the state while allowing subsistence priority overall.

I have requested that Liza McCracken draft two sets of alternative emergency regulations. The first would attempt to accommodate the different user groups along the lines set out above. The second would consist of contingent emergency regulations that would go into effect if a court were to enjoin the state from enforcing the first. The contingent regulations would immediately close all commercial and nonresident fishing, and establish subsistence rules. This will satisfy Madison and Eluska and permit enforcement.

The Fish Board will need to meet no later than mid to late may to consider these regulations.

3. Take No Legislative Or Regulatory Action

If no legislative or administrative action is taken, it will not be possible to enforce noncommercial poaching by residents. In this event, we are probably limited in our enforcement ability to prosecute wanton waste, gear violations, etc. It is not clear whether we could prevent people from using nets in rivers on the basis that netting is not traditional or customary. There will probably be no way to limit the number of fish taken, the hours or days of the taking, or establishing absolute priority of subsistence users.

4. Unless legislative, regulating, or judicial action overrules Eluska, we should:

(a) Refer to federal authorities all game poaching activities occurring in national parks and monuments;

(b) Enforce poaching cases on state land when

(1) the poaching occurs in an area totally closed to the taking of a particular species; or

(2) the taking of a particular sex is totally prohibited;

(c) Continue to process all pending cases until an affidavit is filed claiming subsistence,

(d) Neither cite violations, nor seize evidence, when the game is taken on state land, in an area opened part of the year to taking of the particular species or sex killed, when the taking is by a resident for his personal consumption;

(e) Enforce all game violations by nonresidents or commercial operators;

In every case considered for prosecution, information should be sent to Liza McCracken, who will act as a clearing house and assist in meeting "subsistence use" defenses.

Hunting pressure should be rather slack for a while, but after Eluska, it appears that there are presently no hunting seasons. This may result in depletion of moose stocks in certain areas that are peculiarly vulnerable, like the Matanuska Valley and Kenai Peninsula.

Attachment

VCK:bgh

WHEREAS, the Alaska Board of Fisheries and Alaska Board of Game have been delegated responsibility and authority by the Alaska Legislature to regulate the taking of fish stocks and game populations for the maximum benefit of all of the people of Alaska; and

WHEREAS, prior to the decision of the Alaska Supreme Court in 'son v. Alaska Department of Fish and Game the boards develope cedures which provided adequate regulatory flexibility, both to protect opportunities for subsistence hunting and fishing in rural communities and areas, and to provide hunting and fishing opportunities for 'ecreational, commercial, and other uses; and

WHEREAS, it is unclear to what extent the boards may restrict subsistence harvest after the Madison ruling and as a result, substantial and significantly disruptive reallocations of opportunities to harvest fish stocks and game populations may be necessary. For example:

1. The commercial gill net fishery which is an important component of the Prince William Sound economy may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to accommodate both the historic commercial fishery and other users.

ATT 1.

2. Sport fishing for king and other species of salmon on the Kenai and Naknek rivers and in the Susitna drainage may need to be significantly restricted in 1985 or, eventually, even closed. Prior to the Madison decision the Board of Fisheries had adequate regulatory flexibility to prevent that result.

3. Non-subsistence hunting, including commercial guiding activities may be significantly restricted and, in many cases, eliminated. Prior to the Madison decision the Board of Game had adequate regulatory flexibility to accommodate these users reasonably.

WHEREAS, prior to the Madison decision the State of Alaska was in compliance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). As a result of the Madison decision the federal government may now take control over game populations on public lands and fish stocks on public lands and within navigable waters; and

WHEREAS, if the State of Alaska is no longer in compliance with ANILCA, the state will lose the ongoing million dollar per year federal appropriation for the state's public participation system which is essential to the success of the state's regulatory and management activities; and

WHEREAS, the Alaska Board of Fisheries and Board of Game strongly believe that the potential restrictions, closures, reallocations

and loss of funding described above are not in the best interest of the fish and wildlife resources and the people of Alaska;

NOW THEREFORE BE IT RESOLVED, that the Alaska Board of Fisheries and Board of Game meeting in joint session respectfully, but strongly urge the Alaska Legislature to enact legislation during the current legislative session which returns to the boards the regulatory authority and flexibility which they exercised before the Madison decision; and

THEREFORE BE IT FURTHER RESOLVED, that the Alaska Board of Fisheries and Alaska Board of Game have reviewed SB 231 and HB 288, the legislation introduced by the Governor to accomplish this purpose, and urge that this ① or other app. ₹ legislation be enacted into law as expeditiously as possible.

Move to Adopt Bill - ② Amend John Ernie 2d fails
2nd Sarah

for against
carries 13 Sidney Huntington

Alaska Board of Game
#85-38-GB

Findings on Madison Requirements

April 4, 1985

The Board of Game has examined the legal principles set out by the Alaska Supreme Court in Madison v Alaska Department of Fish and Game, No. 7410. That decision requires substantial reallocation of game resources among Alaskans, in part because the board will no longer be able to use permit drawings to determine which Alaskans can hunt for food.

Before Madison, the board under the subsistence law had been providing reasonable opportunities for subsistence hunting by Alaskans living in rural areas or communities. The board was also providing hunting opportunities for other Alaskans and non-state residents, through general open hunts, registration hunts with unlimited permits, registration hunts with a specified number of permits, and permit drawing hunts.

After Madison, if a game population has been hunted by Alaskans for food, subsistence hunting must be allowed, unless the resource would be jeopardized. All Alaskans are eligible for subsistence hunting, and non-state residents may also be allowed to hunt. However, if the situation will not allow everyone to hunt with an equal legal opportunity, then non state residents may not participate.

Under Madison, the board at that point must determine which Alaskans have the opportunity to hunt based on three criteria contained in AS 16.05.255(b):

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
(2) local residency; and
(3) availability of alternative resources.

The approximately 164 permit drawing hunts, which operate on chance, and the eleven registration permit hunts with a limited number of permits, which are distributed to applicants in the order in which they apply, do not distribute the opportunity to hunt based on the three criteria, and therefore must be restructured.

While the current random drawing or first-come, first-served system must be replaced by systems based on the three criteria,



FROM LAW ANCH D.A.O. 09/11/;9 17:19 P.12

the board must not act arbitrarily and must assess the significance of available information in order to act reasonably under the statute and the Madison mandates. At this time, the Department of Fish and Game, Division of Game, can supply information on the community of residence of people applying for drawing permits in the state, and the Division of Subsistence has a library of approximately 120 technical papers on the use of fish and game by people in various communities and areas in the state. However, the task of synthesizing those two bodies of data and of analyzing their significance in relation to the three criteria will be very expensive and time consuming; the department cannot adequately prepare such material within a few weeks for presentation to the board. Any decision on how to modify these hunts beyond April 7, 1985 will come too late to implement changes in time for the 1985 season. Specifically, it takes up to five days to create a "mock-up" of the two permit papers. At the printer, design and proofing take from 5 - 10 days. Printing and distributing supplements to the regional offices takes three days; distribution of supplements and applications to approximately 800 vendors and department field offices takes about five days to complete. One week must be allowed for mail delivery, thus requiring between 25 - 30 days before information is available to the public. It is expected that the permit applications will be available on or about April 30, 1985, with an application deadline of May 31, 1985 for the fall hunts. It requires up to 6 weeks (or until about July 13) to complete the computerized drawing and mail permits to those whose applications are drawn. The earliest permit seasons presently begin August 10 for some caribou and sheep seasons, thus presuming mailed permits may take at least a week to be delivered, permittees have only about 20 days to prepare for season openings.

Therefore the board finds that the following approach is the most reasonable way to address this problem.

> The board requests that the Commissioner of Fish and Game take the first step required by Madison and by delegation to adopt regulations eliminating non-state residents from permit drawing hunts and registration hunts with a specified number of permits. This should not be done for brown bear, Dall sheep or mountain goats, however, since present information indicates that except for sheep in certain identified situations such as the Noatak area of GMU 23 and the north slope of the Arctic Wildlife Range (GMU's 25 and 26) these species are primarily pursued for trophy or recreational purposes.
>
> Secondly, the board hereby calls for proposals from the public on all permit drawing hunts and registration permit



FROM LAW ANCH D.A.O. 09/11/;9 17:19 P.13

hunts with a specified number of permits for the fall/winter 1985 board meeting. The board also calls for proposals to define the three criteria identified in the statute. During the intervening time, the department is requested to synthesize and analyze the available information, keeping in mind the three criteria which the statute specifies be used to distribute opportunities to hunt: dependency, local residency, and available alternative resources.

Public testimony on how those criteria could be used by the board will be taken at the meeting. The board encourages the advisory committees and regional councils to discuss this subject and to report on those discussions at the board meeting.

It is very important that it be understood that after Madison, if a game population is hunted primarily for food by Alaskans, and if everyone cannot be allowed the same legal opportunity to hunt primarily for food, random permit drawings are not authorized by the statute. Instead, the board must employ the three criteria, and must consider factors that correlate to them, such as miles between the user's residence and the game population, income levels, previous participation in harvest of resources and other less easily quantifiable data.

Before Madison, the uses which the board had provided for as subsistence were those of residents in rural areas and communities, a much smaller group than all Alaskans. Before Madison, other uses could be accommodated, as well, and the board relied heavily on drawing permit hunts to distribute opportunities for other Alaskans to hunt a particular game population. Now that regulatory tool is not available, and as a result many Alaskans who will have a low priority when evaluated under the three criteria will not even have a chance to participate in many hunts. Additionally, non-state residents must be eliminated from many hunts.

Brenda Johnson, Chairman
Alaska Board of Game

Adopted 04/04/85
Anchorage, Alaska



FROM LAW ANCH D.A.O. 09/11/;9 17:20 P.14

Alaska Board of Game
#85-37-GB

Findings on Lime Village Management Area

The Board of Game finds, based upon public testimony and information provided by the Division of Subsistence, that the residents of the Upper Stony River Lime Village area are extremely dependent on moose and caribou in GMU 19(A). As reported in Kari, 1983, Land Use and Economy of Lime Village, the remoteness and isolation of this area, the extremely limited availability of cash earning opportunities, and the high costs of transportation and of food, make local residents highly reliant on local fish and wildlife. Moreover, use of wild game resources is historically customary in the area. The board further finds that the 40 residents of Lime Village are probably the most geographically isolated and subsistence dependent people in the state. Moose and caribou are particularly important because of the quality of the meat and the large size of the animals. They supply the highest proportion of the food eaten by residents of the area.

The board finds that residents of this area have customarily harvested moose and caribou on an opportunistic basis throughout the year. However, the usual hunting periods include fall (August and September), winter (November - February), and spring (March). Recent short seasons in November and February have not fully accommodated the opportunity for local residents to legally obtain the moose they need. The board finds that the lack of appropriate seasons has discouraged Lime Village residents from reporting their harvests.

Residents of the Lime Village area customarily harvest moose and caribou within a fairly well defined area around the village, including along the Stony River by boat and on foot in summer, and further away from the river by dogteam and snowmachines in the winter.

The board finds that information provided by the Game Division shows that moose populations in the Stony River area are at moderate density and are relatively stable. Caribou in this area are part of the Mulchatna caribou herd, which is at high levels and has been growing in recent years.

Therefore, the board concludes that the establishment of the Lime Village Management Area will provide a reasonable opportunity for the residents of Lime Village as well as all



FROM LAW ANCH D.A.O. 09/11/;9 17:21 P.15

other Alaskans to take moose by extending the lengths of the seasons. Restricting the transportation of moose out of the Lime Village Management Area except during September will reduce the potential new demand which might result from these longer seasons and ensure the conservation of the moose population. The board determines it is important that during September, which has been the period of time most used for hunting by all Alaskans and for guided hunting, bull moose can be transported out of the area.

The board further concludes that the establishment of this management area also allows an increase in the caribou bag limit in the area to five, which will provide a reasonable opportunity for customary levels of harvest for the residents of Lime Village as well as other Alaskans. Restrictions on the transport of caribou out of the area will reduce hunting pressure on local caribou and ensure their conservation and availablity to residents of the area. The board again determines that it is important that uses by all Alaskans can be provided for by allowing one caribou to be transported out of the area from September to mid-October.

Brenda Johnson, Chairman
Alaska Board of Game

Adopted April 04, 1985
Anchorage, Alaska
VOTE: 6/0



FROM LAW ANCH D.A.O. 09/11/;9 17:21 P.16 TOTAL P.16

# Subsistence

# Legal

# Questions,

# including Sectional

# Analysis (File 3)

Subsistence
Current 2

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JAN 21 1986

January 13, 1986

Senator Arliss Sturgulewski
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Re: No Need For Action On Subsistence Bills

Dear Senator Sturgulewski:

You are no doubt under pressure to amend the state subsistence law passed in 1978. This pressure stems in significant part from those who represent rural interests in the State of Alaska and who believe that the subsistence law must be amended in order to protect rural residents.

As lawyers with a long history of representing rural Alaskans, we strongly disagree with this position. After extensive legal analysis, we conclude that the State's law is not broken and, therefore, needs no fixing. What is needed is an effective administrative implementation of existing law. We suggest that the Boards of Fish and Game have totally and completely failed to implement the state subsistence priority, and that this administrative inaction is the cause of the existing problem with respect to the subsistence preference.

We have enclosed a copy of a friend of the court brief which we submitted in a case now pending before the Alaska Supreme Court. The case is named Eluska. It will help decide what the existing Alaska Statutes say about the subsistence priority. It will soon be decided. On December 5, 1985, the Alaska Supreme Court entered an order granting the Department of Law an expedited decision. By granting the motion, the court indicated that it will probably decide Eluska within the next few months.

The brief sets forth our legal opinion as to the serious errors and omissions made by the State Boards of Fish and Game when they attempted to implement the subsistence priority. As set out by the brief, the implementation has been remarkably glacial and grudging. We believe the Boards of Fish and Game have been violating both state law and federal law regarding the subsistence priorities since the laws were enacted. Consistently refusing to give a real priority to real subsistence users, the Boards have attempted to impose arbitrary, unreasonable, inappropriate, and often downright silly and irrelevant restrictions upon true subsistence users. To cover up this administrative malfeasance, the Boards are now trying to have the Department of Law obscure simple issues in high-sounding lawyers' jargon.

To us, the facts are plain. The Boards of Fish and Game have refused to implement the law that you passed in 1978. Now, as the courts force them to implement it, they are disingenuously claiming that you must now amend that law.

Our basic position is that you should do nothing, and that the Boards of Fish and Game must be made to finally implement the subsistence priority passed in 1978.

In this regard, we should like to comment on a recent letter sent by Assistant Secretary of the Interior Bill Horn to Governor Sheffield. In this letter, dated September 23, 1985, Mr. Horn asserts that the recent Alaska Supreme Court decision in Madison places the State in a position of not complying with Title VIII of the Alaska National Interest Lands Conservation Act (the 1980 federal subsistence law). We believe that Mr. Horn's letter is totally wrong. The Madison decision does not place the State in a position of non-compliance with federal law, for it merely adds an additional distinction which is not prohibited by federal statute.

The Conservation Act establishes a program of "cooperative federalism." Under this program, the State of Alaska can manage subsistence uses of fish and wildlife pursuant to "laws of general applicability" so long as they afford subsistence users the preference given to them by the Congress of the United States. While the preference required by Congress is limited to "rural Alaska residents," nothing in the federal law purports to prohibit the State from giving a preference to subsistence users who might not properly be classified as "rural residents" so long as rural subsistence users are fully protected. Indeed, section 815(3) of the Conservation Act makes abundantly clear that once rural subsistence users are protected Congress intended to vest the State with broad discretion in allocating uses among other users. This permits the State to extend the subsistence preference to "urban" subsistence users so long as "rural" subsistence users have been given the priority to which they are entitled.

The simple notion that the State can accord "urban" subsistence users a preference has previously been endorsed by Mr. Horn himself. Former Secretary of the Interior James G. Watt, by letter of February 25, 1982, informed the State of Alaska that it could protect "urban" subsistence users so long as the State extended top priority to "rural" subsistence users. A few weeks later, Mr. Bill Horn, then Deputy Undersecretary, appeared before the Joint Boards of Fish and Game and carried the same message. At that hearing, he unequivocally declared that the Boards of Fish and Game could extend the subsistence priority to "urban" subsistence users so long as they accorded first priority to "rural" subsistence users.

The Boards of Fish and Game declined the invitation given to them by both the Secretary of the Interior and his Undersecretary. Expressly deciding that they would not abide by your decision to accord a subsistence priority to all true subsistence users, "rural" or not, the Boards simply amended the statute through the administrative process by declaring that "urban" subsistence users would not be given a preference. As the Alaska Supreme Court found, the Boards of Fish and Game violated the clear intent of the act you passed in 1978 when it took this action. We believe the Boards should be taken to task for their wrongful ways. They should not be allowed to amend the law to suit their fancy.

We therefore urge that you take no action on a subsistence bill. The clients we represent on this issue are for the most part rural subsistence users, most of whom are Native. As the law firms which have represented more individuals and groups

on more subsistence issues than any other firm or firms in the state,[1] we do not believe that the interests of our clients are compromised by the present law. We believe that our clients' interests are significantly and continually compromised by the refusal of the Boards of Fish and Game to accord them the subsistence priority to which they are accorded under both state and federal law. Amending the statute along the lines suggested by Governor Sheffield would merely exacerbate the problem and obscure the true difficulties that rural Alaskans face in trying to force the Boards of Fish and Game to give them a true subsistence priority. We urge you to study the enclosed brief and reach your own independent conclusion as to whether the state subsistence law needs amending, totally and completely confident that your independent review will lead to the conclusion that the current law need not be amended and that those who would pressure you into taking precipitous action are mistaken.

Thank you for your consideration.

Sincerely,

Robert K. Hickerson
Executive Director
Alaska Legal Services Corporation

Donald S. Cooper
Chief Counsel
Alaska Legal Services Corporation

Lawrence A. Aschenbrenner
Directing Attorney
Native American Rights Fund

Robert T. Anderson
Staff Attorney
Native American Rights Fund

cc: Assistant Secretary of the Interior William P. Horn
Governor Bill Sheffield
Alaska Congressional Delegation
Chairman, United States Senate Energy Committee
Chairman, United States House Interior Committee

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[1] These cases include, inter alia: Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984); Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985); Kunaknana v. Clark, 742 F.2d 1145 (9th Cir. 1984); Bobby v. Alaska, D. Alaska Civil No. A84-544.

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR

| | |
|---|---|
| In the Matter of the Petition of the Alaska Federation of Natives Proposing the Adoption of a Regulation Notifying The Public That the State of Alaska Has Not Enacted Laws of General Applicability Which Satisfy the Requirements of Section 805(d) of the Alaska National Interest Lands Conservation Act. | ) |

## PETITION

COMES NOW the Alaska Federation of Natives and pursuant to 5 U.S.C. 553(e) and 43 C.F.R. 14.1 et seq. requests the United States Department of the Interior to adopt and publish the following regulation in the Federal Register:

## NOTICE

> Notice is hereby given that the Secretary of the Interior has determined that the State of Alaska has not enacted and implemented laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804 and 805 of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487 (1980). Until such time as the State enacts laws of general applicability which satisfy the requirements of section 805(d), the taking of fish stocks and wildlife populations which are the subject of subsistence uses as that term is defined in section 803 shall be regulated by the Alaska Board of Fisheries and Alaska Board of Game pursuant to sections 803 and 804 of ANILCA.

### A. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PERSON WITHIN THE MEANING OF 5 U.S.C. 553(e).

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives

residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural communities and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish stocks and wildlife populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent communities and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes, including but not limited to Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses.

AFN is an interested party within the meaning of 5 U.S.C. 553(e).

B. THE NOTICE WHICH THIS PETITION REQUESTS THE DEPARTMENT OF THE INTERIOR TO ADOPT AND PUBLISH IS A "RULE" AS DEFINED IN THE ADMINISTRATIVE PROCEDURE ACT.

The purpose of this petition is to request the Departmen of the Interior to publish a statement from the Department of particular applicability to, and intended to have a future ef upon, the regulation of the taking of fish stocks and wildlif populations in Alaska and the implementation and interpretati of Title VIII of ANILCA. Consequently, the requested notice is a "rule" as defined by 5 U.S.C. 551(4).

C. THE STATE OF ALASKA HAS NOT ENACTED AND IMPLEMENTED LAWS OF GENERAL APPLICABILITY WHICH ARE CONSISTENT WITH, AND WHICH PROVIDE FOR THE DEFINITION, PREFEREN AND PARTICIPATION SPECIFIED IN, SECTIONS 803, 804 AN 805 OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATI ACT. CONSEQUENTLY, SECS. 803 AND 804 OF ANILCA GOVE THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF THE TAKING OF FISH STOCKS AND WILDLIFE POPULATIONS WHICH ARE THE SUBJECT OF SUB-SISTENCE USES.

In 1980 the Congress enacted Title VIII of the Alaska Na Interest Lands Conservation Act. The purpose of Title VIII inter alia is to ensure that the taking of fish stocks and wi populations in Alaska are regulated by the State of Alaska in a manner which ensures the continuation and protection of the taking of such stocks and populations by residents of rural communities and areas for personal and family consumption.

The operative provisions of Title VIII through which the Congress intended to achieve this important national goal are Secs. 803, 804, and 805. In particular, the Congress intende Secs. 803 and 804 to supercede A.S. 16.05 and control the Ala Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803 of ANILCA.

However, as an act of comity, Sec. 805(d) provides tha

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02-576(2/77)

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However, as an act of comity, Sec. 805(d) provides that

if the Alaska Legislature enacts laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, Secs. 803, 804 and 805, then unless and until any one of such laws is repealed, such state statutes shall supercede Secs. 803, 804 and 805 insofar as such sections govern the regulatory activities of the Alaska Board of Fisheries and Alaska Board of Game.

In 1978 the Alaska Legislature enacted ch. 151 SLA 1978. Subsequent to the enactment of ANILCA, the State of Alaska represented to the Department of the Interior that ch. 151 satisfied the requirements of section 805(d), and, consequently, that ch. 151 rather than Secs. 803 and 804 controlled the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

This conclusion was not apparent on the face of the statute. As a result, on February 25, 1982, Secretary of the Interior James Watt wrote Governor Hammond indicating that the Department could not certify that the State of Alaska had satisfied the requirements of Sec. 805(d) because the purview of the state statutory definition of the term "subsistence uses" was not limited on its face to "rural Alaska residents," and, consequently, was not consistent with, and did not provide for the definition of the term "subsistence uses" set forth in Sec. 803. As Secretary Watt explained, the ch. 151 definition of the term "subsistence uses" failed "to distinguish rural residents engaged in subsistence uses from other users who make 'customary and traditional uses' of fish and game resources."

In response, the Alaska Board of Fisheries and Alaska Board of Game adopted an interpretative regulation which limited the purview of the ch. 151 definition to residents of rural Alaska. Only this class of hunters and fishermen would be provided the priority for subsistence uses established by A.S. 16.05.251(b) and 16.05.255(b). As a result, on April 14, 1982, Secretary Watt informed Governor Hammond that the State of Alaska had complied with the requirements of Sec. 805(d) of ANILCA, and that henceforth ch. 151 SLA 1978, rather than Secs. 803 and 804 of ANILCA, would control the Alaska Board of Fisheries and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses. The interpretative regulation which brought the State of Alaska into compliance with Sec. 805(d) was codified as 5 A.A.C. 99.010.

Regrettably, on February 22, 1985, the Alaska Supreme Court issued its opinion in Madison v. Alaska Department of Fish and Game. The Court held that the Tenth Alaska Legislature did not intend to limit the purview of the term "subsistence uses" in ch. 151 to residents of rural Alaska and, consequently, the adoption of a regulation limiting the purview of the ch. 151 definition in that manner was beyond the scope of the statute. Hence, contrary to Secretary Watt's determination on April 14, 1982, the State of Alaska has never been in compliance with the requirements of Sec. 805(d) of ANILCA, and, consequently, Secs. 803 and 804 still control the authority of the Alaska Board of Fisheries and Alaska Board of Game to adopt regulations governing the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

Because of the confusion which the Madison opinion has

engendered, the purpose of this petition is to request the Secretary of the Interior to publish a notice in the Federal Register which clarifies the status of the State of Alaska's compliance with Sec. 805(d) of ANILCA for the benefit of the public, the boards and interested federal agencies.

DATED: July 19, 1985

JANIE LEASK
President
Alaska Federation of Natives

By: _____
Donald C. Mitchell
Attorney for Petitioner

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR

| | |
|---|---|
| In the Matter of the Petition of the Alaska Federation of Natives Proposing the Adoption of a Regulation Governing the Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations. | ) |

## PETITION

COMES NOW the Alaska Federation of Natives and pursuant to 5 U.S.C. 553(e) and 43 C.F.R. 14.1 et seq. requests the United States Department of the Interior to adopt the following regulation:

> 43 C.F.R. ___. REGULATION OF THE TAKING OF FISH AND GAME FOR SUBSISTENCE USES IN ALASKA. (a) The identification of subsistence uses and the regulation of the taking of fish stocks and wildlife populations in Alaska which are the subject of such uses shall be identified pursuant to Sec. 803 and regulated pursuant to Sec. 804 of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (1980).
>
> (b) With respect to the State of Alaska's regulation of the taking of fish stocks and game populations which are the subject of subsistence uses, if the State enacts and implements laws of general applicability which are consistent with, and which provide for, the definition of "subsistence uses" set forth in Sec. 803, the authorization and priority for such uses set forth in Sec. 804, and the system of local advisory committees and regional advisory councils set forth in Sec. 805, then unless and until any one of the aforementioned laws is repealed, such State laws shall govern regulation of the taking of fish stocks and wildlife populations by the State of Alaska and such State laws shall supercede Secs. 803, 804 and 805 of the Alaska National Interest Lands Conservation Act insofar as such sections govern the State of Alaska's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses.
>
> (c)(1) Pursuant to Sec. 806 of the Alaska National Interest Lands Conservation Act, the Secretary of the Interior shall monitor the State of Alaska's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses.
>
> (2) If the Secretary determines either pursuant to the discharge of his monitoring responsibility set forth in paragraph (1) or as the result of oral or written notice from any interested party that the State of Alaska has failed or declined to regulate the taking of a fish stock or wildlife population pursuant to the regulatory standard set forth in subsection (a), then in addition

to such other action as may be authorized or required by law, the Secretary shall adopt regulations governing the taking of such stock or population pursuant to subsection (a), and such regulations shall supercede the State of Alaska's regulation of the taking of such stock or population.

(d) Consistent with sound management principles and the conservation of healthy fish stocks and wildlife populations, regulations adopted by the State of Alaska or the Secretary of the Interior pursuant to this section shall cause the least adverse impact possible on persons engaged in subsistence uses of such stocks and populations.

(e) For the purposes of this section, the terms -

(1) "subsistence uses" means the customary and traditional uses of a fish stock or wildlife population by rural Alaska residents 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 stocks or populations taken for personal or family consumption; and for customary trade.

(2) "rural" means a community or area in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area.

(3) "customary and traditional" means (i) a long-term, consistent pattern of use of a fish stock or wildlife population, excluding interruption by circumstances beyond the control of the persons taking such stock or population such as regulatory prohibition;

(ii) a use pattern which recurs in specific seasons of each year;

(iii) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local circumstances;

(iv) the consistent harvest and use of such stock or population near, or at a location reasonably accessible to, the residence of the persons taking such stock or population;

(v) the handling, preparing, preserving and storing of such stock or population in a manner which has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances;

(vi) a use pattern which includes the handing down of knowledge of fishing or hunting skills and values from generation to generation;

(vii) a use pattern in which the products derived from such stock or population are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises), barter, sharing, and gift-giving; and

(viii) a use pattern which includes reliance upon a wide diversity of fish stocks and wildlife populations of an area for personal and family consumption and which

provides substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take or consume such stock or population for their sustenance.

(4) "fish stock" means a species, subspecies, geographical grouping or other category of fish capable of management as a unit which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States.

(5) "wildlife population" means a group of animals of the same species or smaller taxa whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (3) of this subsection.

A. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PERSON WITHIN THE MEANING OF 5 U.S.C. 553(e).

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural communities and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish

stocks and wildlife populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent communities and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes, including but not limited to Title VIII of the Alaska National Interest Lands Conservation Act, and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and wildlife populations for personal and family consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses.

AFN is an interested party within the meaning of 5 U.S.C. 553(e).

B. FOR THE PAST EIGHTY-THREE YEARS THE CONGRESS HAS CONSISTENTLY RECOGNIZED THE NATIONAL INTEREST IN, AND THE FEDERAL RESPONSIBILITY FOR, ENSURING THAT THE TAKING OF FISH STOCKS AND WILDLIFE POPULATIONS RESIDENT WITHIN ALASKA IS REGULATED IN A MANNER WHICH PROTECTS THE TAKING OF SUCH STOCKS AND POPULATIONS FOR SUBSISTENCE USES BY ALASKA NATIVES AND OTHER PERSONS RESIDENT IN RURAL COMMUNITIES AND AREAS, AND IN 1980 THE CONGRESS ASSERTED ITS JURISDICTION TO ESTABLISH THE REGULATORY STANDARD WHICH PRESENTLY GOVERNS THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF SUCH TAKINGS.

Since 1980 there has been considerable confusion as to the responsibilities which the Congress assigned to, and the relationship which the Congress intended between, the Alaska Board of Fisheries and Alaska Board of Game and the Secretary of the Interior with respect to the regulation of fish stocks and wildlife populations which are the subject of subsistence uses. This confusion was recently compounded by the decision

of the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game. The purpose of the proposed regulation set forth above is to clarify the boards' and the Secretary's respective responsibilities for the benefit of the public, the boards, and affected federal agencies.

For the past eighty-three years the United States Congress has consistently recognized its responsibility, and has consistently asserted its jurisdiction, to ensure that the taking of fish stocks and wildlife populations is regulated in a manner consistent which the continuation and protection of the taking of such stocks and populations by Alaska Natives and other persons resident in rural communities and areas.

For example, the first game law applicable to Alaska was enacted by the Congress in 1902, 32 Stat. 327 (1902). Although the Act established statutory seasons and other forms of regulation of the taking of game birds and animals, the statute specifically exempted the taking of such birds and animals by Indians and Eskimos for food from regulation. The 1902 subsistence exemption was re-enacted by the Congress in the 1908 Alaska Game Act, 35 Stat. 102 (1908) and the 1925 Alaska Game Act, 43 Stat. 743 (1925).

In 1958, when the Congress enacted the Alaska Statehood Act, 72 Stat. 339 (1958), it refused to transfer regulatory authority over the taking of fish stocks and wildlife populations to the State of Alaska until such time as the new state demonstrated that it had adopted a regulatory system which inter alia ensured that the taking of such stocks and populations by Alaska Natives for subsistence uses would be adequately protected. See Sec. 6(e), Pub. L. No. 85-508. This provision was added to the Alaska Statehood Act on the floor of the House of Representatives by an amendment offered by Representatives Pelly and Westland.

By way of explanation as to why their amendment was needed, Pelly and Westland introduced a letter from Acting Territorial Governor Hugh Wade to the Alaska Senate expressing his concern that the fish and game statute which the Territorial Legislature had enacted in anticipation of statehood "overlooked or disregarded" the hunting and fishing rights "of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation [i.e. the 1925 Alaska Game Act, as amended]". 104 Cong. Rec. 9488-9489, 9750 (1958).

Between the transfer of authority to regulate the taking of fish stocks and wildlife populations to the new State of Alaska in 1960 and the enactment of ANCSA in 1971 it had become obvious that the Alaska Board of Fish and Game was not institutionally inclined to adopt hunting and fishing regulations which adequately safeguarded the taking of fish stocks and wildlife populations for subsistence uses as mandated by the Congress in 1958.

As a result, the United States Senate included a provision in its version of ANCSA which would have reasserted federal jurisdiction over the taking of wildlife populations in Alaska to ensure that this important national goal was achieved. See Sec. 21, S. 35, 92d Cong., 1st Sess. (1971). The provision was deleted from the final version of ANCSA after the Conference Committee received assurances from the State of Alaska that such a reassertion of federal jurisdiction was unnecessary because the Board of Fish and Game was prepared to adequately discharge its responsibility to protect subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas. However, in order to make unequivocally clear that both the Department of the Interior and the State of Alaska have a nondiscretionary responsiblity to ensure that subsistence

hunting and fishing by Alaska Natives is adequately protected, the Committee included the following admonition in its report to the Congress on the work of the conference:

> The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take any action necessary to protect the subsistence needs of the Natives. House Rept. No. 92-746, 92d Cong., 1st Sess. 37 (1971)(Emphasis added).

By 1977 when the Congress began consideration of legislation which was enacted in 1980 as the Alaska National Interest Lands Conservation Act (ANILCA), it had become obvious that contrary to representations made by the State of Alaska in 1971, the Alaska Board of Fisheries and Alaska Board of Game had not adopted hunting and fishing regulations which adequately protected subsistence uses. See for example Hearings on H.R. 39 before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs 95th Cong., 1st Sess., Part XI, 398-479 (statement of Donald C. Mitchell), Part XII, 52-61, 461-497 (statement of Byron Mallot).

The suggested solution to the problem was for the United States Congress to reassert its jurisdiction over the regulation of the taking of fish stocks and wildlife populations in Alaska to ensure that in the future such regulation would be conducted pursuant to federal regulatory standards which ensure that the taking of such stocks and populations by Alaska Natives and other residents of rural communities and areas would be adequately protected.

Significantly, this approach was suggested and supported by Jay S. Hammond, then Governor of Alaska, who candidly admitted to the Congress that there was "some justification" for "the perception that state regulation has either favored urban hunters too much, or not favored rural hunters enough when the difficult allocation decisions were made," and then concluded with the

request that:

> "I hope this Congress establishes the priority of subsistence use where there is a conflict on national interest lands. I believe this is a legitimate subject for [federal] legislation, and hope that is principle, which as been State policy for some time, is enacted into Federal law." Id. Part XII, 12 (statement of Hon. Jay S. Hammond).

The Congress responded to Governor Hammond's request by including Title VIII in ANILCA. Secs. 803 and 804 establish a federal standard which governs the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations. As Senator Ted Stevens, a major participant in the drafting of the version of ANILCA which was enacted into law, explained to the United States Senate, the Senate Committee on Energy and Natural Resources version of Title VIII required the Secretary of the Interior to initiate a civil action "to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804." 126 Cong. Rec. S 15131 (December 1, 1980 daily ed.)(Emphasis added).

Senator Stevens went on to explain that though the State of Alaska did not object to the Congress compelling its regulatory agencies to adopt hunting and fishing regulations pursuant to the federal regulatory standard set forth in Sec. 804, it did object to the Secretary of Interior being assigned responsibility to initiate a civil action if the Alaska Board of Fisheries or Alaska Board of Game failed to to so. For that reason Senator Stevens persuaded the Congress to amend the judicial enforcement section of Title VIII to eliminate the Secretary of the Interior's responsibility to prosecute a civil action against a board for failure to adopt regulations which are consistent with Sec. 804 and to establish a private cause of action in its stead.

As a result, if the Alaska Board of Fisheries or Alaska Board of Game adopts a regulation inconsistent with the federal regulatory standard set forth in Sec. 804, Sec. 807 authorizes local residents "aggrieved by a failure of the State...to provide for the priority for subsistence uses set forth in section 804... [to] 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." The exclusive relief afforded by Sec. 807 to remedy the Alaska Board of Fisheries' or Alaska Board of Game's adoption of an unlawful regulation is an order of the United States District Court requiring the offending Board to adopt and submit regulations to the Court "which satisfy the requirements of Sec. 804."

Senator Stevens's understanding that Sec. 804 was intended by the Congress to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations is supported by the report of the committee which reported the version of ANILCA which was enacted into law.

As the Senate Committee on Energy and Natural Resources explained:

> This section [i.e. Sec. 804] requires <u>both</u> the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands... If a particular fish or wildlife population (e.g. salmon, moose, or caribou) in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section [i.e. Sec. 804] need not be imposed by <u>the State rulemaking authority</u>. However, if the continued viability of a particular population or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, <u>the State rulemaking authority</u>, in conjunction with the recommendations of the regional council representing the affected area, is required <u>by this section</u> to establish <u>regulations</u> which restrict the taking of such population to Alaska residents engaged in subsistence uses. Senate Rept. No. 96-413,

96th Cong., 1st Sess. 269-270 (1979) (Emphasis added).

The language and legislative history of Secs. 804 and 807 of ANILCA make clear that the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

However, in addition to its concern that subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas be adequately protected by the Alaska Board of Fisheries and Alaska Board of Game, the Congress was also sensitive to the political tension which has historically surrounded state and federal authority to regulate the taking of the same fish stocks and wildlife populations within the boundaries of the fifty states. No person and no state, including the State of Alaska, any longer challenges the Congress' constitutional authority to supercede state regulation of resident fish stocks and wildlife populations. See Kleppe v. New Mexico, 426 U.S. 529 (1976). However, during Congress' consideration of ANILCA, many members of Congress, including Senator Stevens, were of the opinion that, although constitutional, the assertion of such federal authority over the Alaska Board of Fisheries and Alaska Board of Game was politically unwise unless necessary to protect the national interest.

This policy was consistent with many actions of the Congress prior to enactment of ANILCA which have purposely limited the Department of the Interior's authority to regulate the taking of fish stocks and wildlife populations in contravention of state regulation. The Federal Land Policy and Management Act of 1976 is a recent example of congressional policy in this area. See Sec. 302(b), Pub. L. No. 94-579 (1976).

To the extent the Department of the Interior has been delegated regulatory authority to supercede state regulation, the Department has been similarly circumspect with respect to using it. The statute which delegates the U.S. Fish and Wildlife Service (FWS) authority to manage fish stocks and wildlife populations within units of the National Wildlife Refuge System, for example, requires FWS regulations governing the taking of stocks and populations within refuges to be consistent with the hunting and fishing regulations of the state in which a refuge is located only "to the extent practicable to do so". If consistency is not practicable, FWS may supercede state regulation.

However, because of the political sensitivity involved, FWS has voluntarily limited the exercise of its own jurisdiction. 50 C.F.R. 32.3(d) precludes FWS from adopting regulations governing the taking of a wildlife population within a refuge which are more liberal than the state regulations which, but for FWS' superceding regulations, would control the taking of such population. It is important to note, however, that this self-imposed regulatory restraint is an act of political comity - not a constitutional or statutory requirement.

This long tradition of congressional and administrative sensitivity to the tension between federal responsibility toward and state interest in the regulation of the taking of the same fish stocks and wildlife populations is reflected in Title VIII of ANILCA. Although the Congress intended the regulatory standard set forth in Sec. 804 to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in Sec. 803, if the Alaska Legislature enacts a state statute which establishes the same regulatory standard, then "unless and until [such statute

might be] repealed" the Congress intended the state statute, rather than Secs. 803 and 804, to govern the boards' adoption of fishing and hunting regulations. See Sec. 805(d).

If the Alaska Legislature enacted a statute of this nature and a board refused to adopt regulations consistent with its regulatory mandate, then although an aggrieved party is still authorized to file a civil action pursuant to Sec. 807, the claim for relief would be based upon violation of the state statute rather than Sec. 804.[1]

This act of comity is similar to the approach the Congress followed when it established the Alaska Land Bank Program in Sec. 907 of ANILCA. Village and regional corporations authorized by ANCSA but established pursuant to and regulated by State law are authorized to place lands in the land bank. During the time lands are deposited in the bank, Sec. 907(c)(2) supercedes the laws of the State of Alaska and exempts such lands from state taxation, adverse possession and judicial execution. However, as a matter of comity, if the Alaska Legislature enacts state statutes which provide banked land any of the protections from involuntary loss set forth in Sec. 907(c)(2), then "such [state] laws, unless and until repealed, shall supercede the relevant subparagraph of subsection (c)(2) and shall govern the grant of the benefit so provided".

For the reasons set forth above, the language and legislative history of Secs. 804 and 807 of ANILCA make clear that in the

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[1]Sec. 807(a) provides in pertinent part that:

> Local residents and other persons and organizations aggrieved by a failure of the State... to provide for the priority for subsistence uses set forth in section 804 (or with respect tto the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d))...

absense of a state statute which establishes the same regulatory standard as that set forth in Secs. 803 and 804, the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and wildlife populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

E. THE PURVIEW OF THE REGULATORY AUTHORITY SET FORTH IN SEC. 804 OF ANILCA ENCOMPASSES THE TAKING OF FISH STOCKS WHICH AT ANY TIME OR DURING ANY SEASON OF THE YEAR MAY BE FOUND IN WATERS OF THE UNITED STATES AND WILDLIFE POPULATIONS WHOSE MEMBERS IN WHOLE OR IN PART USE OR MAY BE FOUND AT ANY TIME OR DURING ANY SEASON OF THE YEAR UPON LAND THE TITLE TO WHICH IS IN THE UNITED STATES OR UPON OR IN WATERS SUBJECT TO THE REGULATORY JURISDICTION OF THE UNITED STATES.

Paragraph (4) of proposed subsection (e) defines the term "fish stock" to encompass all fish stocks which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States. Paragraph (5) defines the term "wildlife population" to encompass all wildlife populations whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (4). These definitions are consistent with both the intent of Congress embodied in Title VIII of ANILCA and with fundamental principles of fish and wildlife management.

During the four years of congressional consideration of ANILCA, the policies embodied in Title VIII were the subject of prolonged, emotional, and intense debate. However, although all parties with an interest in Title VIII often disagreed about

various provisions and policies, one issue upon which all responsible parties did agree was that professional and scientific fish and wildlife management requires fish stocks and wildlife populations to be subject to one regulatory standard throughout their range. This is a fundamental tenet of the fish and wildlife management profession. Bifurcation of the regulatory standard would not only be confusing, it would be dangerous to the longterm conservation of the fish stocks and wildlife populations being regulated.

On August 20, 1977, Governor Hammond used strong language to reinforce this point in testimony before the House Committee on Interior and Insular Affairs:

> "The subsistence way of life should be preserved in Alaska for as long as possible. I think that this goal can be accomplished if we all realize that what we really are concerned about are these two basics:
>
> First, the resource itself - the fish and wildlife - must be maintained if subsistence is to persist as a way of life. This requires two things: First, protective management of the resource-sustaining habitat, and professional, coordinated, scientific management of the wildlife or fish species itself.
>
> ...
>
> [C]rucial to protection of the resource is coordinated, scientific wildlife management that manages animal populations <u>regardless of where they may roam, spawn, migrate or be taken</u>. As you know, fish and wildlife have little regard for bureaucratic boundaries and, so far as I am concerned, this is argument enough in itself <u>against segmenting the management</u> of a single species or population according to land ownership or user groups. Split management of a single living resource may make some marginal sense in the context of political science; but it makes absolutely no sense whatsoever in the context of biological science." <u>Id</u>. Part XII, 414, 416-417 (statement of Hon. Jay S. Hammond).(Emphasis added).

For the reasons described by Governor Hammond, the adoption of a construction of the purview of section 804 of ANILCA which would authorize the Alaska Board of Fisheries to apply one regulatory standard to a king salmon run when it is inside the boundaries of the Yukon Delta National Wildlife Refuge and a different standard farther up the Yukon River or to authorize the Alaska

Board of Game to apply one regulatory standard to hunting the harvestable surplus of the Nelchina caribou herd on public land and another for hunting the same herd on State and private land would place the health and longterm stability of fish stocks and wildlife populations of national and international significance at considerable risk.

The approach embodied in subsection (e)(4) and (5) both minimizes the risk of this result and is consistent with the intent of Congress embodied in Sec. 804.

With respect to fisheries, Sec. 804 applies to the taking of fish stocks on "public lands". Sec. 102 of ANILCA defines "public lands" as "federal land" title to which is in the United States, and "land" to include "waters, and interests therein". Consequently, with respect to fisheries, section 804 applies to fish stocks moving in waters in which the United States government has an interest. A regulatory interest is an "interest" as defined in Sec. 102.[2] That this result was intended by the Congress is supported by the legislative history introduced by Senator Stevens to explain the intent of Congress in adopting a substitute for the original Senate version of Sec. 807:

> "[T]he Committee section 807 establishes a complex 'judicial enforcement' scheme whereby the Secretary of the Interior is required to represent local advisory committees and regional advisory councils in civil actions to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804."[3] (Emphasis added).

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[2] See, e.g. 46 U.S.C. 740 (admiralty and maritime jurisdiction of the United States extends to "navigable water"), 33 U.S.C. 1344 (Secretary of the Army has jurisdiction to prohibit dredging of or discharge of fill material into the waters of the United States, including the territorial seas).

[3] 126 Cong. Rec. S15131 (daily ed. December 1, 1980)(remarks of Senator Ted Stevens).

With respect to wildlife, Sec. 802(1) of ANILCA establishes a clear and unequivocal congressional policy that "subsistence uses" of wildlife populations are to be regulated by the State of Alaska and the federal government in a manner consistent with "sound management management principles, and the conservation of healthy populations of...wildlife." With respect to the regulation of the taking of wildlife populations which use, and which are harvested for subsistence uses on, "public lands," the regulation of the taking of a population during a period of time when a population might be outside "public lands" pursuant to a regulatory standard different from the standard applied when the population is on "public lands" would violate the congressional policy set forth in Sec. 802(1) and would be a near guarantee for regulatory chaos.

It should be also be noted that Title VIII in general, and Sec. 804 in particular, were enacted by the Congress to benefit a class of hunters and fishermen composed primarily, albeit not exclusively, of Alaska Natives who reside in isolated rural villages and who provide sustenance for their families through hunting and fishing. For that reason in The People of the Village of Gambell v. Clark, ___ F.2d ___ (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit noted that with respect to the proper interpretation of the term "public lands" in Title VIII:

> "The most compelling reason for resolving the ambiguous language of Title VIII in favor of... [the interpretation urged by Alaska Natives residing in the village of Gambell] is that Title VIII was adopted to benefit the Natives. Under a familar rule of statutory construction doubtful language should be construed to further that purpose."

The Court then applied that principle of statutory construction to give the term "public lands" the widest possible purview in order to effectuate "Congress's intention to protect subsistence

uses by rural residents of Alaska".

The regulation proposed in the instant petition is intended to benefit the same class of Native hunters and fishermen. Subsection (e)(4) and (5) embodies an interpretation of Sec. 804 which is consistent with the fulfillment of this important national goal.

F. CONCLUSION.

Title VIII of ANILCA was intended by the Congress to advance an important national interest - the continuation and protection of the taking of fish stocks and wildlife populations for personal and family consumption by Alaska Natives and other persons who reside in rural communities and areas. The class of hunters and fishermen defined in Sec. 803 and the regulatory system established by Sec. 804 were carefully crafted by the Congress to fulfill this goal and were intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of "subsistence uses" as defined in Sec. 803.

Until such time as the Alaska Legislature enacts a state statute which conforms to the requirements set forth in Sec. 805(d), Secs. 803 and 804 are intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and wildlife populations which are the subject of subsistence uses as that term is defined in Sec. 803.

Consequently, for all of the reasons set forth above, the Alaska Federation of Natives respectfully requests that its Petition Proposing the Adoption of a Regulation Governing the Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations by granted and its proposed regulation

adopted.

DATED: July 19, 1985

Janie Leask
President
Alaska Federation of Natives

BEFORE THE ALASKA BOARD OF FISHERIES AND ALASKA BOARD OF GAME

In the Matter of the Petition )
of the Alaska Federation of Natives )
Proposing the Adoption of a Regulation )
Governing the Identification and )
Regulation of Subsistence Uses of )
Fish Stocks and Game Populations. )
)

PETITION

COMES NOW the Alaska Federation of Natives and pursuant to A.S. 44.62.220 and Joint Board Resolution No. 85-16JB respectfully requests the Alaska Board of Fisheries and Alaska Board of Game to repeal 5 A.A.C. 99.010 and in lieu thereof adopt the following joint regulation:

> 5 A.A.C. 99.010. JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES. (a) The Board of Fisheries and Board of Game shall identify and regulate the taking of fish stocks and game populations according to the following procedures:
>
> (1) each board will assess the biological status of fish stocks and game populations and identify the harvestable surplus which may be taken from each stock and population consistent with the utilization, development and conservation of such stocks and populations on the sustained yield principle.
>
> (2) with respect to each fish stock or game population for which a harvestable surplus has been identified, each board will identify "subsistence uses" of such stock or population as such term is defined in Sec. 803, Pub. L. 96-487 (16 U.S.C. 3113), to wit the customary and traditional uses of such stock or population by rural Alaska residents 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 stocks or populations taken for personal or family consumption; and for customary trade.
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> (3)(A) after identifying subsistence uses of a fish stock or game population pursuant to paragraph (2), the board will determine the amount of the harvestable surplus of such stock or population required to fully provide a reasonable opportunity to engage in such uses and, pursuant to Sec. 804, Pub. L. 96-487

(16 U.S.C. 3114), will adopt regulations which authorize the taking of such stock or population for subsistence uses.

(B) Pursuant to Sec. 802, Pub. L. 96-487 (16 U.S.C. 3112) and the maintenance of fish stocks and game populations on the sustained yield principle, regulations adopted pursuant to this paragraph will cause the least adverse impact possible on persons engaged in subistence uses of such stocks and populations.

(4) If the harvestable surplus of a fish stock or game population is not large enough to safely sustain a harvest consistent with the sustained yield principle by all persons engaged in subsistence uses of such stock or population, the board will adopt regulations which allocate the opportunity to take such stock or population for subsistence uses among such persons on the basis of the following criteria:

(A) customary and direct dependence upon the stock or population as the mainstay of livelihood;

(B) local residency; and

(C) the availability of alternative food resources.

(5) If the harvestable surplus of a fish stock or game population is larger than the amount of the surplus needed to fully provide a reasonable opportunity to engage in subsistence uses of such stock or population, the board will, in its discretion, adopt regulations pursuant to A.S. 16.05 which authorize the taking of such stock or population for nonsubsistence uses consistent with the sustained yield principle.

(b) for the purposes of subsection (a), the terms -

(1) "rural" means a community or area in which the taking of fish stocks and game populations for personal and family consumption is a significant characteristic of the economy of the community or area.

(2) "customary and traditional" means (i) a long-term, consistent pattern of use of a fish stock or game population, excluding interruption by circumstances beyond the control of the persons taking such stock or population such as regulatory prohibition;

(ii) a use pattern which recurs in specific seasons of each year;

(iii) a use pattern consisting of methods and means of harvest which are characterized by efficiency and economy of effort and cost, conditioned by local circumstances;

(iv) the consistent harvest and use of such

stock or population near, or at a location reasonably accessible to, the residence of the persons taking such stock or population;

(v) the handling, preparing, preserving and storing of such stock or population in a manner which has traditionally been used by past generations, but not excluding recent technological advances in appropriate instances;

(vi) a use pattern which includes the handing down of knowledge of fishing or hunting skills and values from generation to generation;

(vii) a use pattern in which the products derived from such stock or population are distributed or shared among others within a definable community of persons, including customary trade (excluding significant commercial enterprises), barter, sharing, and gift-giving; and

(viii) a use pattern which includes reliance upon a wide diversity of fish stocks and game populations of an area for personal and family consumption and which provides substantial benefits to the economic, cultural, social, and nutritional well-being of persons who take and consume such stock or population for their sustenance.

(3) "fish stock" means a species, subspecies, geographical grouping or other category of fish capable of management as a unit which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States.

(4) "game population" means a group of game animals of the same species or smaller taxa whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States or upon or in waters described in paragraph (3) of this subsection.

(c) The taking of fish stocks and game populations which are not subject to regulation pursuant to subsection (a) of this section shall be regulated by the boards pursuant to A.S. 16.05.

A. THE UNITED STATES CONGRESS HAS DELEGATED THE ALASKA BOARD OF FISHERIES AND ALASKA BOARD OF GAME AUTHORITY TO ADOPT THE PROPOSED REGULATION.

The Alaska Board of Fisheries and Alaska Board of Game is empowered to adopt the regulation set forth above pursuant to authority delegated to such boards by the United States Congress in Secs. 803 and 804 of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (1980).

B. THE ALASKA FEDERATION OF NATIVES IS AN INTERESTED PARTY WITHIN THE MEANING OF A.S. 44.62.220.

The Alaska Federation of Natives (AFN) is the statewide Native organization organized to advance the cultural, social, health and economic well-being of Alaska Natives resident within the State of Alaska. Each of the twelve regional corporations established by the Alaska Native Claims Settlement Act (ANCSA) and each of the twelve Native regional nonprofit associations which provide health, social and other services to Alaska Natives residing within each of the twelve regions are members of AFN. AFN and its member organizations represent the totality of the over 60,000 Alaska Natives resident within the State of Alaska.

Alaska Natives who reside in subsistence dependent rural villages and areas throughout the state, including such communities and areas as the Copper River drainage, Lime Village, the Native Village of Tyonek, English Bay and Port Graham (to list only a few examples) are shareholders or members of corporations and nonprofit associations which are members of AFN. For many years, AFN has actively represented the interests of Alaska Natives who are shareholders or members of its member corporations and nonprofit associations to ensure that the taking of fish stocks and game populations in Alaska is regulated in a manner which protects the health of such stocks and populations in a manner consistent with sustained yield principles and which affords Alaska Natives and other persons who reside in rural subsistence dependent villages and areas a reasonable opportunity to take such stocks and populations for their sustenance.

In the latter regard, AFN has supported the enactment of statutes and the adoption of regulations intended to protect harvest opportunities by Alaskans who reside in rural communities and areas in which the taking of fish stocks and game populations

for personal consumption is a significant characteristic of the economy of the community or area from unfair and numerically overwhelming competition from persons seeking to harvest the same stocks and populations for commercial, sport, trophy and other uses. AFN is an interested party within the meaning of A.S. 44.62.220.

C. FOR THE PAST EIGHTY-THREE YEARS THE CONGRESS HAS CONSISTENTLY RECOGNIZED THE NATIONAL INTEREST IN, AND THE FEDERAL RESPONSIBILITY FOR, ENSURING THAT THE TAKING OF FISH STOCKS AND GAME POPULATIONS RESIDENT WITHIN ALASKA IS REGULATED IN A MANNER WHICH PROTECTS THE TAKING OF SUCH STOCKS AND POPULATIONS FOR SUBSISTENCE PURPOSES BY ALASKA NATIVES AND OTHER PERSONS RESIDENT IN RURAL VILLAGES AND AREAS, AND IN 1980 THE CONGRESS ASSERTED ITS JURISDICTION TO ESTABLISH THE REGULATORY STANDARD WHICH PRESENTLY GOVERNS THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF SUCH TAKINGS.

For the past eighty-three years the United States Congress has consistently recognized its responsibility, and has consistently asserted its jurisdiction, to ensure that the taking of fish stocks and game populations is regulated in a manner consistent which the continuation and protection of the taking of such stocks and populations by Alaska Natives and other persons resident in rural communities and areas.

For example, the first game law applicable to Alaska was enacted by the Congress in 1902, 32 Stat. 327 (1902). Although the Act established statutory seasons and other forms of regulation of the taking of game birds and animals, the statute specifically exempted the taking of such birds and animals by Indians and Eskimos for food from regulation. The 1902 subsistence exemption was re-enacted by the Congress in the 1908 Alaska Game Act, 35 Stat. 102 (1908) and the 1925 Alaska Game Act, 43 Stat. 743 (1925).

In 1958, when the Congress enacted the Alaska Statehood Act, 72 Stat. 339 (1958), it refused to transfer regulatory

authority over the taking of fish stocks and game populations to the State of Alaska until such time as the new state demonstrated that it had adopted a regulatory system which inter alia ensured that the taking of fish stocks and game populations by Alaska Natives for subsistence uses would be adequately protected. See Sec. 6(e), Pub. L. No. 85-508. This provision was added to the Alaska Statehood Act on the floor of the House of Representatives by an amendment offered by Representatives Pelly and Westland. By way of explanation as to why their amendment was needed, Pelly and Westland introduced a letter from Acting Territorial Governor Hugh Wade to the Alaska Senate expressing his concern that the fish and game statute which the Territorial Legislature had enacted in anticipation of statehood "overlooked or disregarded" the hunting and fishing rights "of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation [i.e. the 1925 Alaska Game Act, as amended]". 104 Cong. Rec. 9488-9489, 9750 (1958).

Between the transfer of authority to regulate the taking of fish stocks and game populations to the new State of Alaska in 1960 and the enactment of ANCSA in 1971 it had become obvious that the Alaska Board of Fish and Game was not institutionally inclined to adopt hunting and fishing regulations which adequately safeguarded the taking of fish stocks and game populations for subsistence uses as mandated by the Congress in 1958.

As a result, the United States Senate included a provision in its version of ANCSA which would have reasserted federal jurisdiction over the taking of fish stocks and game populations in Alaska to ensure that this important national goal was achieved. See Sec. 21, S. 35, 92d Cong., 1st Sess. (1971). The provision was deleted from the final version of ANCSA after the Conference

Committee received assurances from the State of Alaska that such a reassertion of federal jurisdiction was unnecessary because the Board of Fish and Game was prepared to adequately discharge its responsibility to protect subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas. However, in order to make unequivocally clear that both the Department of the Interior and the State of Alaska have a nondiscretionary responsiiblity to ensure that subsistence hunting and fishing by Alaska Natives is adequately protected, the Committee included the following admonition in its report to the Congress on the work of the conference:

> The Conference Committee expects both the Secretary [of the Interior] and the State [of Alaska] to take <u>any action necessary</u> to protect the subsistence needs of the Natives. House Rept. No. 92-746, 92d Cong., 1st Sess. 37 (1971)(Emphasis added).

By 1977 when the Congress began consideration of legislation which was enacted in 1980 as the Alaska National Interest Lands Conservation Act (ANILCA), it had become obvious that contrary to representations made by the State of Alaska in 1971, the Alaska Board of Fisheries and Alaska Board of Game had not adopted hunting and fishing regulations which adequately protected subsistence uses. <u>See for example Hearings on H.R. 39 before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs</u> 95th Cong., 1st Sess., Part XI, 398-479 (statement of Donald C. Mitchell), Part XII, 52-61, 461-497 (statement of Byron Mallot).

The suggested solution to the problem was for the United States Congress to reassert its jurisdiction over the regulation of the taking of fish stocks and game populations in Alaska to ensure that in the future such regulation would be conducted pursuant to federal regulatory standards which ensure that the taking of such stocks and populations by Alaska Natives and

other residents of rural communities and areas will be adequately protected.

Significantly, this approach was suggested and supported by Jay S. Hammond, then Governor of Alaska, who candidly admitted to the Congress that there was "some justification" for "the perception that state regulation has either favored urban hunters too much, or not favored rural hunters enough when the difficult allocation decisions were made," and then concluded with the request that:

> "I hope this Congress establishes the priority of subsistence use where there is a conflict on national interest lands. I believe this is a legitimate subject for [federal] legislation, and hope that is principle, which as been State policy for some time, is enacted into Federal law." Id. Part XII, 12 (statement of Hon. Jay S. Hammond).

The Congress responded to Governor Hammond's request by including Title VIII in ANILCA. Secs. 803 and 804 establish a federal standard which governs the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations. As Senator Ted Stevens, a major participant in the drafting of the version of ANILCA which was enacted into law, explained to the United States Senate, the Senate Committee on Energy and Natural Resources version of title VIII required the Secretary of the Interior to initiate a civil action "to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804." 126 Cong. Rec. S 15131 (December 1, 1980 daily ed.)(Emphasis added).

Senator Stevens went on to explain that though the State of Alaska did not object to the Congress compelling its regulatory agencies to adopt hunting and fishing regulations pursuant to the federal regulatory standard set forth in section 804, it

did object to the Secretary of Interior being assigned responsibility to initiate a civil action if the Alaska Board of Fisheries or Alaska Board of Game failed to to so. For that reason Senator Stevens persuaded the Congress to amend the judicial enforcement section of title VIII to eliminate the Secretary of the Interior's enforcement responsibility and establish a private cause of action in its stead.

As a result, if the Alaska Board of Fisheries or Alaska Board of Game adopts a regulation inconsistent with the federal regulatory standard set forth in Sec. 804, Sec. 807 authorizes local residents "aggrieved by a failure of the State...to provide for the priority for subsistence uses set forth in section 804... [to] 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." The exclusive relief afforded by Sec. 807 to remedy the Alaska Board of Fisheries' or Alaska Board of Game's adoption of an unlawful regulation is an order of the United States District Court requiring the offending board to adopt and submit regulations to the Court "which satisfy the requirements of Sec. 804." The language and legislative history of Secs. 804 and 807 of ANILCA make clear that the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses," as that term is defined in section 803 of ANILCA.

However, in addition to its concern that subsistence hunting and fishing by Alaska Natives and other residents of rural communities and areas be adequately protected by the Alaska Board of Fisheries and Alaska Board of Game, the Congress was also sensitive to the political tension which has historically

surrounded state and federal authority to regulate the taking of the same fish stocks and game populations within the boundaries of the fifty states. No person and no state, including the State of Alaska, any longer challenges the Congress' constitutional authority to supercede state regulation of resident fish stocks and game populations. See Kleppe v. New Mexico, 426 U.S. 529 (1976). However, during Congress' consideration of ANILCA, many members of Congress, including Senator Stevens, were of the opinion that, although constitutional, the assertion of such federal authority over the Alaska Board of Fisheries and Alaska Board of Game was politically unwise unless necessary to protect the national interest.

This policy was consistent with many actions of the Congress prior to enactment of ANILCA which purposely limited the Department of the Interior's authority to regulate the taking of fish stocks and game populations in contravention of state regulation. The Federal Land Policy and Management Act of 1976 is a recent example of congressional policy in this area. See Sec. 302(b), Pub. L. No. 94-579 (1976).

To the extent the Department of the Interior has been delegated regulatory authority to supercede state regulation, the Department has been similarly circumspect with respect to using it. The statute which delegates the U.S. Fish and Wildlife Service (FWS) authority to manage fish stocks and game populations within units of the National Wildlife Refuge System, for example, requires FWS regulations governing the taking of stocks and populations within refuges to be consistent with the hunting and fishing regulations of the state in which a refuge is located only "to the extent practicable to do so". If consistency is not practicable, FWS may supercede state regulation.

However, because of the political sensitivity involved,

FWS has voluntarily limited the exercise of its own jurisdiction. 50 C.F.R. 32.3(d) precludes FWS from adopting regulations governing the taking of a game population within a wildlife refuge which are more liberal than the state regulations which, but for FWS' superceding regulations, would control the taking of such population. It is important to note, however, that this self-imposed regulatory restraint is an act of political comity - not a constitutional or statutory requirement.

This long tradition of congressional sensitivity to the tension between federal responsibility toward and state interest in the regulation of the taking of the same fish stocks and game populations was reflected in title VIII of ANILCA. Although the Congress intended the regulatory standard set forth in Sec. 804 to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803, if the Alaska Legislature enacted a state statute which established the same regulatory standard, then "unless and until [such statute might be] repealed" the Congress intended the state statute, rather than Secs. 803 and 804, to govern the boards' adoption of fishing and hunting regulations. See Sec. 805(d).

If the Alaska Legislature enacted a statute of this nature and a board refused to adopt regulations consistent with its regulatory mandate, then although an aggrieved party is still authorized to file a civil action pursuant to Sec. 807, the claim for relief would be based upon violation of the state

statute rather than Sec. 804.[1]

This act of comity is similar to the approach the Congress followed when it established the Alaska Land Bank Program in Sec. 907 of ANILCA. Village and regional corporations authorized by ANCSA but established pursuant to and regulated by State law are authorized to place lands in the land bank. During the time lands are deposited in the bank, Sec. 907(c)(2) supercedes the laws of the State of Alaska and exempts such lands from state taxation, adverse possession and judicial execution. However, as a matter of comity, if the Alaska Legislature enacts state statutes which provide banked land any of the protections from involuntary loss set forth in Sec. 907(c)(2), then "such [state] laws, unless and until repealed, shall supercede the relevant subparagraph of subsection (c)(2) and shall govern the grant of the benefit so provided".

For the reasons set forth above, the language and legislative history of Secs. 804 and 807 of ANILCA make clear that in the absense of a state statute which establishes the same regulatory standard as that set forth in Secs. 803 and 804, the Congress intended such sections to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in section 803 of ANILCA.

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[1]Sec. 807(a) provides in pertinent part that:

> Local residents and other persons and organizations aggrieved by a failure of the State... to provide for the priority for subsistence uses set forth in section 804 (or with respect tto the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d))...

D. THE STATE OF ALASKA HAS NOT ENACTED A STATUTE WHICH ESTABLISHES THE SAME REGULATORY STANDARD AS THAT SET FORTH IN SECS. 803 AND 804 OF ANILCA. CONSEQUENTLY, SECS. 803 AND 804 CONTROL THE ALASKA BOARD OF FISHERIES' AND ALASKA BOARD OF GAME'S REGULATION OF FISH STOCKS AND GAME POPULATIONS WHICH ARE THE SUBJECT OF "SUBSISTENCE USES" AS THAT TERM IS DEFINED IN SECTION 803.

In 1978 the Alaska Legislature enacted ch. 151 SLA 1978. Subsequent to the enactment of ANILCA, the State of Alaska represented to the Secretary of the Interior that ch. 151 established the same regulatory standard as that set forth in Secs. 803 and 804 of ANILCA, that ch. 151 satisfied the requirements of section 805(d), and, consequently, that ch. 151 rather than Secs. 803 and 804 should be determined by the Secretary to control the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803. This conclusion was not apparent on the face of the statute.

On February 25, 1982, Secretary of the Interior James Watt wrote Governor Hammond indicating that the Department of the Interior could not at that time certify that the State of Alaska had satisfied the requirements of Sec. 805(d) of ANILCA because the purview of the state statutory definition of the term "subsistence uses" was not limited on its face to "rural Alaska residents". As Secretary Watt explained, the State had failed "to distinguish rural residents engaged in subsistence uses from other users who make 'customary and traditional uses' of fish and game resources."

In response, the Alaska Board of Fisheries and Alaska Board of Game adopted an interpretative regulation which limited the purview of the state statutory definition to residents of rural Alaska. Only this class of hunters and fishermen would be provided the prioirty for subsistence uses established by A.S. 16.05.251(b)

and 16.05.255(b). As a result, on April 14, 1982, Secretary Watt informed Governor Hammond that the State of Alaska had complied with the requirements of Sec. 805(d) of ANILCA, and that henceforth the ch. 151 SLA 1978, rather than Secs. 803 and 804 of ANILCA, would control the Alaska Board of Fisheries and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of subsistence uses. The interpretative regulation which brought the State of Alaska into compliance with Sec. 805(d) was codified as 5 A.A.C. 99.010.

Regrettably, on February 22, 1985, the Alaska Supreme Court issued its opinion in Madison v. Alaska Department of Fish and Game. The Court held that the Tenth Alaska Legislature did not intend to limit the purview of the term "subsistence uses" in ch. 151 to residents of rural Alaska and, consequently, the adoption of a regulation limiting the purview of the statutory definition in that manner was beyond the scope of the statute. Hence, contrary to Secretary Watt's determination on April 14, 1982, the State of Alaska has never been in compliance with the requirements of Sec. 805(d) of ANILCA, and, consequently, Secs. 803 and 804 still control the authority of the Alaska Board of Fisheries and Alaska Board of Game to adopt regulations governing the taking of fish stocks and game populations which are the subject of "subsistence uses" as that term is defined in Sec. 803.

The purpose of this petition is to request the boards to adopt a regulation which clarifies their regulatory authority in this regard.

E. THE PURVIEW OF THE REGULATORY AUTHORITY SET FORTH IN SEC. 804 OF ANILCA ENCOMPASSES THE TAKING OF FISH STOCKS WHICH AT ANY TIME OR DURING ANY SEASON OF THE YEAR MAY BE FOUND IN WATERS OF THE UNITED STATES AND GAME POPULATIONS WHOSE MEMBERS IN WHOLE OR IN PART USE OR MAY BE FOUND AT ANY TIME OR DURING ANY SEASON OF THE YEAR UPON LAND THE TITLE TO WHICH IS IN THE UNITED STATES OR UPON OR IN WATERS SUBJECT TO THE REGULATORY JURISDICTION OF THE UNITED STATES.

Paragraph (3) of proposed subsection (b) defines the term "fish stock" to encompass all fish stocks which at any time or during any season of the year may be found in waters of the United States, including but not limited to navigable waters described in 33 U.S.C. 1362(8), the territorial sea, waters located within the boundaries of a conservation system unit and waters which abut land the title to which is in the United States. Paragraph (4) defines the term "game population" to encompass all game populations whose members in whole or in part use or may be found at any time or during any season of the year upon land the title to which is in the United States, or upon or in waters described in paragraph (3). These definitions are consistent with both the intent of Congress embodied in title VIII of ANILCA and with fundamental principles of fish and game management.

During the four years of congressional consideration of ANILCA, the policies embodied in title VIII were the subject of prolonged, emotional, and intense debate. However, although all parties with an interest in title VIII often disagreed about various provisions and policies, one issue upon which all responsible parties did agree was that professional and scientific fish and game management requires fish stocks and game populations to be subject to one regulatory standard throughout their range. This is a fundamental tenet of fish and wildlife management profession. Bifurcation of the regulatory standard would not only be confusing, it would be dangerous to the longterm conservation

of the fish stocks and game populations being regulated.

On August 20, 1977, Governor Hammond used strong language to reinforce this point in testimony before the House Committee on Interior and Insular Affairs:

> "The subsistence way of life should be preserved in Alaska for as long as possible. I think that this goal can be accomplished if we all realize that what we really are concerned about are these two basics:
>
> First, the resource itself - the fish and wildlife - must be maintained if subsistence is to persist as a way of life. This requires two things: First, protective management of the resource-sustaining habitat, and professional, coordinated, scientific management of the wildlife or fish species itself.
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> ...
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> [C]rucial to protection of the resource is coordinated, scientific wildlife management that manages animal populations regardless of where they may roam, spawn, migrate or be taken. As you know, fish and wildlife have little regard for bureaucratic boundaries and, so far as I am concerned, this is argument enough in itself against segmenting the management of a single species or population according to land ownership or user groups. Split management of a single living resource may make some marginal sense in the context of political science; but it makes absolutely no sense whatsoever in the context of biological science." Id. Part XII, 414, 416-417 (statement of Hon. Jay S. Hammond).(Emphasis added).

For the reasons described by Governor Hammond, the adoption of a construction of the purview of section 804 of ANILCA which would authorize the Alaska Board of Fisheries to apply one regulatory standard to a king salmon run when it is inside the boundaries of the Yukon Delta National Wildlife Refuge and a different standard farther up the Yukon River or to authorize the Alaska Board of Game to apply one regulatory standard to hunting the harvestable surplus of the Nelchina caribou herd on public land and another for hunting the same herd on State and private land would place the health and longterm stability of fish stocks and game populations of national and international significance at considerable risk.

The approach embodied in subsection (b)(3) and (4) both

minimizes the risk of this result and is consistent with the intent of Congress embodied in Sec. 804.

With respect to fisheries, Sec. 804 applies to the taking of fish stocks on "public lands". Sec. 102 of ANILCA defines "public lands" as "federal land" title to which is in the United States, and "land" to include "waters, and interests therein". Consequently, with respect to fisheries, section 804 applies to fish stocks moving in waters in which the United States government has an "interest" - including a regulatory interest.[2] That this result was intended by the Congress is supported by the legislative history introduced by Senator Stevens to explain the intent of Congress in adopting a substitute for the original Senate version of section 807:

> "[T]he Committee section 807 establishes a complex 'judicial enforcement' scheme whereby the Secretary of the Interior is required to represent local advisory committees and regional advisory councils in civil actions to compel the State, if necessary, to conform its regulation of fish (stocks in the waters of Alaska), and wildlife populations on the public lands, to the requirements of section 804."[3] (Emphasis added).

With respect to game, Sec. 802(1) of ANILCA establishes a clear and unequivocal congressional policy that "subsistence uses" of game populations are to be regulated by the State of Alaska and the federal government in a manner consistent with "sound management management principles, and the conservation of healthy populations of...wildlife." With respect to the regulation of the taking of game populations which use, and

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[2] See, e.g. 46 U.S.C. 740 (admiralty and maritime jurisdiction of the United States extends to "navigable water"), 33 U.S.C. 1344 (Secretary of the Army has jurisdiction to prohibit dredging of or discharge of fill material into the waters of the United States, including the territorial seas).

[3] 126 Cong. Rec. S15131 (daily ed. December 1, 1980)(remarks of Senator Ted Stevens).

which are harvested for subsistence uses on, "public lands," the regulation of the taking of a population during a period of time when a population might be outside "public lands" pursuant to a regulatory standard different from the standard applied when the population is on "public lands" would violate the congressional policy set forth in Sec. 802(1) and would be a near guarantee for regulatory chaos.

It should be also be noted that Title VIII in general, and Sec. 804 in particular, were enacted by the Congress to benefit a class of hunters and fishermen composed primarily, albeit not exclusively, of Alaska Natives who reside in isolated rural villages and who provide sustenance for their families through hunting and fishing. For that reason in The People of the Village of Gambell v. Clark, ___ F.2d ___ (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit noted that with respect to the proper interpretation of the term "public lands" in Title VIII:

> "The most compelling reason for resolving the ambiguous language of Title VIII in favor of... [the interpretation urged by Alaska Natives residing in the village of Gambell] is that Title VIII was adopted to benefit the Natives. Under a familar rule of statutory construction doubtful language should be construed to further that purpose."

The Court then applied that principle of statutory construction to give the term "public lands" the widest possible purview in order to effectuate "Congress's intention to protect subsistence uses by rural residents of Alaska".

The regulation proposed in the instant petition is intended to benefit the same class of Native hunters and fishermen. Subsection (b)(3) and (4) embody an interpretation of Sec. 804 which is consistent with the fulfillment of this important national goal.

F. CONCLUSION.

Title VIII of ANILCA was intended by the Congress to advance an important national interest - the continuation and protection of the taking of fish stocks and game populations for personal and family consumption by Alaska Natives and other persons who reside in rural communities. The class of hunters and fishermen defined in Sec. 803 and the regulatory system established by Sec. 804 were carefully crafted by the Congress to fulfill this goal and were intended by the Congress to govern the Alaska Board of Fisheries' and Alaska Board of Game's regulation of the taking of fish stocks and game populations which are the subject of "subsistence uses" as defined in Sec. 803.

As the Senate Committee on Energy and Natural Resources, the committee which reported the version of title VIII which was enacted into law, explained:

> This section [i.e. Sec. 804] requires <u>both</u> the State and the Federal government to accord nonwasteful subsistence uses a preference over the taking of such resources for other purposes on the public lands... If a particular fish or wildlife population (e.g. salmon, moose, or caribou) in a particular area is sufficient to sustain a harvest by all persons engaged in subsistence and other uses, the implementation of restrictions on taking set forth in this section [i.e. Sec. 804] need not be imposed by <u>the State rulemaking authority</u>. However, if the continued viability of a particular population or the ability of rural subsistence-dependent residents to satisfy their subsistence needs would be threatened by a harvest by all such persons, <u>the State rulemaking authority</u>, in conjunction with the recommendations of the regional council representing the affected area, is required <u>by this section</u> to establish <u>regulations</u> which restrict the taking of such population to Alaska residents engaged in subsistence uses. Senate Rept. No. 96-413, 96th Cong., 1st Sess. 269-270 (1979) (Emphasis added).The

Alaska Legislature has not enacted a state statute which conforms to the requirements set forth in Sec. 805(d), and, consequently, the applicability of Secs. 803 and 804 to the boards' regulatory activities has not been superceded by state law.

The boards' recent attempts to adopt hunting and fishing

regulations which reflect the definition of "subsistence uses" set forth in ch. 151 SLA 1978 rather than Sec. 803 of ANILCA has disadvantaged the class of hunters and fishermen Title VIII was enacted to protect by placing them in the same regulatory class as urban hunters and fishermen. For example, as a result of the fishing regulations recently adopted by the Alaska Board of Fisheries, rural residents of the village of Tyonek and along the Copper River are no longer protected by regulation from being overwhelmed by competition from large numbers of urban sportsmen harvesting the same fish stocks.

The regulations recently adopted by the Alaska Board of Game also treat urban sportsmen as unfairly as they do rural hunters and fishermen engaged in "subsistence uses" as that term is defined in Sec. 803. The application of the mainstay of livelihood, local residency, and availability of alternative resources criteria to allocate access to sport hunting opportunities among urban sportsmen makes little sense. Although both Sec. 804 and ch. 151 SLA 1978 include the same three criteria, Sec. 804 limits application of the criteria to allocating access to the harvestable surplus of a fish stock or game population among hunters or fishermen within the class of persons engaged in "subsistence uses" of the stock or population as defined by Sec. 803. Application of the criteria to <u>all</u> hunters and fishermen, both urban and rural, is a needlessly divisive and prohibitively expensive administrative nightmare.

Consequently, for all of the reasons set forth above, the Alaska Federation of Natives respectfully requests that its Petition Proposing the Adoption of a Regulation Governing the

Identification and Regulation of Subsistence Uses of Fish Stocks and Game Populations by granted and its proposed regulation adopted.

DATED: July 18, 1985

Janie Leask
President
Alaska Federation of Natives

RECEIVED JAN 3 1 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC. and ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC.,

Plaintiffs,

vs.

ROBERT JANTZEN, Director, United States Fish and Wildlife Service, and DON COLLINSWORTH, Commissioner, Alaska Department of Fish and Game,

Defendants.

and

THE ALASKA FEDERATION OF NATIVES, THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, and STATE REPRESENTATIVE TONY VASKA,

Intervenors/Defendants.

MEMORANDUM AND ORDER

J84-013 CIV

I. Background

THIS CAUSE comes before the court on the parties' cross motions for summary judgment. It concerns issues of game

management and Native subsistence hunting in the Yukon-Kuskokwim delta. Four species of migrating birds, the cackling Canada goose, the emperor goose, the white-fronted goose, and the black brant, have suffered major declines in population over the last 20 years. All parties agree that unless these declines are reversed, the species' populations may fall to dangerously low levels. As of 1983, the estimated populations are as follows: cackling Canada goose - 30,000; white-fronted goose - 113,000; black brant - 110,000; and emperor goose - 71,000. Approximate estimates for 1984 are: cackling Canada goose - 30,000; white-fronted goose - 100,000; black brant - 133,000; and emperor goose - 71,000. These numbers are necessarily approximate, given that geese do not fill out census forms.

The Yukon-Kuskokwim delta is a major summer nesting ground for these species. The species traditionally have been hunted by Natives in the spring for subsistence, and this hunting continues. As explained by the Native intervenors, the arrival of the migrating birds represents the first available fresh meat after the long winter and they therefore are an important part of the Native diet. The evidence before this court indicates that this harvesting - along with hunting by sportsmen, loss of habitat, and natural predation - has been a major cause of the population decline.

Such spring hunting is potentially illegal under the terms of the migratory bird treaty between the United States and Canada

and the Migratory Bird Treaty Act of 1918 (MBTA), which implements that treaty's provisions in the United States. See United States-Great Britian Convention for the Protection of Migratory Birds, August 16, 1916, 39 Stat. 1702, T.S. 628 (Canada Treaty); Migratory Bird Treaty Act of 1918, Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (1982)). Both state and federal law enforcement officials have assumed spring taking of geese by Natives to be illegal, but in recent years virtually no effort has been made to enforce compliance. As was found by this court in denying plaintiffs' motion for preliminary injunction, traditional methods of enforcing game laws have not been effective in the vast reaches of rural Alaska for both political and geographical reasons.

In January, 1984, the Association of Village Council Presidents (AVCP), Alaska Department of Fish and Game (ADF&G), U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game, and two California sportsmens' groups tentatively agreed to a cooperative plan to reduce hunting of some species. This plan, called the Hooper Bay Agreement, called for no hunting or harvest of cackling Canadian geese and reduced hunting and harvest of white-fronted geese and black brants. Emperor geese were not included in the agreement for the reason that they do nct migrate to California.

The Hooper Bay Agreement was replaced in 1985 by the Yukon-Kuskokwim Goose Management Plan. See Ex. A, Docket 96. In

addition to continuing the hunting restrictions of the previous agreement, the plan also restricts sport and subsistence hunting of the emperor goose. Native leaders have worked closely with villages in the delta region to publicize it and encourage compliance.

Pursuant to the plan, the parties adopted monitoring, verification and enforcement procedures. Ex. B, Docket 96. Under these procedures, any suspected violations of it are to be reported to the USFWS, APVC, and the ADF&G. These procedures further provide that the USFWS and ADF&G shall cite individual hunters for violations of the plan upon (1) a local village request; (2) recurring non-compliance or blatant violation; or (3) use of charter or private aircraft to assist in hunting. Other instances of non-compliance are responded to more informally. A cooperative team of AVCP, ADF&G and USFWS employees visits villages in response to reported violations to ensure compliance through education and information.

Initial reports indicate that the cooperative plan has been successful. See, e.g., USFWS Report attached to Docket 119. There has been particularly strong support for the program from the Native community. Apparently, this had led to a major decline in the subsistence harvest of each of the species in question. The plan has also substantially reduced egg gathering activities. Of equal importance, because of the involvement of



AO 72A
Rev. 8/82)

the Native community in the plan, increased enforcement, including the issuance of citations, has occurred.

Plaintiffs seek to have the court set aside the Goose Management Pla as well as what is known as the "Watson Policy" as violative of the MBTA and improperly promulgated. The "Watson Policy" refers to a policy memorandum written by the Alaska Area Director of USFWS in 1975. In this memorandum, he stated "that where there is a demonstrable need for the taking of migratory bird resources for subsistence purposes, the U.S. Fish and Wildlife Service will not recommend prosecution in Federal court for a violation of the Migratory Bird Treaty Act during the statutory closed period." Memorandum of Gordon Watson to All Stations, Alaska Area, December 5, 1975, Plaintiffs' Exhibit A.

After plaintiffs filed this suit against the state and federal defendants, the Alaska Federation of Natives and the Association of Village Council Presidents moved for, and were granted, intervenor status. In their cross-claim, among other arguments, they allege that Congress had repealed the MBTA's prohibition on spring subsistence hunting in the Alaska Game Law of 1925, Ch. 75, 43 Stat. 739 (1925), and the Fish and Wildlife Improvement Act of 1978 53(h)(2), Pub. L. No. 95-616, 92 Stat. 3110, 3112 (1978) (codified at 16 U.S.C. § 712 (1982). The court will address these claims first.

## II. Intervenors' Cross-Claim

### A. The Canadian Treaty and the MBTA



:O 72A
Rev. 8/82)

Prior to the passage of the MBTA, Congress had established a "subsistence" exception to the Alaska game laws. See Alaska Game Law of 1902, ch. 1037, 31 Stat. 327 (1902); Alaska Game Law of 1908, ch. 162, 35 Stat. 102 (1908). These laws allowed Natives to hunt game animals and birds at any time for food or clothing, and allowed miners and explorers to kill such game at any time when in need of food. See H.R. Rep. No. 951, 57th Cong., 1st Sess. 2 (1902).

The passage of the MBTA in 1918 apparently outlawed spring subsistence hunting of most migratory birds by Natives for the reason it created a closed season on migratory game birds between March 10 and September 1 of each year. The Act also left an extremely short to non-existent fall hunting season for the Natives, as the geese leave the delta in or before September.

Intervenors initially allege that Congress did not intend the MBTA to apply to Alaska, or to repeal by implication the Alaska Game laws and their subsistence exceptions. The court disagrees, and finds that Congress intended the MBTA to apply to subsistence hunting in Alaska. First, the purpose of the MBTA was to implement the Canadian Treaty, a treaty clearly intended to include Alaska Natives within its scope. Article II, sec. 3 of the Treaty states:

> The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.



) 72A
ev. 8/82)

Although the Treaty's framers created a subsistence exception for migratory nongame birds, they created no similar exception for migratory game birds. This demonstrates the framers' intent that no subsistence exception exist for migratory game birds, and that the Treaty apply to Alaska.

The purpose of this exception was explained in a letter from the Secretary of Agriculture to the Secretary of State, dated March 10, 1916:

> The word other is inserted before "migratory non-game birds" to differentiate this group from migratory insectivorous birds in Paragraph 2 and the proviso is added "except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres, and puffins and their eggs for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale." This proviso affects primarily the Territories of Alaska and the coastal Provinces and Territories of Canada, where the natives have been accustomed since time immemorial to utilize certain sea birds for food and clothing. The clause follows essentially certain provisions already contained in the laws of Alaska and some of the Provinces of Canada and is inserted merely to prevent any hardship on the natives in these remote parts of the continent.

Federal Memorandum in Opposition to Intervenors' Motion for Summary Judgment, Ex. A.

Other factors further evidence that the MBTA applies to Alaska. First, by its own language, the MBTA applies to both "States " and "Territories." See, e.g., MBTA § 7, 40 Stat. at 756. Second, an attempt by Mr. Sulzer, the delegate from Alaska to the House of Representatives, to amend the MBTA to create a subsistence exemption was voted down. See 55 Cong. Rec. 7457 (June 6, 1918) (comments of Rep. Sulzer). Last, regulations



) 72A
ev. 8/82)

issued contemporaneous with the MBTA included Alaska within their scope. See Proclamation of July 31, 1918, 40 Stat. 1812; Proclamation of October 25, 1918, 40 Stat. 1863.

B. The Alaska Game Law of 1925

Intervenors further contend that the Alaska Game Law of 1925, ch. 75, 43 Stat. 739 (1925), created a "subsistence" exception to the MBTA. The Alaska Game Law of 1925 superseded the 1900 Game Law, and by its own terms, comprehensively regulates all hunting of game, including migratory birds, in Alaska. See Alaska Game Law of 1925, §§ 2, 8 and 10, 43 Stat. at 740, 743.

Section 8 of the Act prohibits all taking of game, including migratory birds, unless permitted by the Act or regulations made pursuant to it.[1] Section 10 of the Act authorizes the Secretary to issue comprehensive regulations to implement the Act, but then places certain restrictions on the scope and content of

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1 Section 8, in relevant part, reads as follows:

> Sec. 8. TAKING OF ANIMALS AND BIRDS RESTRICTED.--That, unless and except as permitted by this Act or by regulations made pursuant to this Act, it shall be unlawful for any person to take, possess, transport, sell, offer to sell, purchase, or offer to purchase any game animal, land fur-bearing animal, wild bird, or any arts thereof, or any nest of egg of any such bird . . . : Provided, that nothing in this Act shall be construed to prevent the collection or exportation of animals, birds, parts thereof, or nests or eggs of birds for scientific purposes, or of live animals, birds, or eggs of birds, for propagation or exhibition purposes, under a permit issued by the Secretary of Agriculture and under such regulations as he may prescribe. . . . (Emphasis added).



O 72A
Rev. 8/82)

those regulations. Two of those restrictions are relevant to the issue before the court. First, the Act states that no regulation shall "prohibit any Indian or Eskimo, prospector or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available." Second, the Act requires that "nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations."[2] The court finds that these two sections cannot

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[2] The relevant language of the statute reads as follows:

> Sec. 10. Regulations.--That the Secretary of Agriculture, upon consultation with or recommendation of the [Alaska Game] commission, is hereby authorized and directed from time to time to determine when, to what extent, if at all, and by what means . . . game birds, nongame birds,and nests or eggs of birds may be taken, possessed, transported, caught, or sold, and to adopt suitable regulations permitting and governing the same in accordance with such determinations. . . .
>
> . . .
>
> but no such regulation . . . except as herein provided, shall prohibit any Indian or Eskimo, prospector, or traveler to take animals or birds during the close season when he is in absolute need of food and other food is not available, but the shipment or sale of any animals or birds or parts thereof so taken shall not be permitted, except that the hides of animal so taken may be sold within the Territory, but the Secretary by regulation may prohibit such native Indians or Eskimos, prospectors, or travelers from taking any species of animals or birds for food during the close season in any section of the Territory within which he shall determine that the supply of such species of animals or birds is in danger of extermination; nor shall any such regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

Alaska Game Act of 1925, § 10, 43 Stat. at 743-44.



O 72A
Rev. 8/82)

be reconciled. The issue thus is whether the "emergency taking" clause must be read as an exception to the MBTA, i.e., the MBTA applies except for emergency taking, or whether the MBTA excludes migratory birds from an emergency taking exception.[3] To solve this problem, the court must divine the Congressional intent behind the 1925 Act. Fortunately for the court, the structure of the Act contains a number of indications of that intent.

First, the court finds that Congress intended the 1925 Act to comprehensively regulate all game and bird hunting in Alaska and replace the MBTA as a source of authority for issuing regulations in Alaska. Section 8, for example, makes all taking of birds illegal, "except as permitted by this Act or by regulations made pursuant to this Act." The plain meaning of this language is that Congress no longer intended the MBTA to be a statutory authority for migratory bird regulations.

Section 10 of the Act further evidences Congressional intent that all future regulation of migratory birds in Alaska be pursuant to it and not to the MBTA. Section 10 gives the Secretary comprehensive authority to regulate taking of migratory birds. See footnote 2 supra. The final proviso of the section further supports this view. It states:

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Initially, the court finds that the "emergency exception" in the 1925 Act to be a positive grant of authority to natives, prospectors, and travelers to harvest game when in need. To read it otherwise would rob the section of any meaning or effect.



O 72A
Rev. 8/82)

nor shall any regulation contravene any of the provisions of the migratory bird treaty Act and regulations.

If Congress had intended migratory bird regulations to be promulgated under the MBTA, it would not have been necessary for Congress to order the Secretary not to issue regulations in conflict with it. Rather, the proviso indicates that Congress expected the Secretary to issue new regulations on migratory birds under the 1925 Act and not under the MBTA.

Section 16 of the 1925 Act further demonstrates that Congress intended it to supersede the MBTA as the basis of bird regulation.[4] Assuming that the MBTA superseded the 1908 Act the MBTA would have been the primary source of bird regulation in Alaska at the time of the 1925 Act. If Congress had intended the MBTA to continue to be in effect in Alaska as an independent basis for regulation after the passage of the 1925 Act, it would not have repealed its applicability to Alaska in section 16. See discussion below.

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> Sec. 16. Existing Legislation Continued in Force Temporarily. -- That the provisions of existing laws relating to the protection of game and fur-bearing animals, birds, and nests and eggs of birds in the Territory shall remain in full force and effect until expiration of ninety days from the date of publication of regulations of the Secretary of Agriculture adopted pursuant to the provisions of this Act.

Alaska Game Act of 1925 § 16, 43 Stat. at 747 (emphasis added).



\O 72A
Rev. 8/82)

While Congress intended all regulation of bird hunting in Alaska to be pursuant to the 1925 Act, nevertheless the terms of the MBTA were incorporated into it by reference, and any regulation under the 1925 Act was to be consistent with the MBTA. The question thus arises whether the 1925 Act repealed the MBTA as it applied to Alaska in any manner. Such a repeal could be either express or implied. 1A Singer, Sutherland Statutory Construction (Sands Fourth Edition 1985 Revision) § 23.07.

First, the court finds that section 16 of the 1925 Act expressly repealed the MBTA insofar as it applied to Alaska. This section voids all previous enactments relating to the protection of birds in Alaska. Given that Congress was aware of the MBTA when this section was enacted (see the section 10 proviso), the language's plain meaning is that Congress intended to include the MBTA within the term "existing legislation."[5] Additionally, such a result--that all previous acts are void irregardless of consistency--accords with the conclusion reached above that Congress intended the 1925 Act to be the comprehensive source of regulation for all bird hunting in Alaska. Nevertheless, since the 1925 Act incorporates the terms of the MBTA by reference, the MBTA still applied to Alaska to the extent it was not inconsis-

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5 This clause is not a "general repealing clause." See 1A Singer at § 23.08; Hess v. Reynolds, 113 U.S. 73, 79 (1885); Henderson's Tobacco, 78 U.S. (11 Wall.) 652 (1870). Section 16 does not merely void prior legislation to the extent it was inconsistent. Rather, all previous enactments are voided, irregardless of consistency.



D 72A
ev. 8/82)

tent with the other terms of the 1925 Act. However, this application was through its incorporation into the vehicle of the 1925 Act.

Second, the court finds that the 1925 Act repealed the MBTA's applicability to Alaska by implication at least so far as it is contrary to the 1925 Act's subsistence exemption. As stated by the Supreme Court,

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal "must be clear and manifest." It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy."

United States v. Borden Co., 308 U.S. 188, 198-96 (1939) (citations omitted). Thus, where a particular local law conflicts with an earlier general law of nationwide application, the special or local law will supersede the general enactment to the extent they are inconsistent. 1A Singer at § 23.16.

To determine whether there is an inconsistency between the 1925 Act and the MBTA, the court must first determine the relationship between the conflicting clauses in section 10 in the 1925 Act. The court finds both cannot simultaneously be given their full scope. If the penultimate emergency need[6] clause is

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6 As noted below, the emergency exception was expanded to a broader subsistence exception in 1940.



O 72A
Rev. 8/82)

given its plain meaning, then the word "birds" within the exception would apply to both migratory and non-migratory birds and contravene the MBTA. If, however, the MBTA clause is given precedence, then the emergency need exception only applies to non-migratory birds, not all birds as its language suggests.

A number of factors show that Congress intended the emergency need exception to take precedence. While no one of these factors is conclusive, the weight of all the factors supports the conclusion. First, the plain language of the emergency need exception compels this result. Congress shows it knew how to distinguish between different types of birds elsewhere in the 1925 Act. Its failure to do so here is evidence that it intended the exception to include all birds.

Second, the emergency need proviso states that "[no regulation] . . . shall prohibit any Indian or Eskimo to take . . . birds during the close reason when he is in absolute need of food . . . ." This direct grant of authority under the statute allows Natives to undertake subsistence hunting, even absent implementing regulations.[7] The MBTA clause only applies to regulations issued pursuant to the 1925 Act. Consequently, it must be presumed that the MBTA was not meant to apply to taking

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7 This position is further supported by the subsection of the emergency need proviso that allows the Secretary "by regulation" to limit such taking in event of species decline. The implication is that, absent such regulation, emergency need taking is allowed.



.O 72A
Rev. 8/82)

for subsistence/emergency needs, which was permitted without regulation.

Third, the court places great weight on the contemporaneous interpretation given to the 1925 Act by the Department of Agriculture, the agency charged with issuing regulations. In May 1925, four months after the Act's passage, the Department issued regulations that interpreted the Act as creating an "emergency" exception to the MBTA. See U.S. Dept. of Agriculture, Bureau of Biological Survey, Alaska Game Law and Regulations and Federal Laws Relating to Game and Birds in the Territory, issued May 1925 (Federal Defendants' exhibit "E". Intervenor's Exhibit "3"). Regulations 12 and 13 created seasons and set bag limits for migratory birds. Regulation 8, however, provided an absolute exception to those limits, providing:

> REGULATION 8.--TAKING OF GAME BY PROSPECTORS, TRAVELERS, AND CERTAIN INDIANS WHEN IN NEED OF FOOD
>
> An Indian, Eskimo, or half-breed who has not severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise and an explorer, prospector, or traveler may take animals or birds in any part of the Territory at any time for food when in absolute need of food and other food is not available, but he shall not ship or sell any animal or bird or part thereof so taken.

This interpretation prevailed for 19 years, until 1944 (See below.)

Fourth, the court relies on the principles of statutory interpretation that ambiguities in statutes intended to benefit Natives must be resolved in favor of the Natives, and that the

emergency clause, being the more specific, locally-oriented clause, is presumed to control over the MBTA, the more general statute. See, e.g., Morton v. Mancari, 417 U.S. 540, 550-51 (1974). Last, reading the "emergency" exemption as controlling is logical as well. It would be reasonable to assume that, given an "absolute" need for food, Congress would intend that all type of game be available for taking to avoid starvation.

Based on the above factors, the court finds that Congress intended the "emergency need" provision to create an exception to the MBTA rather than the other way around. Consequently, the 1925 Act, at least to the extent of that provision, is repugnant to the MBTA and impliedly repeals the MBTA to the extent of that inconsistency.

C. The 1940 "Subsistence" Amendment and the 1943 Game Act

In 1940, Congress expanded the "emergency" provision in the 1925 Act to create a broader subsistence exception. The 1925 Act had created a narrow subsistence exception, under which a Native could take game and birds out of season "when in absolute need of food and other food is not available." Federal agencies apparently interpreted this standard narrowly to prosecute Natives for hunting game out of season.[8] In order to reconfirm that the "need" exception was intended to apply to subsistence hunting, Congress amended section 10 of the 1925 Act to allow

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8 The major area of dispute was deer hunting in southeast Alaska.



G 72A
Rev. 8/82)

Natives to take birds and animals out of season "when . . . in need of food and other sufficient food is not available." Act of October 10, 1940, ch. 845, 54 Stat. 1103-04; H. Rep. No. 2746, 76th Cong. 3d Sess. (1940). Thus, to the extent that the 1925 Game Act survived statehood, it survived in this broader form.[9]

D. The 1944 Regulation

In 1944, the USFWS amended the subsistence regulation to exclude migratory birds from its scope. As rewritten, the regulation read:

> An Indian or Eskimo, or an explorer, prospector, or traveler, may take animals, birds (except migratory birds), or game fishes in any part of the territory at any time for food when in need thereof and other sufficient food is not available, but he shall not transport or sell any animal, bird, game fish, or part thereof so taken; and an Indian or Eskimo also may take, possess, and transport, at any time, auks, auklets, guillemots, murres, and puffins and their eggs for food, and their skins for clothing, for his own use and that of his immediate family.

9 Fed. Reg. 5270 (May 15, 1944) (emphasis added). When an administrative agency changes its interpretation of a statute after a long period of time, the court must give far more credence to the original interpretation than the later reinterpre-

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9 The 1925 Act was reenacted, with amendments not relevant here, in 1943. Act of July 1, 1943, ch. 183, 57 Stat. 301. This reenactment is important in one sense, however. At the time of reenactment, Congress had before it the long-standing regulation allowing subsistence hunting of migratory birds. Congress' failure to clarify the statute's language demonstrates its acceptance of that regulatory interpretation and must be seen as a ratification of the regulation.

tation. See Watt v. Alaska, 451 U.S. 259, 272-73 (1981). The court finds that the reinterpretation here was contrary to law, and the prior interpretation correct. Accordingly, it is the 1925 Act and not the 1944 regulation that controls.

E. Alaska Statehood Act

The federal defendants argue that even if the 1925 Act repealed the MBTA by implication, the 1925 Act was in turn "superseded" or "rendered obsolete" by the Alaska Statehood Act, thus reviving the MBTA. See Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act states:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska Game Law of July 1, 1943, [the 1925 Alaska Game Law, as amended], and under the provisions of the Alaska commercial fisheries laws of June 26,1906 [citation omitted] and June 6, 1924 [citation omitted] as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; Provided, that the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety calendar days after the Secretary of the Interior certifies to the Congress that the Alaska State legislatures has made adequate provision for the administration, management, and conservation of said resources in the broad national interest * * *.

Federal defendants admit there was never an express repeal of the 1925 Act. See generally Alaska Omnibus Act, Pub. L. 86-70, 73 Stat. 141 (1959) (act repealing laws made obsolete by



O 72A
Rev. 8/82)

Statehood Act). However, if a statute was not expressly repealed, any repeal (at least under the facts of this case) must have occurred through repeal by implication.

1. Express Repeal

Although not mentioned by the parties, there in fact was an express repeal of the 1925 Act. See Fish and Game Code of Alaska, Ch. 94, 1959 Session Laws of Alaska, Art IV, § 1. For the reasons stated below, this repeal did not affect that portion of the 1925 Act that regulated migratory birds.

This repeal by the Alaska State Legislature presumably was under the authority granted it by section 8(d) of the Alaska Statehood Act. This section allowed the state to modify or repeal Territorial laws, that is "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the union." See generally Metlakatla Indian Community v. Egan, 362 P.2d 901, 922 (Alaska 1961), vacated on other grounds, 369 U.S. 45 (1962) (discussing effect of § 8(d)).

This statute did not effectively repeal the 1925 Act's subsistence exception to the MBTA for two reasons. First, that portion of the 1925 Act that regulated migratory birds was not a law "the validity of which is dependent solely upon the authority of Congress to provide for the government of Alaska. . . ." Rather, that regulation's validity was equally based on the



.O 72A
Rev. 8/82)

authority of Congress to implement treaties. See Missouri v. Holland, 252 U.S. 416 (1920). The fact that Congress incorporated the terms of the MBTA, which was based on Congress' treaty power, into the 1925 Act by reference clearly demonstrates Congress' intent to rely on its authority. Additionally, Congress in the 1925 Act chose, for humanitarian reasons, not to enforce the 1916 Canadian treaty against Natives in need of food. Although this exception was contrary to the terms of the treaty, Congress nevertheless was acting under its authority to implement the treaty when it decided to implement it only partially.

Second, even after statehood, the authority to manage migratory birds remained an area of federal regulation, and such authority was not passed to Alaska. See Federal opposition brief, Docket 70, at 38. The reason for this appears in a letter written by the Department of the Interior that appears in a Senate Report on Alaska statehood:

> [The Statehood Act] would transfer to the State of Alaska the same jurisdiction and control over the fisheries and wildlife therein as are possessed and exercised by the existing States within their territorial limits and adjacent waters. Authority over matters affecting migratory birds would not be transferred, since this is a subject which is governed by Federal law throughout the Union. . . . [This situation] involve[s] the discharge of international commitments, undertaken by the United States through treaty or convention.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Accordingly, given that regulation of taking of migratory birds is an area of federal primacy, the Statehood Act's § 8(d) did not give the



O 72A
Rev. 8/82)

state the authority to repeal federal policy in the area.

2. Repeal by Implication

The Statehood Act also did not impliedly repeal the 1925 Act's regulation of migratory birds. As noted above, in order for there to be repeal by implication, there must be actual inconsistency or repugnance between statutes. If implied repeal is to be present here, such inconsistency must be found in section 6(e) of the Statehood Act, which transferred the administration and management of fish and wildlife resources to Alaska. However, authority over regulation of migratory bird takes was not transferred to Alaska (see above). It therefore cannot be shown that there was the transfer of any authority to the state that would be inconsistent with continued federal management of migratory birds under the 1925 Act.

F. The Fish and Wildlife Improvement Act of 1978

The court declines to address whether the Secretary has authority to issue regulations pursuant to the Fish and Wildlife Improvement Act of 1978, § 3(h)(2), Pub. L. No. 95-616, 92 Stat. 3112 (1978) (codified at 16 U.S.C.§ 712(1) (1982)). There is no case or controversy in this area. Any opinion would be advisory in nature, the issues not being ripe for decision.

G. Conclusion

In conclusion, the court finds that the MBTA's direct

regulation of migratory birds in Alaska was repealed by the 1925 Act. However, since the 1925 Act incorporates the terms of the MBTA by reference, the net result is that the MBTA's terms, except for subsistence situations, continue to apply. Such regulation is pursuant to authority granted the Secretary by the 1925 Act. The court further finds that the Statehood Act did not transfer authority over migratory birds to Alaska, and that therefore the 1925 Act's provisions on migratory birds continue in effect. In the absence of regulation to the contrary, subsistence hunting of migratory birds for nutritional (as opposed to cultural or other) needs remains legal.

III. Plaintiffs' Claims

A. The Hooper Bay Agreement

Plaintiffs allege that the Hooper Bay Agreement was adopted in violation of a number of statutes and that its adoption was arbitrary and capricious. Because the Hooper Bay Agreement has been superseded by the 1985 Yukon-Kuskokwim Delta Goose Management Plan, these claims must be dismissed as moot.

B. The Watson Non-Enforcement Policy

The Watson policy of December 5, 1975, purported to define circumstances in which the U.S. Fish and Wildlife Service would forebear to enforce the MBTA against subsistence users. Plaintiffs challenge this declaration of policy on a variety of procedural and substantive grounds. Because this court holds



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Rev. 8/82)