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4222.24 SRES SUBSISTENCE LEGAL QUESTIONS (file 3)

1205

that the MBTA does not apply to the subsistence takings addressed by the policy, the forebearance promised by the Watson Non-Enforcement Policy is irrelevant. To invalidate the policy would not affect enforcement--there can be none--or remedy the injuries of which plaintiffs complain. Accordingly, the claims relating to the validity of this policy are moot.[10]

C. The 1985 Yukon-Kuskokwim Delta Goose Management Plan

1. APA

Plaintiffs apparently contend that the current Goose Management Plan (GMP) constitutes a regulation adopted without compliance with the Administrative Procedure Act. Portions of the GMP are not self executing; the proposed restrictions on sport hunting, for example, were not intended to become effective without separate promulgation of appropriate regulations. Plaintiffs, however, challenge the agreement only insofar as it allegedly restricts agency discretion with respect to enforcement of the MBTA against subsistence users and delegates enforcement responsibility to the Association of Village Council Presidents (AVCP).

This claim is mooted by this court's holding regarding the reach of the MBTA. In essence, the subsistence-enforcement

---

10 Alternatively, the lack of redressability of plaintiffs' alleged injury may be viewed as vitiating standing. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). What is clear is that no case or controversy exists with respect to the Watson policy.

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aspect of the GMP has become a mere statement of intent by the AVCP to enforce the plan voluntarily. The Fish and Wildlife Service cannot enforce the MBTA against bona fide subsistence users in the Delta, and its promises to refrain from doing so under certain conditions are irrelevant. Thus, the GMP is no longer a "promise" to withhold enforcement of the MBTA.

2. NEPA

For the same reason, plaintiffs' National Environmental Policy Act (NEPA) claim regarding the GMP is also moot. Given the irrelevance of the federal promises not to enforce, the subsistence aspect of the GMP is not the major federal action required to trigger NEPA. 43 U.S.C. § 4332(c). Moreover, it would be futile to order an EIS for a government declaration regarding application and enforcement of an act it has no power to enforce.

It is conceivable that the GMP as a whole could trigger the EIS requirement, even though much of it is not self-executing and subsequent implementing regulations might be promulgated only after issuance of their own EIS's. When the moot MBTA-enforcement aspect of the plan is removed, what remains is a plan in which state and federal governmental parties propose interrelated actions to reduce sport hunting take, and which the AVCP states on behalf of its constituents a plan to reduce subsistence take on a voluntary basis. Even if NEPA applies to the GMP as a whole, however, it must be remembered that plaintiffs' alleged

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injury grows solely out of subsistence hunting and egging. The Fish and Wildlife Service's acceptance of voluntary concessions regarding that legal take has caused plaintiffs no injury in fact; in other words, the alleged injury from subsistence take is not "fairly traceable" to the action occurring here, i.e., voluntary reduction in subsistence take. Cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261 (1977). Moreover, invalidation of the GMP would not redress plaintiffs' injury. See Simon, supra. Plaintiffs are therefore without standing to raise NEPA issues growing out of the GMP.[11]

3. Yukon Delta National Wildlife Refuge/ANILCA Claims

Section 303(7)(B) of the Alaska National Interest Land Conservation Act (ANILCA) sets forth the purposes for which the Yukon Delta National Wildlife Refuge shall be managed. 94 Stat. 2392. Sub-parts (ii) and (iii) of the above section create the following purposes for the refuge:

> (ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;
>
> (iii) to provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local rural residents;

---

11 Even if plaintiffs had standing to raise the NEPA issues and prevailed on those issues, it is likely that the "exceptional circumstances" doctrine would preclude issuance of an injunction pending completion of the EIS. See American Motorcyclist Ass'n v. Watt, 714 F.2d 963, 966-97 (9th Cir. 1983).

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There is no evidence that Congress intended to prevent any taking of migratory birds in the refuge. Such an intent would conflict with Congressional intent in passing section 3(h)(2) of the FWIA. See 16 U.S.C. § 712(1) and associated legislative history. In any event, the Canadian government has agreed to amend the 1916 treaty to allow some subsistence huntinr 7 migratory birds. Thus, allowing subsistence hunting does n conflict with the purpose of any treaty obligation. On the ..her hand, if this section is read as prohibiting all subsistence hunting of migratory birds, section (iii) becomes devoid of meaning, as practically all birds within the refuge are migratory and thus would not be subject to subsistence take.

IV. State's Motion to Dismiss Counts IV and VII and Part of Count I

Plaintiffs have not opposed the state's motion to dismiss their state law claims. The motion is deemed well taken and granted. Local Rule 5(B)(4).

Accordingly, IT IS ORDERED:

(1) THAT the intervenors' cross-motion for summary judgment on their cross claims is granted in part and denied in part as set forth above.

(2) THAT the state's motion to dismiss Counts IV, VII and part of Count I of plaintiff's complaint is granted;

(3) THAT the various parties' motions to dismiss/grant summary judgment on plaintiffs' claims are granted:

(4) THAT plaintiffs' motion for partial summary judgment is denied;

(5) THAT plaintiffs' motion to vacate stay is denied as moot;

(6) THAT the federal defendants' cross-motion for summary judgment against intervenors is denied in part and granted in part, as set forth above.

DATED at Anchorage, Alaska, this 24th day of January, 1985.

, United States District Judge

Outdoor C — cc: Gregory F. Cook 6-9719
Dept of Justice/Anc Go between — Bruce Landon
Larri Irene Spengler 3600
AFN — Donald C. Mitchell 276-1681
Nat'l Rifle Assn — Wayne Anthony Ross
James R. Hanson - Columbus Oh. W. Life Legisl Fund of Am. lobbyist — a lot of exp.
Go between Waterfowl — Clarke Young 6-5755
Kenneth O. Jarvi 276-4271
Olof Hellen 276-2713
Jim Kilbourne --
J. Carol Williams - appelate Div. - Dept of justice WDC

Jack

72A
ev. 8/82)

[illegible]

DAVID [illegible],

Respondent.

Dist. Ct. Case No. 3KO-83-455 Cr.
Ct. App. Case No. A-210
Supreme Ct. Case No. S-99[illegible]

ON PETITION FOR HEARING FROM THE COURT OF APPEALS

BRIEF AMICI CURIAE OF
PLAINTIFFS IN BOBBY v. ALASKA AND
THE NATIVE AMERICAN RIGHTS FUND

ALASKA LEGAL SERVICES CORPORATION
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Filed this 22nd day of October, 1985
in the Supreme Court of the State of Alaska

Deputy Clerk

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STATUTES PRINCIPALLY RELIED UPON

Alaska National Interest Lands Conservation Act

Public Law 96-487
96th Congress
December 2, 1980
(94 Stat. 2371)

TITLE VIII — SUBSISTENCE MANAGEMENT AND USE

FINDINGS

16 USC 3111.

SEC. 801. The Congress finds and declares that —

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

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

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

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

43 USC 1601 note.

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

POLICY

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

16 USC 3112.

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

Ante, p. 2377.

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

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

DEFINITIONS

16 USC 3113.

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

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

16 USC 3114.

Priority criteria.

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

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

(2) local residency; and

(3) the availability of alternative resources.

LOCAL AND REGIONAL PARTICIPATION

16 USC 3115.

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

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

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

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

Regional advisory council, authority.

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

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

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

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

Annual report to Secretary.

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

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

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

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

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

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

(c) The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

Implementation.

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

Reimbursement to States.

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

Report to Congress.

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

FEDERAL MONITORING

Report to congressional committees.
16 USC 3116.

SEC. 806. The Secretary shall monitor the provisions by the State of the subsistence preference set forth in section 804 and shall advise the State and the Committee on Interior and Insular Affairs and on Merchant Marine and Fisheries of the House of Representatives and the Committees on Energy and Natural Resources and Environment and Public Works of the Senate annually and at such other times as he deems necessary of his views on the effectiveness of the implementation of this title including the State's provision of such preference, any exercise of his closure or other administrative authority to protect subsistence resources or uses, the views of the State, and any recommendations he may have.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

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

Sec. 16.05.094. Duties of section of subsistence hunting and fishing. The section of subsistence hunting and fishing shall

(1) compile existing data and conduct studies to gather information, including data from subsistence users, on all aspects of the role of subsistence hunting and fishing in the lives of the residents of the state;

(2) quantify the amount, nutritional value, and extent of dependence on food acquired through subsistence hunting and fishing;

(3) make information gathered available to the public, appropriate agencies, and other organized bodies;

(4) assist the department, the Board of Fisheries, and the Board of Game in determining what uses of fish and game, as well as which users and what methods, should be termed subsistence uses, users, and methods;

(5) evaluate the impact of state and federal laws and regulations on subsistence hunting and fishing and, when corrective action is indicated, make recommendations to the department;

(6) make recommendations to the Board of Game and the Board of Fisheries regarding adoption, amendment and repeal of regulations affecting subsistence hunting and fishing;

(7) participate with other divisions in the preparation of statewide and regional management plans so that those plans reorganize and incorporate the needs of subsistence users of fish and game. (§ 3 ch 151 SLA 1978)

Sec. 16.05.255. Regulations of the Board of Game.

(b) The Board of Game shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) permitting the taking of game for subsistence uses unless the board determines, in accordance with the Administrative Procedure Act, that adoption of the regulations will jeopardize or interfere with the maintenance of game resources on a sustained-yield basis. Whenever it is necessary to restrict the taking of game to assure the maintenance of game resources on a sustained-yield basis, or to assure the continuation of subsistence uses of such resources, subsistence use shall be the priority use. If further restriction is necessary, the board shall establish restrictions and limitations on and priorities for these consumptive uses on the basis of the following criteria:

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;

(2) local residency; and

(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

Sec. 16.05.940. Definitions.

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

INTEREST OF AMICI CURIAE

Bobby v. Alaska, Civil Action No. A84-544 (D. Alaska), is a federal court class action pending against the state filed in November 1984 on behalf of the people of Lime Village pursuant to ANILCA §807, alleging that the state, through the imposition of arbitrary closed seasons and individual bag limits, had denied the people the subsistence preference mandated by ANILCA §804. One Lime Village subsistence hunter had his snowmachine confiscated by the state for taking moose in accordance with custom and tradition but not provided for in the state's regulatory scheme (civil forfeiture action still pending), and another Lime subsistence hunter was charged criminally (since dismissed) for the same moose taking. At the insistence of the state that the plaintiffs exhaust the same purported administrative remedies that the state holds out in the instant case as an adequate alternative to judicial vindication of subsistence rights, the lawyers for the Bobby plaintiffs devoted five months to the state's complex and time-consuming administrative process. The Bobby plaintiffs found the proffered remedy to be exhausting but wholly inadequate.

The Board of Game, at its March regulatory meeting in Anchorage, found that the people of Lime Village, who by custom and tradition harvest moose and caribou on a year-round basis, "are probably the most geographically isolated and subsistence dependent people in the state." Findings on Lime Village Management Area, Alaska Board of Game #85-36-GB (4 April 1985); see also Priscilla Kari, Land Use and Economy of Lime Village

(ADF&G Technical Paper No. 80, June 1983). Nevertheless, the Board, while liberalizing some of the sport-hunting restrictions, refused to abandon the precepts of arbitrary calendar-based closed seasons and individual bag limits -- precepts which discriminate against Lime Village's customary and traditional uses of wildlife resources and the communal subsistence-based socioeconomic and sociocultural system of the village. The Board's refusal was not based on the sustained-yield principle, inasmuch as the Board continued to allow non-local and nonresident sport and trophy hunting on the Lime hunting grounds. Rather, the state blames this Court for the Board's refusal:

> On February 22, 1985, the Alaska Supreme Court decided Madison v. Alaska Department of Fish and Game, 696 P.2d 168 (Alaska 1985). The case held that the Boards of Fisheries and Game do not have statutory authority to identify subsistence uses as the customary and traditional uses of fish and game in Alaska by rural Alaska residents, nor do the boards have the authority to identify subsistence users on a community or area basis. Therefore, when the Board of Game met, it could not consider establishing seasons and bag limits specific to Lime Village, as it could have done before Madison.

Response to the Defendant's Supplemental Motion for Partial Summary Judgment at 2, filed 20 September 1985 by the state in State v. One Red Yamaha Snowmachine and Wasilie Bobby, No. 4MC-84-1 Civ. (Dist. Ct., Fourth Judicial Dist. at McGrath).

In June the Board of Game again convened, this time in "emergency" session in Juneau, the alleged emergency having arisen as a result of the decision of the court of appeals in the case at bar, 698 P.2d 174 (Alaska App. 1985). The state had announced, in

effect, that the Eluska decision had legalized "poaching," and that, since Madison had assertedly declared "all Alaskans" to be subsistence users, it was no longer possible to distinguish true subsistence hunters from poachers.[1] Amicus curiae Bobby plaintiffs and others again petitioned the Board, at its emergency meeting, for specific relief and for the adoption of subsistence regulations which they believed would constitute compliance with state law, as construed in Madison, as well as federal law -- plaintiffs being of the view that the state's interpretations of Madison and Eluska were fundamentally flawed. See Appendices A, B and C, attached hereto. Again plaintiffs were denied relief. The Board adopted emergency regulations, but these consist entirely of mere name changes, except for the creation of a limited-entry-type "tier II" application and permit system for those hunts previously governed by registration or random-drawing permits.[2]

In the case before the Court the state openly solicits "this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings." State's Br. at 31. Such guidance is sorely needed, and the state is also in need of guidance as to its paramount federal legal obligations. Amicus Bobby plaintiffs have a vital interest in the

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[1] Memo from the state's Chief Prosecutor to the Commissioners of Public Safety and Fish & Game (22 May 1985). See also State's Brief of Appellant at 5 n.2.

[2] These emergency regulations were formally promulgated by the Commissioner of Fish & Game on 5 July 1985, and transmitted to the public on 11 July. They have since been published in a more comprehensible format as Alaska Game Regulations No. 26 [hereafter "Game Regs."]. The new regulations are described in notes 44 & 95, infra.

correct outcome of this case. Moreover, having sifted through the maze of "confusing, unorganized and often unintelligible"[3/] fish and game statutes and regulations, and having participated intimately in the administrative process with which the state seeks to encumber the fundamental subsistence rights of hunters in remote villages, amicus believes that the views presented here will assist the Court in the proper resolution of this controversy.

The Native American Rights Fund (NARF) is a national non-profit legal foundation established in 1970 to represent Native Americans across the country on cases of major importance. It has office in Washington, D.C.; Boulder, Colorado and Anchorage, Alaska. NARF has played a major role in much of the successful natural resource litigation involving Native Americans in the "lower 48" such as United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) (Great Lakes fisheries) and United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (the "Boldt decision").

NARF opened its Alaska office in October 1984 to respond to an increasing number of requests for assistance from village councils and individuals on matters involving Native governmental rights and subsistence. Its two Anchorage attorneys have spent the past year researching the law in these areas and giving legal advice to approximately thirty Native villages and organizations. The court of appeals' decision in Eluska is critical to the

[3/] Alaska Judicial Council, Twelfth Report to the Legislature and Supreme Court: 1983-84 at Appendix N-1.5 ("Fish & Game Sentences: 1980-81").

subsistence lifeway of our Native clients. Our participation is not on behalf of a specific client. We support the decision of the court below in the general interest of our clients and wish to inform this Court of well-established analogous principles in Native American law which provide additional support for the decisions of the lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Introduction

"The subsistence way of life" -- regardless of whether or not its precise components can be agreed upon -- has a special meaning to Alaskans. Most residents of the state know and readily acknowledge that they either do or do not lead such a rugged lifeway. To be sure, there is murkiness at the confluence of the subsistence, sport, trophy and commercial classifications, and those who find themselves situated there deserve fair and sensitive treatment. And there are no doubt those who opportunistically classify themselves according to their individual perceptions, on any given day, of self-interest. This is easy enough to understand in a regulatory system that portrays yesterday's Grand Slam trophy hunter as today's subsistence hunter/fisher/gatherer. Still, most Alaskans know it when they see it, and most know that it is primarily a "rural" enterprise. They know also that leading a subsistence lifeway is not merely a weekend or recreational activity, but rather that true subsistence users have integrated the activities associated with hunting and

fishing -- learning the necessary skills, preparing the equipment, hunting, fishing, preparing what is caught or taken, sharing the take with others -- to the extent that these attributes are so much a part of their lives that they use them to define themselves. Their dependence on hunting and fishing is cultural and social as well as economic. Moreover, all Alaskans are aware that the state and national legislatures have mandated a wildlife-use preference for those engaged in subsistence lifeways and lifestyles, albeit that some of them believe (without reason, in our view) that such a preference is unconstitutional.

This case, however, is not about the constitutionality of the "subsistence priority." Rather, like Madison v. Alaska Dept. of Fish & Game, 696 P.2d 168 (Alaska 1985), it is about whether or not the state's game regulations satisfy the subsistence priority requirements of state and federal law. The court of appeals, relying solely on state law, has concluded that the state has a mandatory duty to issue regulations which implement the statutory priority for subsistence. State v. Eluska, 698 P.2d 174, 178 (Alaska App. 1985). The state does not now challenge this conclusion. Rather, its position is that its regulations do all that the law requires. The court of appeals disagreed. Relying on its own reading of state law and on this Court's decision in Madison, it held that, as a general matter, the state has failed to give subsistence proper consideration before enforcing regulations which restrict it.

According to AS 16.05.251(b), as interpreted in Madison, all non-subsistence uses of fish and game must be curtailed before

restrictions are imposed on subsistence uses. Madison at 174. It is not enough, therefore, for the regulations to give local subsistence hunters and fishers a limited seasonal "opportunity" to hunt and fish. Nor is it enough to design slightly longer seasons and slightly more liberal individual bag limits for subsistence hunters and fishermen. Rather, the subsistence priority requires what the word "priority" implies. Subsistence comes first. Regulations which impose substantial restrictions on subsistence hunters and fishers are justifiable only on one or both of two grounds -- protection of fish and wildlife or preservation of subsistence itself -- and justifiable only if sport and commercial hunters and fishers who might compete with subsistence users have been told to do their hunting and fishing elsewhere. Because the state game regulations do not come close to putting this approach to fish and game management into practice, the court of appeals correctly called the entire regulatory system into question.

We are filing this brief to provide additional support for the court of appeals' basic conclusions and, as part of our arguments, to emphasize the central problem the Boards of Fisheries and Game have failed to address. For seven years, the state subsistence law has required the Boards to identify customary and traditional subsistence uses of fish and game and give those uses priority. A similar federal mandate has been in place for almost five years. Not only has the state failed to do what the law requires, its reaction to the decisions in Madison and Eluska has been to relabel its sport regulations as

"subsistence" regulations, as if a change in name alone will satisfy the law and the courts.

Believing that the state's position is wrong in all material respects[4/], and that the Court ought to examine the questions presented for review from the perspective of the history that produced the subsistence preference, we present the following arguments as friends of the court and of subsistence users. In doing so we have acknowledged the broadest definition of subsistence users to include rural and non-rural and Native and non-Native peoples wherever the legislative histories or subsistence studies support such breadth. However, the history and case law primarily relied upon in this historical/legal analysis demonstrate that at the heart of the subsistence preference is the overriding federal commitment (with some state support) to protect Alaska Native communities, including their subsistence lifeways. Certain sections of this brief will speak exclusively to this fundamental subsistence right of Native Alaskans, without which there would be no subsistence preference at all for anyone, rural or non-rural, Native or non-Native.

Summary of Argument

Before examining the substantive guarantees of the state and federal subsistence laws[5/] and considering the propriety of the

[4/] We do agree with the state that this case is not moot and that "this Court's guidance on how to adopt permanent regulations that comply with state law in light of both the Eluska and Madison rulings" (State's Br. at 30-31) is desperately needed.

[5/] AS 16.05.094, -.255(b), -.257 and -.920(23); Title VIII of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487 (2 Dec. 1980), 94 Stat. 2422, 16 U.S.C. §§ 3111 et. seq. [hereinafter cited as "ANILCA" with the Public Law section numbers].

state's regulatory management system under those laws and in the light of the actual facts of Alaska's subsistence lifeways, we urge the Court to review the evolution of the subsistence-preference laws. We therefore briefly review the operation of English wildlife law, its influences on early American wildlife law, and the development of the latter into today's regulatory system, which is dominated by sport, commercial and wildlife-protector interests. We then trace the parallel legal preference consistently accorded (in word if not in deed) to the subsistence hunting and fishing rights of American Indians. We show that general wildlife law in Alaska has come to be similarly dominated by sport and wildlife-protector (as well as commercial) interests, but that Alaska Natives (and others) have consistently received a legal preference for subsistence hunting and fishing similar to that accorded to lower-48 Indians.

From this perspective, the state/federal subsistence laws (mandated by principles of federal supremacy) may be seen as securing a positive right with all of the attributes of a fundamental right, due to be respected and protected as such. The manner in which the subsistence preference was designed to operate is then examined in some detail, as is the accumulated body of knowledge about the function and inner-workings of the varied subsistence ways of life throughout the state, including that of respondent Eluska and his village. We show that that way of life is entitled to constitutional protection independently of the subsistence statutes. Against these conclusions we juxtapose the state's sporting management system and demonstrate that it is in

significant conflict with both the facts and the law.

From this, and from the relevant precedents of Indian law, we conclude that the basic approach of the court of appeals is correct, though in certain respects it should have gone further. We also expose the fatuity of the state's avoidance arguments (e.g., exhaustion of non-existent administrative remedies). We respectfully submit the information and arguments herein believing them to be useful to the Court in laying down guidelines for bringing the state into compliance with the subsistence-preference laws.

ARGUMENT

I.

HISTORICALLY IN AMERICA THE NATIVE SUBSISTENCE HUNTING AND FISHING RIGHT HAS BEEN ACCORDED THE STATUS OF A FUNDAMENTAL RIGHT AND EXEMPTED FROM THE EVOLVING PRECEPTS OF ANGLO-AMERICAN WILDLIFE LAW

In support of the restrictions it seeks to apply to respondent Eluska, the state invokes Biblical injunctions and claims that "[s]easons and sex restrictions have been law in the United States since colonial days." State's Br. at 13 n.10. It is well to review the history of Anglo-American wildlife jurisprudence, to trace its development and examine the purposes it serves, to contrast these sport-hunting rules with Indian and other subsistence ways of life and with applicable Indian law, and to see how these developments have played out on the Alaska scene, culminating in the landmark federal/state subsistence-preference experiment.

A. English and Early American Wildlife Management Systems

The English antecedents of American wildlife law consisted primarily of harsh, cruel and antidemocratic game laws which afforded an absolute preference for the sporting pleasure of the English aristocracy over the needs of the common man.[6] Although some of these sporting rules -- e.g., seasons, bag limits and methods restrictions -- survived the American Revolution, early American wildlife management was dominated by the democratic principle of "free taking."[7] This passion for "democracy," for equal hunting rights for all, had disastrous consequences, for it led, among other excesses, to commercial dealing in wildlife. Market hunting and the "free taking" ethos brought many game species to the brink of extinction by the end of the nineteenth century.[8] This unrestrained slaughter had devastating consequences for Indian cultures which had depended for millenia on these subsistence resources as the mainstay of their physical and cultural survival; sometimes the slaughter was specifically motivated by the goal of driving the Indians from their land to make room for white settlement (and to force the conversion of

[6] See Thomas A. Lund, American Wildlife Law 3-17, 21-23, 100-03 (1980) [hereafter, American Wildlife Law]; E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975). The "qualification statutes" were the English system's principal means of bestowing sport hunting rights upon the wealthy and depriving the masses of both food and hunting weapons. These laws were enforced by the king's Forest Jurisdiction.

[7] American Wildlife Law at 19-34.

[8] Id. at 57-60.

Indians into farmers).[9]

Thus, rejection of the English caste system for allocating wildlife uses led to the early American approach to wildlife as primarily an economic resource to be exploited, which in turn threatened the very existence of wildlife. Complete disaster was avoided only by the intervention and influence of sport interests, which secured the elimination of commercial hunting, other regulatory restrictions, funding for regulatory enforcement, wildlife restoration programs, habitat protection, and the like.[10] Thus American wildlife law has come to be dominated by sport and (especially at the federal level) wildlife-protector interests;[11] the survival of many species is indebted to those interests, as are the pleasures and desires of sport and commerce, and the subsistence needs of many peoples.

B. The Simultaneous Recognition of the Subsistence Rights of Native Americans and the Protection of Those Rights From Sport and Commercial Restrictions

European discoverers of the "new world" recognized from the outset that Native occupants of America had possessory rights to their lands which should not be unilaterally taken. This principle of discovery was acknowledged by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

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[9] For example, "[i]t has been forcefully contended that, through considered inaction, the federal government encouraged the annihilation of the buffalo as a means to oust native tribes from areas destined for white occupation." Id. at 89, citing Peter Matthiessen, Wildlife in America 145-48 (1959). See also, e.g., Bruce Brown, Mountain in the Clouds: A Search for the Wild Salmon (1982).

[10] American Wildlife Law at 61-73.

[11] Id. 75-78, 81-99.

> [Discovery] could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

Id. at 544.[12] This aboriginal right of use and occupancy included the right to hunt and fish free of outside interference, F. Cohen, Handbook of Federal Indian Law 443 (1982 ed.), and these aboriginal rights could only be extinguished by the federal government. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

The Indians "yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831). In the very first treaties with the Indians, the United States guaranteed the sanctity of their hunting grounds (e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) at 551-556), it being recognized that "[h]unting was...the principal occupation of the Indians, and their land was more used for that purpose than for any other." Id. at 553.

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until

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[12] Which is not to say that the elitism and arrogance of the English were absent from United States policy, for one of the colonizing objects was "the civilization of the Indians and their conversion to Christianity -- objects to be accomplished by conciliatory conduct and good example; not by extermination." 31 U.S. (6 Pet.) at 546.

they abandoned them, made a cession to the government, or an authorized sale to individuals.

Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

As can be seen from the cases cited hereafter, the subsistence hunting and fishing rights of Native Americans (and often their commercial rights as well[13/]) were routinely reserved by the Indians in the eighteenth and nineteenth century treaties and agreements negotiated with the United States.[14/] This fundamental subsistence right was "not much less necessary to the existence of the Indians than the atmosphere they breathed....[It] was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905).

Over the years, and continuing still, these rights have come into conflict with the non-Indian, non-subsistence oriented wildlife management systems of the states. As these conflicts have been presented to the courts, the pattern of judicial response has been to give vigorous positive protection to Native hunting and fishing rights. Indeed, Native hunting and fishing rights reserved by treaty, statute or agreement have been liberally construed to accomplish the important purpose of providing for the continued pursuit of a subsistence lifeway. See Menominee Tribe v. United States, 391 U.S. 404 (1968); Cohen,

13/ See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

14/ That these rights were expressly reserved is not, of course, to imply that such sovereign contracts were always honored. See, e.g., Ward v. Race Horse, 163 U.S. 504 (1896); New York ex rel. Kennedy v. Becker, 241 U.S. 557 (1915); United States v. Harris, 117 F. Supp. 915 (D. Alaska 1954).

supra at 446.

Recognition of the importance of subsistence rights is partially responsible for the rule that reservation Indians have jurisdiction, exclusive of that of the states, to regulate on-reservation hunting and fishing by both tribal members and non-members, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).[15] Of greater significance for the present case, however, are those decisions enforcing off-reservation hunting and fishing rights which the Indians have reserved by treaty or statute. These treaty and statutory provisions frequently reserve such rights "in common with all other persons," yet it is routinely held that the states may not impose their sport and commercial restrictions on Indians engaged in protected hunting and fishing activities, at least unless the state can "demonstrate that its regulation is a reasonable and necessary conservation measure, ... and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 184, 207 (1975).[16] In addition, such regulatory measures as state

[15] See also Arnett v. 5 Gill Nets, 121 Cal. Rep. 906 (Cal. App. 1975) (state precluded from regulating on-reservation fishing). Moreover, the tribes have jurisdiction to enforce their tribal hunting and fishing regulations against tribal members engaged in off-reservation activities. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

[16] Depending perhaps on the particular treaty or statutory language involved, some cases either hold or imply that state regulation of off-reservation reserved hunting and fishing activities is precluded altogether. See, e.g., Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665, 669 (10th Cir. 1980) ("state hunting and fishing regulations do not apply, directly or indirectly, to hunting and fishing by [tribal] members... on land held as Indian allotments and on land held in trust by the United States for the Tribes," i.e., in "Indian country" within a disestablished reservation); Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) (continued)

licensing requirements, which are "not indispensable to the effectiveness of a state conservation program," may not be applied to the Indians' reserved hunting and fishing rights, Tulee v. Washington, 315 U.S. 681 (1942),[17] nor may the state, by license granted to private land-holders, obstruct the Indians from fishing on their treaty-protected "usual and accustomed" fishing grounds. United States v. Winans, supra.

In Argument IV, infra, we show that the cases cited above

(footnote 16 continued) (within ancestral reservation, now part of a national forest and wildlife refuge) (but see Kimball II, 590 F.2d 768 (9th Cir. 1979)); People v. Jondreau, 185 N.W.2d 375 (Mich. 1971) (only the President may regulate Indian fishing at treaty-protected places); State v. Stasso, 563 P.2d 562, 565 (Mont. 1977) (Indians have "right to hunt game animals free from state regulation on lands ceded by the tribes to the federal government" which remain "open and unclaimed"); State v. Arthur, 261 P.2d 135, 143 (Idaho 1953) (holding that the Indians' reserved rights "to hunt upon open and unclaimed land still exist unimpaired and that they are entitled to hunt at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation"). Other cases, however, as in Antoine (quoted in the text), allow the state to regulate the off-reservation fishing and hunting activities of the Indians, at least where those rights were reserved "in common" with non-Indians, but only in a reasonable and nondiscriminatory manner upon a showing by the state of a conservation necessity that cannot be effectively addressed by less-intrusive measures. See New Mexico v. Mescalero Apache Tribe, supra, 462 U.S. at 342; Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 174, 175-77 (1977); Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983); United States v. Michigan, 653 F.2d 277 (6th Cir. 1981); Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979); Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976), and 302 F. Supp. 899 (D. Ore. 1969); United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), aff'd on subsequent review sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Holcomb v. Confederated Tribes, 382 F.2d 1013 (9th Cir. 1967); Peterson v. Christensen, 455 F. Supp. 1095 (E.D. Wis. 1978); State v. Braun, 309 N.W.2d 875 (Wis. 1981); State v. Peterson, 297 N.W.2d 52 (Wis. App. 1980); State v. Coffee, 556 P.2d 1185 (Idaho 1976); People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976); State v. Gurnoe, 192 N.W.2d 892 (Wis. 1972).

[17] See also State v. McConville, 139 P.2d 485 (Idaho 1943).

provide instructive precedent for the proper resolution of the instant case. We mention them here to highlight the Nation's longstanding recognition of the supreme importance of Native hunting and fishing rights, as well as the recognition that "[t]he tribes could not eat by seasons, nor could sporting bag limits suffice for family [or tribal] sustenance. For aboriginal Indian behavioral patterns to be perpetuated, neither seasons nor bag limits could be imposed. At the same time, laws had to be enacted to prevent the burgeoning population of non-Indians from taking the limited wildlife resource." American Wildlife Law, supra, at 90.[18] The customary and traditional subsistence uses of wildlife by Native peoples, as these cases reflect, have been accorded all of the attributes of fundamental rights in constitutional jurisprudence[19] -- rights which the states may regulate, if at

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[18] See also, e.g., State v. Arthur, 261 P.2d 135, 142 (Idaho 1953):

> While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion....

[19] Indeed, the reserved hunting and fishing right is so powerful that, in the absence of an express congressional abrogation, it overrides such exclusively conservation legislation as the Eagle Protection Act, the Migratory Bird Treaty and the Endangered Species Act. United States v. Dion, 752 F.2d 1261 (8th Cir. 1985) (en banc); United States v. White, 508 F.2d 453 (8th Cir. 1974); United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941); but cf. United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980). Where the Indians, by treaty, have secured protection for "their way of life which included hunting and fishing," congressional intent to abrogate such rights will not be lightly imputed, Menominee Tribe v. United States, 391 U.S. 404, 406 (1968), and states may adopt regulations to implement (continued)

all, only upon a demonstration of conservation necessity, and then only through the least intrusive nondiscriminatory means available. We now show that these rights have been accorded at least as much, if not more, respect in the development of Alaska wildlife and Native law.

C. Historic Protection of the Alaska Subsistence Ways of Life of Natives and Others

The evolution of wildlife law in Alaska has pretty much followed the pattern nationally and in the lower 48, which is not surprising inasmuch as Alaska's territorial game codes were written by Congress, which was heavily influenced by sport and conservation interests. But while the "free taking" ethos was just as prevalent here as elsewhere, resulting in significant market hunting and other excesses during the gold rushes, Alaska in large part was spared the threat of wildlife extinction until World War II, since which time we have seen the development of the present system. _See_ Morgan Sherwood, _Big Game in Alaska: A History of Wildlife and People_ (1981).[20]

(footnote 19 continued) federal rights notwithstanding contrary provisions of their constitutions. _Washington_ v. _Washington State Commercial Passenger Fishing Vessel Ass'n_, _supra_, 4[illegible] U.S. at 692-96.

[20] We cite this book for its historical perspective on the evolution of game management in Alaska, but we do not commend its apparent insensitivity to both the legal rights of Alaska Natives and their cultural plight in the face of the encroachments by the "free taking" civilization. For example, Sherwood suggests "that Native conservation systems either did not exist or broke down rapidly following the introduction of rifles and the commercial economy." Steve J. Langdon, _Alaskan Native Subsistence: Current Regulatory Regimes and Issues_ 19 (October 1984, Paper for Roundtable Discussions of Subsistence, Alaska Native Review Commission). As Professor Langdon points out (_id._):

> Evidence can be cited of wasteful Native harvesting. Two points (continued)

The subsistence hunting and fishing rights (along with certain commercial rights) of Alaska Natives were also protected in much the same way as they were in the rest of the United States, except that in Alaska these rights were protected unilaterally by statute rather than by negotiated treaty.[21] At the time of Alaska's acquisition by the United States, the

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(footnote 20 continued) should be made about those depredations. First and foremost they occurred in an altered sociocultural environment in which the ability of Natives to control their resources was severely undermined. New users made demands on their resources and although most Alaskan Native groups objected to the appropriation of their resources, they were nearly powerless to stop it. When the initial conditions of population, technology, and economy changed, it became a new adaptational setting, and it is to be expected that new forms of behavior might appear. Second, the incidents which occurred were not widespread and were the product of a relatively small minority of individuals, perhaps even those who had become most detached from their Native cultures of birth as they attached themselves to the commercial exchange economy of the immigrants. It is untenable to propose either that general Native cultural patterns can be characterized on the basis of an isolated number of cases or that situations of wildlife mismanagement in an entirely altered socioeconomic and sociocultural setting can be used to make judgments about the characteristics of previous adaptations.

<u>See also</u> note 64, <u>infra</u>.

[21] Article III of the 1867 Treaty of Purchase, 15 Stat. 539, left the land and land-related claims of Alaska Natives for future resolution by Congress, which did not attempt a settlement until the 1971 Alaska Native Claims Settlement Act ["ANCSA"], P.L. 92-203, 85 Stat. 689, 43 U.S.C. §§ 1601 <u>et seq</u>., and the 1980 passage of ANILCA.

subsistence rights of the Territory's Native peoples were protected by the "laws of an antecedent government [Russia]."[22/] The Second (1821) and Third (1844) Charters of the Russian American Company guaranteed Native hunting and fishing rights in the following terms:[23/]

> The natives not employed by the Company are permitted to enjoy fishing along the shores where they live, while free from the service to the Company, in order to procure food for themselves and their families. They shall not, however, visit the neighboring shores without permission of the colonial authorities. They are entitled also to catch the sea animals and the wild beasts on these islands and places where they are living, and everything acquired by them in this way is their full property. If, however, they would like to trade some of their furs, they are permitted to sell them only to the Company at fixed rates which shall be submitted by the Board of Directors to the government.

From the outset of American acquisition, Congress recognized the necessity and justice of according Natives special preference for the taking of subsistence wildlife resources. In an Act to Prevent the Extermination of Fur-bearing Animals in Alaska (1 July 1870), ch. 189, 16 Stat. 180, Congress imposed a 20-year bag limit of 75,000 per annum and 25,000 per annum, respectively, on the commercial taking of fur-seals on St. Paul and St. George islands, with open seasons only during June, July, September and October. Natives were exempted from these restrictions in the following language (§1):

[22/] United States v. Berrigan, 2 Alaska Rep. 442, 446 (D. Alaska 1905).

[23/] Russian Administration of Alaska and the Status of the Alaska Natives, S. Doc. No. 152, 81st Cong., 2d Sess. 45, 50-51 (6 April 1950).

Provided, That the natives of said islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use, which killing shall be limited and controlled by such regulations as shall be prescribed by the Secretary of the Treasury.

Throughout the remainder of Alaska's territorial status, Congress regularly provided subsistence-taking preferences for Natives and others in the wildlife laws which Congress found it increasingly necessary to adopt. In Alaska's first game law, enacted 7 June 1902, 32 Stat. 327, Congress, *inter alia*, banned the taking of game animals for export and established seasons, individual bag limits and sex restrictions for the taking of game animals and birds. Congress expressly provided (§1), however, that "[n]othing in this Act shall...prevent the killing of any game animal or bird for food or clothing by native Indians or Eskimo or by miners, explorers, or travelers on a journey when in need of food; but the game animals or birds so killed shall not be shipped or sold." This exemption, classified as such, was re-enacted when the 1902 Act was amended by the Act of 11 March 1908, 35 Stat. 102.

The United States continued to be cognizant of the rights and special needs of Alaska Natives when it negotiated the Migratory Bird Treaty of 1916, 39 Stat. 1702, 1703:

> 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, murries and puffins, and their eggs for food and their

skin for clothing, but the birds and eggs so taken shall not be sold or offered for s[illegible].

In an enactment on 6 June 1924, 43 Stat. 464, to protect Alaska's fisheries, Congress exempted from methods and closed-season restrictions "the taking of fish for local food requirements or for use as dog feed." Id. at 466 (§§ 4 and 5).[24/] The Act was amended on 16 April 1934, 48 Stat. 594. With respect to restrictions on fish fences, traps, fishwheels, etc. (§3), as well as other methods and means restrictions (§4), the "Karluk, Ugashik, Yukon, and Kuskokwim Rivers" were specifically excepted. Congress explained (id. at 595):

> That the exception hereinabove contained with reference to the Kuskokwim and Yukon Rivers shall be solely for the purpose of enabling native Indians and bona fide permanent white inhabitants along the said rivers to take from said rivers for commercial purposes and for export from the Territory of Alaska king salmon in such manner and such quantities, and at such times as the Secretary of Commerce may, by suitable regulations, from time to time permit: Provided further, That no person shall be deemed to be a bona fide permanent inhabitant of the said rivers who has not resided thereon, or within fifty miles thereof for a period of over one year, and that the term 'native Indians' as used herein shall be taken to mean members of the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood.

By Act of 13 January 1925, 43 Stat. 739, Congress established the Alaska Game Commission and a law enforcement mechanism, and

[24/] The predecessor Act of 26 June 1906, 34 Stat. 478, did not contain the exemption in these words, although it did "except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto." Id. at 479 (§5). The early fisheries act of 2 March 1889, 25 Stat. 1009, prohibiting the obstruction of spawning streams, did not contain any exceptions.

directed the Secretary of Agriculture, in consultation with the Commission, to regulate the taking of game and other animals. With the exception of the prohibition against the use of "strychnine or other poison" (§9), the legislation provided that the Secretary's regulations may not restrict "any Indian or Eskimo, prospector, or traveler to take animals and birds during the close seasons when he is in absolute need of food and other food is not available...," unless "he shall determine that the supply of such species of animals or birds is in danger of extermination..." (§10).[25] This exemption was continued in the amending act of 25 June 1938, 52 Stat. 1169, 1171,[26] with an additional proviso added to §3 (the one-year residency requirement) that whenever the Secretary finds "that the economic welfare and interests of native Indians or Eskimos, or the fur resources of Alaska, are threatened by the influx of trappers without the Territory," he may impose a three-year residency requirement for a resident trapping license. *Id.* at 1170.

Meanwhile, Congress passed the Reindeer Industry Act of 1 September 1937, 50 Stat. 900, addressed explicitly to Native

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[25] Section 11(H) also provided the following exemption from the licensing requirement for fur dealers: "but no license shall be required of a native-born resident Indian, Eskimo, or half-breed who has now severed his tribal relations by adopting a civilized mode of living or by exercising the right of franchise, or of a hunter or trapper selling the skins of such animals which he has lawfully taken...." This exemption was amended by act of 14 February 1931, 46 Stat. 1111, 1113, to include "cooperative stores operated exclusively by and for native Indians, Eskimos, or half-breeds, or of stores operated by missions exclusively for native Indians, Eskimos, or half-breeds." This exemption, as amended, was retained in the amending act of 25 June 1938, 52 Stat. 1169, 1171-72, and that of 1 July 1943, 57 Stat. 301, 308.

[26] It was further retained by amending acts of 10 October 1940, 54 Stat. 1103, and 1 July 1943, 57 Stat. 301, 306, except that the word "absolute" was dropped in these later amendments.

"subsistence" (§1):

> That a necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this Act, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business. . . .

Four years later, on 18 August 1941, 55 Stat. 632, legislation was passed prohibiting the taking of walruses, with but two exceptions -- for "scientific or educational purposes" with approval of the Secretary of the Interior, and (id. at 633):

> That walruses may be taken at any time by natives for food and clothing for themselves and by miners or explorers or any other person when in need of food and other food is not available, and the skins, hides, tusks, or ivory of walruses so taken may be possessed, sold, bartered, or purchased in the Territory and said tusks or ivory, when carved or otherwise manufactured or processed in the Territory, may be exported therefrom.

There matters basically stood on the law books when the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (7 July 1958) was debated in Congress. Congressman Westland, arguing for federal retention of control over Alaska's fish and wildlife, complained of the Territorial Legislature's failure to protect "the rights and privileges of a large and important part of Alaska's population, our native people, which are safeguarded under existing legislation." 104 Cong. Rec. 9488-89 (1958); see also id. at 9747-50.[27/] In response to this concern, in part,

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[27/] In 1957 the Territorial Legislature had created a special-interest seven-member Fish and Game Commission composed of three commercial fishermen from three specified regions of the state, one hunter, one trapper, one sport fisherman and one fish processor, the latter four at large. Ch. 63 SLA 1957.

§6(e) of the Statehood Act retained federal control over wildlife resources until "after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest." 72 Stat. 341. Congressional intent and his trust responsibility to Alaska Natives[28] notwithstanding, the Secretary failed to protect the "rights and privileges" of Alaska Natives with respect to wildlife,[29] and the state was eventually certified to assume administration and management of fish and game.[30]

Nevertheless, in wildlife matters over which the federal government continued to exercise jurisdiction, Congress continued to provide protection for Native hunting and fishing rights. In the 1966 legislation regulating the taking of fur seals in the North Pacific, an exemption was given from the law's prohibitions for "Indians, Aleuts, and Eskimos who dwell on the coasts of the North Pacific Ocean." 16 U.S.C. §1152. The subsistence issue then received considerable consideration in the deliberations leading up the passage of ANCSA in 1971, but in the end Congress

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[28] See, e.g., People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979).

[29] See Letter from Secretary Fred A. Seaton to Governor Hugh J. Wade (2 March, 1959) reprinted in Hearings on H.R. 39 et al. Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., part XI 411-412 (1978) [hereinafter "House Hearings"].

[30] On 17 April 1959 the state legislature enacted ch. 94 SLA 1959, which contained no provision for Native or other subsistence uses, but which was given compliance certification by the Secretary on 27 April 1959 (House Hearings, supra, part XI at 413), and the President thereafter transferred jurisdiction to the state by Executive Order No. 10857 (5 January 1960).

elected to protect Native subsistence rights through Conference Committee directive rather than positive law.[31]

That the congressional directive was intended to be taken seriously, however, was immediately made manifest. The year following ANCSA, 1972, Congress passed the Marine Mammal Protection Act, 16 U.S.C. §§1361 et seq. Adhering to its 100-year-old policy, Congress expressly exempted Alaska Natives from the Act's prohibitions against taking marine mammals, if such taking by Natives "is for subsistence purposes" or "for purposes of creating and selling authentic native articles of handicrafts and clothing," and is nonwasteful. 16 U.S.C. §1371(b). The next year, in the Trans-Alaska Oil Pipeline Act of 1973, Congress imposed strict damages liability upon the pipeline constructors for any harm to the subsistence resources of Natives or others. 43 U.S.C. §1653(a)(1). That same year Congress enacted the Endangered Species Act, and again an exemption from the Act's restrictions was given for subsistence uses by Alaska Natives resident in the state and "any non-native permanent resident of an Alaskan native village." 16 U.S.C. §1539(e)(1). This section of the Act further provides:

> Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

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[31] See David S. Case, Alaska Natives and American Laws 294-95 (1984); see also Argument IIA, infra.

Finally, in the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3110, 3112, Congress referred to the subsistence provisions in the migratory bird treaties with Canada, Japan, Mexico and the Soviet Union and vested the Secretary of the Interior with authority "to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs...." 16 U.S.C. §712(1).

Meanwhile, of course, Alaska's indigenous peoples were pressing Congress for the positive protection of their subsistence way of life from the restrictions of the state's wildlife management regime, which was dominated by and geared to the interests of sport and commerce. In a process involving extended negotiations, the state, through its legislative and executive branches, and the Congress took action to protect the profound value of the Alaska subsistence way of life. As seen above, this action was not taken in a vacuum, nor was it the product merely of some intuitive sense of justice and morality. Rather, the legislators labored in the context of a legal history establishing beyond doubt and without equivocation that the subsistence right is a fundamental human right. The culmination of that history and legislative effort is before the Court, to be given meaning or, as the state would have it, treated as a dead letter.

II.

THE STATE SUBSISTENCE LAW MUST BE CONSTRUED IN HARMONY WITH ITS FEDERAL COUNTERPART, BUT THE STATE IS NOT PRECLUDED FROM PROVIDING BROADER PROTECTION, SO LONG AS THE PROTECTION MANDATED BY FEDERAL LAW IS

PROVIDED, WHICH CAN READILY BE ACCOMPLISHED THROUGH IMPLEMENTATION OF THE "CUSTOMARY AND TRADITIONAL USE" GUIDELINE -- THE CENTERPIECE OF BOTH STATE AND FEDERAL LAW

The state and federal subsistence-preference laws are unique in the history of Anglo-American wildlife and Indian law. They are positive laws, which recognize and seek to protect fundamental rights. Rather than exempting subsistence hunting and fishing from the wildlife management system dominated by sport, commercial and wildlife-protector interests, as had been done historically in Alaska, these laws impose upon that system an affirmative duty to alter its management prerogatives so as to protect subsistence lifeways by giving subsistence uses an absolute preference over all other wildlife uses. The state's wildlife managers have had a hard time swallowing this law, as the instant case demonstrates, but it is the law nonetheless. The state's effort to gut the law must be rejected, and instead the Court should give full force to the legislatures' recognition of the profound value of a way of life that has no equal, and is not possible, outside of Alaska -- to the recognition that subsistence uses are "essential to Native physical, economic, traditional and cultural existence and to non-Native physical, economic, traditional, and social existence." ANILCA §801(1).

In this argument section we show that settled principles of federalism oblige the Court to construe the state law consistently with federal law. We also show, however, that the state is not precluded by federal standards from affording protection to the broader class of non-"rural" subsistence users identified in

Madison. Nevertheless, neither the state nor the Court is free to abandon the "customary and traditional use" guideline, which is the substantive bedrock of both the state and federal subsistence-preference mandates. The law requires the state to systematically identify such uses and provide them with positive protection through regulations designed to fit the facts of Alaska's subsistence lifeways. Only by enforcing this affirmative obligation upon the state is it possible to ensure that subsistence uses are accorded first priority, rather than the status they now enjoy as activities subordinate to the entrenched regulatory system designed to allocate among sport and commercial uses.

A. The Federal/State Subsistence Protection Program Is One Of Cooperative Federalism In Which the State Is Bound By, But Not Limited To, The Minimum Standards Set Forth In Federal Law

In considering the interplay between state and federal law one must begin with the federal government's continuing responsibility to protect Native ways of life. ANCSA did not extinguish this responsibility. Although that Act did not contain any specific provisions on subsistence, the reason it did not was that Congress believed that the state and the Secretary of the Interior would protect subsistence using their existing authority. As the conference committee which drafted ANCSA's final version explained: "The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives." Conference Report No. 92-746, 92nd Cong., 1st Sess., reprinted in [1971] U.S. Code Cong. & Ad.

News 2247, 2250.[32] ANILCA's Title VIII, which contains the federal priority, grew out of this continuing responsibility: it was enacted "because the Secretary and the State failed to heed Congress's admonition" to protect subsistence. People of the Village of Gambell v. Clark, 746 F.2d 572, 580 (9th Cir. 1984).

The state's subsistence law is itself in part a reaction to congressional doubts about the state's commitment to defending subsistence. See Op. Atty. Gen. A66-120-82 (December 2, 1981) at 6. In 1977, Governor Hammond and at least five legislators heard Congressman Seiberling suggest that one way to ensure that subsistence would receive a priority "would be for the Federal Government to do what we did in the strip mining law, to lay down conditions governing management of game on Federal lands and then say if the State were willing to meet those conditions we would turn over that management to the State." House Hearings, supra note 29, part XII at 18.[33] During their deliberations on the bill which became the state subsistence law, legislators were given information about the progress and probable requirements of federal Alaska lands legislation. (Representative Cotten remarked on the House floor, for example, about some of H.R. 39's important features, e.g.: "[B]oy, they did use the word 'traditional.'" Partial transcript of House Debate on HB 960 (26 May 1978) at 10;

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[32] The conference committee suggested that, among other things, the Secretary could protect subsistence by "closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened." Id.

[33] Six other legislators testified at another hearing at which state management under federal standards was discussed. House Hearings, part XI at 155-56.

see also id. at 8. (This transcript was prepared by the Department of Law on 1 September 1981, and was later submitted to the Secretary of the Interior as part of the state's certification package. It is hereafter referred to as Legislative History.)) This is not to say that in enacting Ch. 151 SLA 1978 the Legislature agreed that its law should be interpreted to be identical to whatever law Congress eventually approved.[34] But it is also clear that some legislators knew that the bill they passed might eventually be tested for consistency with federal requirements.

For our purposes, the federal requirement important here is that the state must give subsistence a priority, and the terms of the federal conditions are set out in ANILCA's §804:

> Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:
>
> (1) customary and direct dependence upon the populations as the mainstay of livelihood;
>
> (2) local residency; and
>
> (3) the availability of alternative resources.

Important members of Congress expected that the state's management of fish and wildlife would be consistent with the

[34] In Madison, this Court has already rejected this way of interpreting the state statute. 696 P.2d at 176-77 n.13.

federal priority. Indeed, Senator Stevens referred to "the State's responsibilities under Section 804" [126 Cong. Rec. S15130 (December 1, 1980)], Congressman Udall described what "the subsistence priority requires the State of Alaska" to do [126 Cong. Rec. H10546 (November 12, 1980)], and the Senate Committee on Energy and Natural Resources explained that § 804 "requires both 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...." S. Rep. No. 96-413, 96th Cong, 1st Sess. 269, reprinted in [1980] U.S. Code Cong. & Ad. News 5070, 5213. Parts of Title VIII do bind the State as well as the Secretary of the Interior. Section 804 says that "[e]xcept as provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority" -- without specifying who is to do the according. Section 807 gives people and organizations the right to sue the State if they have been "aggrieved by a failure of the State . . . to provide for the priority for subsistence uses set out in Section 804." And §805(d) provides that appropriate State laws "shall supersede" some of ANILCA's subsistence provisions, specifically including the subsistence priority, "insofar as [the ANILCA provisions] govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses."

Congress did agree to defer direct application of federal law to state fish and game management -- but only if the state fine-tuned its statutes and regulations to make them consistent

with federal objectives. According to § 805(d), the ANILCA priority would not directly govern state management if within one year of ANILCA's enactment the state satisfied the Secretary that it had "enact[ed] and implement[ed] laws of general applicability which are consistent with, and which provide for, the definition, preference, and participation specified in sections 803, 804, and 805." Appropriate state laws, "unless and until repealed," would "supersede" these ANILCA provisions. Their enactment and implementation would also stave off direct federal management of the public lands and lead to federal financial contributions towards the costs of allowing greater public participation in subsistence management. See §§ 805(d) and (e).

Thus, under ANILCA, the state had a choice. It could have asserted its refusal to comply with the federal conditions, thus provoking federal fish and game management of the public lands and risking federal cutoffs of funding for state fish and game management. Or the state could have decided to meet the federal conditions, retain its management authority, and continue to receive federal funds. Not surprisingly, it chose the latter course. Governor Hammond sent documents evidencing Alaska's compliance with Title VIII to Secretary Watt on December 2, 1981. (These included Op. Atty. Gen. A66-120-82, supra.) Changes in state regulations and policies were reported to the Secretary in a letter of December 23. Secretary Watt then expressed some doubt about certain features of the state program (see Appendix D hereto), and the Boards of Fisheries and Game responded by again revising their regulations. When, on May 14, 1982, the Secretary

finally certified that Alaska was in compliance with ANILCA, the state had clearly demonstrated its desire to meet federal conditions in order to retain the right to regulate fish and game.[35]

By doing this it ensured that its own laws would be interpreted in light of the federal standards with which it had pledged its willingness and ability to comply. A state which elects to accept federal benefits and avoid federal penalties by participating in what, in other contexts, is called "a program of co-operative federalism," must not ignore or undercut the federal standards which underlie the program -- unless it abandons the program altogether. Yet, while it participates in the program, it retains some discretion. If it decides to supplement the federal requirements, or pursue independent policies of its own, that is its right, unless the regulatory system it sets up is inconsistent with what federal law mandates. See ANILCA §815(3).

This kind of relationship between federal and state authority is not at all unusual. It is, for example, the way in which a number of important social welfare programs work.[36] And it is

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[35] The voters agreed that state subsistence management should continue. By a vote of 111,770 to 79,679, they rejected an initiative which would have repealed the state subsistence law. State of Alaska Official Election Returns by Precinct, General Election, November 2, 1982 at 47 (Ballot Measure No. 7).

[36] See King v. Smith, 392 U.S. 309 (1968) (assuming that welfare recipients may sue state officials to get them to comply with federal law); Rosado v. Wyman, 397 U.S. 397 (1970) (making that assumption explicit); and New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) (states may pursue their own special welfare policies so long as these are not inconsistent with federal law). See also Thomas v. Johnston, 557 F.Supp. 879, 919 (W.D. Tex. 1983) ("While a state is free to decide whether to participate in the Medicaid program and receive Federal assistance, once the state opts into the Federal program it (continued)

central to the operation of the Surface Mining Control and Reclamation Act of 1977 -- the law Congressman Seiberling was remembering when in that same year he proposed state subsistence management under federal conditions.[37/] The Surface Mining Control and Reclamation Act established a "continuing partnership between the states and the federal government, with the Secretary [of the Interior] providing oversight, advice, and back-up authority, and the States bearing the major responsibility for implementation." _In Re Permanent Surface Mining Regulation Litigation_, 653 F.2d 514, 516 (D.C. Cir.), _cert. denied_, 454 U.S. 822 (1981); _see generally id._ at 519-21. In this Act Congress "prescribe[d] federal minimum standards governing surface coal mining, which a state may either implement itself or else yield to a federally administered regulatory program." _Hodel_ v. _Virginia Surface Mining and Reclamation Ass'n_, 452 U.S. 264, 289 (1981). States may submit management plans to the Secretary of the Interior, just as Alaska submitted its subsistence management plan to the Secretary. 30 U.S.C. § 1253. If the Secretary approves, the states are then responsible for regulating surface coal mining. _See_ 30 U.S.C. §§ 1253(b) and 1254. State plans must include laws which regulate surface mining and reclamation "in accordance with the requirements of [the Act]," 30 U.S.C.

(footnote 36 continued) must comply with the strictures of Federal law"); _Caldwell_ v. _Blum_, 621 F.2d 491 (2d Cir. 1980) (applying this principle); _compare Norman_ v. _St. Clair_, 610 F.2d 1228, 1237 (5th Cir. 1980) (under Medicaid Act states have some discretion to choose how to make one spouse responsible for the other's medical care).

[37/] _See_ text at note 33 _supra_.

§ 1253(a), but federal law does not prevent states from enforcing laws which are more protective than the federal minimum standards:

> No State law or regulation in effect on August 3, 1977, or which may become effective thereafter, shall be superseded by any provision in [the Act] or any regulations issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this chapter.
>
> Any provision of any State law or regulation... which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of [the Act] or any regulation issued pursuant thereto will not be construed to be inconsistent with [the Act].

30 U.S.C. § 1255. Meanwhile, citizens have a private federal right of action, paralleling the right established by ANILCA's § 807, to compel "the appropriate State regulatory authority" "to perform any act or duty under [the Act] which is not discretionary...." 30 U.S.C. § 1270(a).[38]

The similarity to ANILCA is obvious, and a recognition that ANILCA establishes a program of co-operative federalism will help the Court interpret state law consistently with federal standards.

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[38] Hodel upheld this system against Tenth Amendment attacks, explaining that federal statutes which "[allow] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs," are generally constitutional. In a footnote Justice Marshall cited three federal cases sustaining statutes resembling the Surface Mining Control and Reclamation Act, including the Airborne Hunting Act, 16 U.S.C. Secs. 742j - 1; the Clean Air Act, 33 U.S.C. §§ 7401 et seq.; and the Clean Water Act, 33 U.S.C. Sec. 1251 et seq.. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 289 & n.30.

B. The Broader Protection Afforded By State Law, As Construed In Madison, Is Not Necessarily In Conflict With Federal Law, Unless The State Is Correct In Its Interpretation That "All Alaskans" Have Been Declared Subsistence Users.

In Madison the Court held, quite correctly in our view, that the 1978 state subsistence law's protections are "not strictly limited to rural communities." 696 P.2d at 176. Throughout its opinion the Court emphasized that "the legislature intended to protect subsistence, not limit it." E.g., id. At the same time, there can be no doubt that Congress did strictly limit the federal subsistence preference to "rural Alaska residents." ANILCA § 803. This was undoubtedly due in part to Congress' concern with fulfulling its obligations to Alaska Native villages where some three-fourths of the state's Native peoples reside,[39] and also in part due to the correct belief that the subsistence way of life is primarily something engaged in by "rural" people.[40]

[39] See, e.g., Federal Field Committee for Development Planning in Alaska, Alaska Natives and The Land (Oct. 1968).

[40] See, e.g. Yupiktak Bista, Does One Way of Life Have to Die So Another Can Live? (Dec. 1974). One committee report, for example, explained the "rural" limitation as follows (S. Rep. No. 96-413, supra, at 233):

> Although many residents of cities such as Ketchikan, Juneau, Anchorage, and Fairbanks harvest renewable resources from the public lands for personal or family consumption, by its very nature a "subsistence use" is something done only by Native and non-Native residents of "rural" Alaska. The Committee adopted an amendment to clarify this point by limiting application of the definition to areas of "rural" Alaska including communities such as Dillingham, Bethel, Nome, Kotzebue, Barrow, and other Native and non-Native villages scattered throughout the State. However, the Committee does not intend to imply that the rural nature of such (continued)

We are not persuaded, however, that by focusing exclusively on "rural" Alaska Congress intended to preclude the state, in its discretion, from affording a wildlife-use preference to identifiable subsistence users who might not properly be classified as rural residents, or who might live in areas whose "rural" character, through no fault of those living there, has been eroded by the encroachments of rapid economic development and population growth -- such as the Madison plaintiffs. We have found no legislative history indicating such an intent on the part of Congress, and we are bolstered in our view by the position taken by Secretary Watt during the certification process. By letter to Governor Hammond dated 25 February 1982 (Appendix D hereto), Secretary Watt responded to a subsistence "policy" of the Joint Boards which had been previously submitted to him as part of

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(footnote 40 continued) communities is a static condition; the direction of the economic development and rural character of such communities may change over time. It should be emphasized that this amendment is not intended to impose a "durational" rural residency requirement in the definition or impede the traditional movement of Alaska residents between the rural areas and the major population centers and vice versa. Nor does the amendment prohibit the taking of fish and wildlife on certain public lands by normal residents. Rather, nonsubsistence uses may continue in accordance with existing law but do not enjoy any preference on the public lands, and, consequently, may be restricted pursuant to Section 804 when necessary to protect subsistence resources or to ensure the satisfaction of the subsistence needs of rural residents.

the state's certification package, and he proposed a revised version of the policy, to be adopted in regulatory form. The effect of Watt's proposed revisions was to authorize the state to implement a "three-tier" system whereby (1) "rural and other subsistence uses" would have a preference over nonsubsistence uses, (2) if resources were not sufficient to satisfy all subsistence uses, then "rural subsistence uses" would have priority, and (3) if still further restrictions among rural users were necessary, they would be applied according to the three criteria currently known as the "tier II" criteria. According to Watt, if the boards had adopted that policy in regulatory form, the state's program "would comply with all applicable provisions of Title VIII."

For reasons known only to themselves, so far as we are informed,[41] the boards elected instead to adopt the strict rural limitation, which was then applied with a vengeance until the *Madison* court intervened. Had the boards adopted the regulation suggested by Secretary Watt, or should they now adopt such a

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[41] The timing of these events, however (*see* *Madison*, 696 P.2d at 177), raises the strong suspicion that the boards (or the Board of Fisheries, at least) seized upon the "rural" limit as a means of stripping all Cook Inlet subsistence fishers, except those residing in the three undeniably rural villages of Tyonek, English Bay and Port Graham, of any preference over, or even equal rights with, the powerful sport and commercial lobbies. *See* Thomas D. Lonner, *The Spider and the Fly: American Dominion and the Survival of Alaska Native Subsistence* 12 (October 1984). The *Madison* court struck a solid blow against this unlawful purpose, but the only effect has been to cause the Board of Fisheries to open up to "all Alaskans" the subsistence fisheries of the three villages that had been protected, and with respect to which this Court (*see* 696 P.2d at 174) expressed not the slightest hint of disapproval. *Compare* 5 AAC 01.580 (vol. 2 AAC, pp. 5-21-22) *with* 5 AAC 01.580 (vol. 4 AAC, Appendix A, p. ER-4, Emergency Regulation adopted 6/1/85).

regulation or some similar approach,[42] the state would, in our judgment, be in substantial paper compliance with both Title VIII and state law. But the state has taken a different tack, and one that is at least as hostile to subsistence uses as the policy struck down in Madison.

If state law actually did classify "all Alaskans" as subsistence users, then the conflict with Title VIII would be manifest and the state would have to surrender its privilege of managing a substantial part, if not most, of Alaska's wildlife resources. Such an extension of the subsistence preference to all state residents would so trivialize and dilute the priority as to render it "like the earth before it was made, 'without form and void.'"[43] Moreover, by placing such a construction upon the Madison opinion the state in effect contends that the Court convicted the 1978 Legislature of committing a fraud, to wit: of pretending to engage in extended and intense debate about the difficult subject of subsistence, when what it was really doing was devising a means of restricting nonresidents.[44] We are

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[42] In conjunction with the Board of Game's self-imposed "emergency" meeting in June, the plaintiffs in Bobby v. Alaska and others, before becoming aware of Secretary Watt's recommendation, unsuccessfully petitioned the Board to adopt a subsistence regulation (see Appendix B) designed to comply with both state and federal law.

[43] People v. Jondreau, 185 N.W.2d 375, 383 (Mich. 1971) (Black, J., concurring), citing Genesis ch. 1:2.

[44] If "all Alaskans" are subsistence users, and every consumptive Alaskan activity is "subsistence," then all Alaskans have a priority over non-Alaskans, and if limitations must be made all non-Alaskans will be forbidden to hunt or fish before any Alaskans are affected. Under the Board of Game's new approach, hunts previously limited to those holding random-drawing or registration permits have been designated as "tier II subsistence hunts," with non-Alaskans excluded and Alaskans (continued)

certain that the Legislature did no such thing and, having searched the Madison decision in vain, we are confident that the Court did not declare "all Alaskans" to be subsistence users.

Finally, the state's distorted view of Madison would read the "customary and traditional use" guideline right out of the law. That, too, the Court clearly did not say. Rather, the Court quite plainly said: "The words 'customary and traditional' serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans." 696 P.2d at 176. The "customary and traditional use" standard, to which we turn next, is the very heart of the law. It is the sole mechanism for identifying and preferring subsistence uses, and it is obvious that neither the state nor national legislatures entertained the notion that "rural" could serve as a proxy for "customary and traditional."[45/] Of course, we readily concede that, even in the rural setting, the development and application of appropriate "customary and traditional use" criteria is not an easy task. Furthermore, the Court's Madison holding that subsistence protection cannot be strictly limited to rural residents

(footnote 44 continued) required to qualify through a "tier II" point system. See Game Regs, supra note 2, at 12-13; Tier II Questionnaire, attached as Appendix E. Non-Alaskans had been able to participate in popular sport hunts; now, under the new policy, they may not be. The court of appeals presumed that the state would be able to avoid unconstitutional "discrimination against outsiders and newcomers," Eluska, 698 P.2d at 178 n.6, but there is no sign that it anticipated the state's regulatory reaction to its decision.

45/ It is clear from ANILCA's legislative history that "customary and traditional" subsistence uses of fish and game are a subset of all consumptive uses, and not everything "rural" people do is subsistence. See Cong. Rec. H 10547 (November 12, 1980) (Congressman Udall). The Congressman's example was a local subsistence moose hunt. People living outside the areas where the moose were -- whether "urban" or "rural" people -- would not be classified as "subsistence hunters."

undoubtedly makes the state's task even more difficult. And that's the rub.

C. The Core Mechanism of the Subsistence Laws for Identifying and Protecting Subsistence Uses Is the "Customary and Traditional Use" Guideline, Designed To Ensure Coverage of All Legitimate Subsistence Uses

Although the state approaches the subsistence laws as though they were mere procedural enactments drafted to assist the state in making discretionary resource-allocation decisions, it cannot be gainsaid that the overriding goal of the laws, and hence the paramount duty of the state, is to protect the subsistence way of life, not to subject it to needless and discriminatory rules designed to regulate sport and commerce. Congress thus declared the national interest to be in the interdependent goals of "proper regulation, protection and conservation of fish and wildlife on the public lands and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska...." ANILCA § 801(5). Perhaps nowhere is the supreme importance of this goal better exemplified than in Congress' decision to make a subsistence exception to the theretofore inviolate policy of prohibiting hunting in all national parks.[46] The legislative history explained:[47]

[46] See American Wildlife Law, supra, at 94-95.

[47] 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); accord, e.g., id. at H10541 (12 Nov. 1980). It was further noted: "The National Park Service recognizes, and the Committee agrees, that subsistence uses by local rural residents have been, and are now, a natural part of the ecosystem serving as a primary consumer in the natural food chain." S. Rep. No. 96-413, supra, at 171. In the national parks of Alaska Congress wanted to insure "stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems, including recognition that local rural residents engaged in subsistence uses may be a natural part of that ecosystem." Id. at 233.

> With respect to the situation of local residents in and near certain new national parks and monuments established by this Act, the Committee believes that the establishment of these units should protect the opportunity for local rural residents to continue to engage in a subsistence way of life. The Committee notes that the Alaska Native people have been living a subsistence way of life for thousands of years, and that the Alaska Native way of life in rural Alaska may be the last major remnant of the subsistence culture alive today in North America. In addition, there is also a significant non-Native population residing in rural Alaska which in recent times has developed a subsistence lifestyle that also is a cultural value.

Congress thus sought to protect subsistence lifeways by guaranteeing the basic right of self-determination:[48]

> In addition to the cultural importance of the subsistence lifestyle, curtailment of subsistence uses would impose major hardships upon many residents of rural Alaska. It is a combination of these factors which has led to the conclusion that there is a need to continue the opportunity for subsistence uses of renewable resources, including wildlife, within certain National Parks and Monuments by local rural residents who have, or are a member of a family which has, an established or historical pattern of subsistence uses within such units. Local rural residents who maintain their primary, permanent residence within or near such units should have the opportunity to decide for themselves the course, pace, and extent, if any, of their own lifestyle and community evolution.

Both the state and federal subsistence laws were predicated upon an extensive record revealing that numerous rural Alaska

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[48] 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); *accord, e.g., id.* at H10541, H10545, H10546 (12 Nov. 1980); *H. Rep. No. 95-1045,* 95th Cong., 2d Sess., part I at 182, 185 and 187 (1978).

Native villages and others were greatly dependent upon wild renewable resources for their economic, cultural and/or social existence--a dependence that commanded a positive legal preference over all other uses of such resources.[49] At the same time, the legislators recognized that the precise nature and inner-workings of subsistence lifeways, and the extent of subsistence users' economic, cultural and/or social dependence on wildlife and other renewable resources, were not well known. Consequently, the legislatures designed a statutory scheme that would ensure extensive research into these unknown factors, the results of which, it was clearly contemplated, would then be incorporated into protective regulations.[50] The vehicle for thus guaranteeing the protection of subsistence lifeways was the definition of subsistence uses as "customary and traditional uses." This definition was intended to have sufficient flexibility, depth and breadth to take account of and protect the diverse Alaska subsistence ways of life in all of their manifestations. It was

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[49] Congress found, for example: "Alaska's more than 200 rural villages are unique in that they are the last communities in the United States in which a substantial number of residents are still dependent upon the harvest of renewable resources on the public lands for their sustenance." S. Rep. No. 96-413, supra, at 230-31.

[50] The state law therefore created the Subsistence Division of ADF&G and assigned it substantial research obligations. AS 16.05.094. ANILCA §812 imposes similar duties on the Secretary of the Interior. AS 16.05.094(5) and (6) expressly mandate the Subsistence Division to evaluate the impact of laws and regulations on subsistence hunting and fishing and to recommend "corrective action" to the Department and the fish and game boards. As Representative Gruening pointed out during debate, in opposition to Representative Cotten's unsuccessful amendment to delete "customary and traditional" from the bill, "I think that the meaning of customary and traditional applying it to use...is not that confusing. After all, this bill is to establish a framework in which these can be developed." Legislative History at 11-12.

designed in no small way to identify historical subsistence uses, restore the opportunity to continue those uses to the extent such opportunity had been eroded, and to perpetuate the esential resource base and the opportunity for such uses in the future.

The "customary and traditional use" guideline was intended by Congress, as it was by the state legislature,[51] to identify and protect long-established economic and cultural dependence on wild renewable resources:[52]

> However, the phrase "customary and traditional" is intended to place particular emphasis on the protection and continuation of the taking of fish, wildlife, and other renewable resources in areas of, and by persons (both Native and non-Native) resident in, areas of Alaska in which such uses have played a long established and important role in the economy and culture of the community and in which such uses incorporate beliefs and customs which have been handed down by word of mouth or example from generation to generation.

At the same time, the standard was not intended to preclude future adaptations in technology. In discussing the term "traditionally employed" in § 811(b), Congress explained that it is "not intended to foreclose the use of new, as yet unidentified means of surface transportation, so long as such means are subject to reasonable regulation necessary to prevent waste or damage to fish, wildlife or terrain."[53] This point was made elsewhere in

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[51] See Representative Anderson's discussion during the state debate, quoted in Madison, 696 P.2d at 175-76, and the Court's recognition that "[h]is major concern focused on the potential pressure put on resources by newcomers." Id. at 176.

[52] H. Rep. No. 96-97, 96th Cong., 1st Sess., part I at 279 (1979).

[53] S. Rep. No. 96-413, supra, at 275.

the legislative history as follows:[54]

> The Committee, after careful consideration, has adopted a definition of "subsistence uses" which affords significant flexibility to the Secretary and others responsible for implementing this title. In particular, the Committee recognizes that technology and techniques employed by those making subsistence uses of resources of the public lands may be subject to continuing change in the future as they have been in the past; the Committee does not intend that any such change, by itself, should be considered as inherently impermissible or as necessarily placing subsistence users completely outside the scope of this act. Similarly, the Committee recognizes that people may be dependent upon subsistence uses in a very realistic way even though they may, to some limited extent, be participants in the cash-oriented economy, and also that subsistence uses sometimes have an important cultural significance which should not be disregarded by those responsible for interpreting and implementing the policies of this act.

It was further stated:[55]

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[54] H. Rep. No. 95-1045, supra, part I at 186.

[55] 126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980). A similar point was made in the House debate in the state legislature. Representative Hayes expressed concern that defining subsistence in terms of "personal or family consumption" might not cover the situation in which it is "traditional and customary to share with the elderly and those that are sick and those that are without a hunter in the family" (Legislative History at 13); he questioned "[i]f a hunter takes game and shares it with someone other than himself or his family, does he fall outside this definition?" Id. at 14. He was assured that there was no problem, that the law fully covered the situation he described. Id. at 13, 14-15. During the ANILCA debate, Congressman Udall gave the following example of how the subsistence preference was intended to be implemented on a community or regional, rather than individual basis (126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980)):

> For example, if residents of the villages in a particular area normally harvest five hundred moose for subsistence uses, and fly in hunters from outside the local area normally harvest five hundred moose from the same herd, but the (continued)

It also should be noted that customary and traditional subsistence uses must be evaluated on a community or area basis, rather than an individual basis. If not, our commitment in this legislation to the protection of the Alaska Native subsistence way of life would be terminated in one generation as rural residents with established subsistence

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(footnote 55 continued) biologists determine that the herd can safely sustain a total harvest of only six hundred moose, the subsistence priority in section 804 requires that only one hundred moose be made available for harvest by persons other than residents of the local area engaged in subsistence uses. This result could be achieved by opening the moose season to the residents of the game management units in which the moose herd is located for hunting without a permit to obtain moose for subsistence uses, and then allocating access to the remaining one hundred moose to non-residents of the area by lottery.

If in the previous example the moose herd is only capable of sustaining a total harvest of four hundred moose, then not only must no hunting of the herd be permitted by persons not resident of the local area, but the State must also establish priorities for access to the herd by the rural residents of the local area as well, based upon the three criteria set forth in the subsistence preference; local residency, availability of alternative resources, and dependence upon the resource. Only at this stage of the regulatory process, when dependence upon the resource as the mainstay of livelihood for the first time becomes a permissible allocation criteria does the income of individual rural residents become a permissible factor in the allocation process. The availability of alternative resources criteria is intended to focus on alternative subsistence or other food resources, not money. For example, if caribou are reduced are some villages better able to withstand the hardship than others because they have more access to seals or moose?

> uses pass away and their descendents with no established customary and traditional uses take their place in the subsistence cycle.

Additionally, Congress emphasized that subsistence users should have access to their resources "regardless of where such [wildlife] populations may be located in the future":[56]

> Traditional habitat and migration routes may be altered by transportation systems and development activities on the public lands. By focusing on access to the resource itself, rather than on the particular portion of the public lands upon which the resources may presently be located, this section [811(a)] provides the flexibility necessary to ensure the continuation of subsistence uses in the future, subject to reasonable regulation.

Furthermore, Congressman Udall emphasized that the state has a duty to restore subsistence-harvest opportunities that had been eroded by the state's inhospitable management regime:[57]

> The State must first identify the customary and traditional subsistence uses of each population and stock by rural residents. It should be emphasized that this evaluation must be based upon subsistence use, not upon any form of economic or other need. It also should be emphasized that the level of subsistence uses by rural residents of particular wildlife populations and fish may have been repressed by State regulatory activities and, consequently, recent historical levels of harvest of a particular population or stock may not accurately reflect the normal level of the customary and traditional subsistence use of such population.

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[56] S. Rep. No. 96-413, supra, at 275; see also, e.g., 126 Cong. Rec. S11128-29 (daily ed. 18 Aug. 1980); id. at S11198-99 (19 Aug. 1980); id. at H10535 (12 Nov. 1980).

[57] 126 Cong. Rec. H10546 (daily ed. 12 Nov. 1980).

After giving some examples of how customary and traditional harvest levels had been repressed, he concluded (id.):

> Mr. Speaker, similar examples are too numerous to mention. The point I am making is that the subsistence priority requires the State of Alaska to determine the customary and traditional subsistence use of a particular wildlife population or fish which would have reasonably been made by rural residents if their subsistence uses had consistently been respected and adequately protected by State regulation.

Thus, it is seen that "customary and traditional uses" is a broad and flexible concept. It reaches deep into the past and looks forward to the future. It is designed to protect and continue renewable natural resource harvesting in rural communities in which such resource use has been an integral part of the economic and cultural fabric, and to restore harvesting opportunities that have been repressed by state management. It encompasses beliefs and customs handed down, by word of mouth or example, from generation to generation. It applies to people as a group, as well as to individuals. It is not circumscribed by geography; it focuses on the resource itself, rather than on where the resource is now located or has been located in the past. It embraces advances in resource harvesting technology and technique, and does not seek to confine subsistence users to present or past technologies. It recognizes the necessity of cash. It has great social and cultural significance which is due to be honored.

Obviously, the "customary and traditional use" standard was designed to be given such content as dictated by the known and knowable facts of Alaska's subsistence lifeways. It is not an

easy standard to administer, but as we now show, there can be no doubt that the state's wildlife managers have both the knowledge and competence to properly implement the "customary and traditional use" guideline.

III.

THE LIFEWAYS OF MEMBERS OF SUBSISTENCE-BASED SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS, ABOUT WHICH THE STATE HAS A SUBSTANTIAL BODY OF KNOWLEDGE, ARE ENTITLED TO CONSTITUTIONAL PROTECTION INDEPENDENTLY OF THE SUBSISTENCE LAWS

Here we provide a brief overview of the ever-increasing volume of research into the diverse subsistence lifeways of Alaskans. That research reveals that the most common such way of life is that engaged in by Alaska Native villages with "subsistence-based socioeconomic systems." Those "systems" represent a culturally distinct way of life in which subsistence activities constitute the central, integral component of the ultimate being of members of those communities. We suggest that this way of life is entitled to constitutional protection without benefit of the subsistence-preference laws.

> Finally, subsistence societies typically have a set of beliefs and values which link the human participants in the natural order to the natural resources, particularly the living ones, on which they depend. These belief systems tend not to dichotomize the living world into human and other, but rather to link together in an order ordained by some ultimate force the lives and spirits of humans and others. Among Alaskan Natives there are often more direct links in addition to respect, deference, and obligation shown to animals and their spirits, in that some animals are conceived to have been human at one point and transformed into their current form in the past. This is

further affirmation of the essential unity between humans and animals in spiritual nature and supports the notion of their mutual dependence and obligation.

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It is through capturing, processing, distributing, celebrating, and consuming naturally occurring fish and animal populations that subsistence societies define the nutritional, physical health, economic, social, cultural, and religious components of their way of life. Without harvests, there is no subsistence.[58]

A. The Nature of Alaska Subsistence Lifeways

Undoubtedly the most significant impact of the subsistence laws to date is that the legislative expectation of extensive research into the Alaska subsistence way of life is being fulfilled. An ever-expanding volume of subsistence research is being conducted and published by ADF&G's Subsistence Division, as well as by numerous other government agencies and private organizations.[59] While much is yet to be done, the process is firmly in place and ongoing. The body of research already published reflects considerable diversity among those Alaskans who are economically and socially dependent upon the harvest of wild renewable resources for local uses.

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[58] Steve J. Langdon, Alaskan Native Subsistence: Current Regulatory Regimes and Issues 3 (October 1984, Paper for Roundtable Discussions of Subsistence, Alaska Native Review Commission, Vol. XIX).

[59] The Subsistence Division has published over 125 volumes in its "Technical Paper Series." While some of the papers are concerned only with theoretical or policy matters, most of them involve in-depth reviews of the subsistence uses of a particular village or region. There is, in addition, a substantial amount of research available from other government agencies, as well as private organizations. See, e.g., U.S. Dept. of the Interior, Subsistence Management and Use: Implementation of Title VIII of ANILCA (March 1985), and the numerous references therein.

By far the most common type of such resource use is that engaged in by "subsistence-based socioeconomic systems" with certain common identifiable characteristics. These "systems" consist primarily of rural Native villages, or groups of villages, although a few non-Native communities may also share many of the same characteristics.[60/] These subsistence systems are exceedingly complex, and their varied features are not readily apparent to the untrained or unfamiliar observer:[61/]

> Many White persons imagine that subsistence is merely the act of an individual going hunting or fishing. Subsistence, in actual fact, is a complicated economic system, and it demands the organized labor of practically every man, woman, and child in a village. There are countless tasks, such as the maintenance of equipment (nets, snowshoes, boats, fishwheels, outboard motors, snowmobiles, etc.), preparing the outfit for major hunting and fishing expeditions, setting and checking traplines, dressing and packing hundreds of pounds of meat, cutting and drying thousands of pounds of fish, gathering berries and edible plants, tanning skins and hides, making things from them--clothing, footgear, containers, sleds, tents, kayaks--sharing harvests of meat and fish, and trading with other communities.

[60/] Deposition of Steven R. Behnke (18 Sept. 1985), in Bobby v. Alaska, Civil Action No. A84-544 (D. Alaska). By the very nature of Native communal subsistence systems, which have evolved over thousands of years, and which incorporate kinship-based distribution systems and oral traditions, the Native system is not likely to have a non-Native community counterpart, although the deposition just cited indicates that there may be a few non-Native communities which during the past 50 years or so have acquired some of the attributes of the Native systems. At the same time, non-Natives who marry or otherwise become integrated into Native villages are given equal status in the socioeconomic system. See, e.g., Thomas R. Berger, Village Journey: Report of The Alaska Native Review Commission, 151, 153 (1985).

[61/] Thomas Berger, supra, at 56.

These systems operate at the community or regional level:[62]

> The fishing and hunting pattern is not an attribute of an individual, but of an entire community or regional group. The patterns of resource use have a relatively long and continuous time depth within the community, passed on from one generation to the next through instruction and learning. A person may adopt the fishing and hunting patterns by becoming socialized into the community. However, the behaviors of any individual are not a complete or sufficient representation of the socioeconomic system.

Although they predominate in the smaller rural villages, these subsistence-based socioeconomic systems are also present elsewhere on the Alaska landscape, such as in "regional centers" (e.g., Nome) where, despite the more pervasive presence of the market ecomony, the attributes of a subsistence-based socioeconomic system still predominate. Wolfe & Ellanna, supra, at 273. Thus, as early recognized, in its most visible form "subsistence is a kinship-bound community economic system with an elaborate division of labor and special roles. By defining and confining activities to individuals only, regulatory systems may intrude seriously and unreasonably into these arrangements."[63]

Still, there are other uses that merit subsistence-preference protection. Even in Fairbanks, for example, where hunting and fishing activities "were scheduled around wage jobs and engaged in for the value of 'being outdoors' and 'recreation yielding a food

[62] Robert J. Wolfe & Linda J. Ellanna, Resource Use and Socioeconomic Systems: Case Studies of Fishing and Hunting in Alaskan Communities 250 (ADF&G Technical Paper No. 61, March 1983). See generally Steve Langdon & Rosita Worl, Distribution and Exchange of Subsistence Resources in Alaska (ADF&G Technical Paper No. 55, April 1981).

[63] Thomas D. Lonner, Subsistence as an Economic System in Alaska: Theoretical and Policy Implications 27 (ADF&G Technical Paper No. 67, 3 Nov. 1980).

return,'" there are also "a small number of the sampled fishermen [who] fished for salmon for more economic reasons, for food for families and dogteams, as part of a self-sufficient, 'interior way of life.'" Wolfe & Ellanna, supra, at 257. Hence, while subsistence "systems" of one sort or another comprise the bulk of true subsistence harvest activities:

> On the other hand, there are a number of persons who live on their own in the bush, who live in urban areas but whose ties are to rural economies, who live in urban areas but who have been customary and traditional users of wild resources for long periods, and so on. These persons must have their interests protected through factual research and documentation and permitting systems.

Lonner, supra note 63, at 27-28; accord, Madison, 696 P.2d at 170.

Finally, it should be acknowledged that no one has a more literally vital interest in wildlife conservation than those engaged in the subsistence way of life, who are themselves one with the ecosystem. These descendants of peoples who have lived off the land from time out of mind operate within a set of cultural, social, economic and environmental constraints that are likely far more effective for ecosystem conservation than any printed words of Anglo-Saxon sporting law.[64/]

[64/] See, e.g., Steve J. Langdon, supra note 58, at 14-20; Richard K. Nelson, Make Prayers to the Raven 16-24 (1983); Harvey A. Feit, Waswanipi Realities and Adaptations: Resource Management and Cognitive Structure (1978 dissertation, McGill Univ. Anthropology Dept.); Harvey A. Feit, Decisionmaking and Management of Wildlife Resources: Contemporary and Historical Perspective on Waswanipi Cree Hunting (1983, International Congress of Anthropological and Ethnological Sciences); Harvey A. Feit, James Bay Cree Self-Governance and Management of Land and Wildlife Under the James Bay and Northern Quebec Agreement (1985, American Indian Workshop, Copenhagen); Peter J. Usher, Property Rights: The Basis of Wildlife Management (Draft) (Presented to the Third National Workshop on People, Resources, and the Environment North of 60°); Priscilla Kari, Land Use and Economy of Lime Village 127-29 (ADF&G Technical Paper No. 80, June 1983).

B. Alaska Native Subsistence-Based Socioeconomic and Sociocultural Systems Are Entitled to Constitutional Protection.

The fundamental right of Alaska Natives to engage in subsistence hunting and fishing is grounded in federal law and long-standing federal policy towards Native American peoples, including Alaska Natives. See Argument I B and C. The source of this fundamental right can also be found in the First[65/], Ninth, and Fourteenth Amendments to the United States Constitution, insofar as the right is intimately involved with the associational, religious, and personal rights of Native Alaskans in the exercise of their traditional subsistence lifeways.

The State of Alaska has criminalized many of these subsistence activities by making conduct illegal which does not conform to its sport hunting regulations, seasons, and bag limits. Its unwarranted intrusion into the way Native people live is forbidden by the United States Constitution.

65/ Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 587, 594 (N.D. Cal. 1983) ("We also reject the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs and practices. Governmental action that makes difficult or impedes religious observances may also be 'invalid even though the burden may be characterized as being only indirect.' (citation omitted)"), aff'd in relevant part, __ F2d __ (9th Cir. 1985), 12 Indian Law Rptr. 2118; Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639-40 (N.D. Tex. 1973) ("Congress has the power or duty to preserve our Native American Indians [also our Eskimos and Aleuts] as a cohesive culture until such time, if ever, as all of them are assimilated in the mainstream of American culture. . . . [S]ome sort of a formal organization or community must be extant so that it may be determined who is a member of the culture to be preserved."); United States v. Warner, 595 F.Supp. 595 (D. N.D. 1984); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); (upholding right of Indian prisoner to wear long hair as expression of religious belief protected by First Amendment); People v. Woody, 394 P.2d 813 (1964) (reversing criminal conviction of Navajo Indians for use of peyote on grounds use of drug constituted an integral element of their religious practices).

One cannot point to a specific place in the Constitution that says in so many words that the historical subsistence activities of Native Americans shall not be abridged. Nor can one find an express protection for the sanctity of the family[66/] or the marital community,[67/] the right to bear[68/] or not to bear children,[69/] the right to raise them free of overly intrusive governmental regulation,[70/] or the freedom of association.[71/] Nevertheless, an abiding commitment to diversity, privacy, and personal liberty, based on deeply rooted history and tradition, has led the Supreme Court to articulate "peripheral" rights without which "the specific [Bill of R]ights would be less secure." Griswold v. Connecticut, supra note 67, 381 U.S. at 483. These are rights "so rooted" in the "collective conscience of our people . . . as to be ranked fundamental." Id. at 493.

NAACP v. Alabama, 357 U.S. 449, 469 (1958), articulated the constitutional right to "freedom to engage in association for the advancement of beliefs and ideas [as] an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

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66/ Moore v. City of East Cleveland, 431 U.S. 494 (1977); Stanley v. Illinois, 405 U.S. 645 (1972).

67/ Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967).

68/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Skinner v. Oklahoma, 316 U.S. 535 (1942).

69/ Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

70/ Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

71/ Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

Amendment." The Court stated that the beliefs sought to be advanced by association may be political, economic, religious or cultural, and it is the effect of the state's action, not its intentions, which is relevant:

> In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

357 U.S. at 460-61. In Griswold v. Connecticut, the Court had occasion to further explain the right of association in the context of exploring the "penumbras" that emanate from the specific guarantees of the Bill of Rights and which "help give them life and substance." 381 U.S. at 484.

> [W]e have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members [citations omitted] . . . . [it] is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.

Id. at 483.

Wisconsin v. Yoder, 406 U.S. 205 (1972), a case dealing with the right of the Old Order Amish to live separate and apart and free from state compulsory education laws, failed to mention the association cases, but relied instead on the free exercise clause of the First Amendment. The case is instructive, both in its evaluation of the claims of the Old Order Amish for special treatment under the Constitution, and to show that the facts in any given case may call for the protections of one constitutional

amendment rather than another.[72] The Court found in Yoder that the state's requirement of compulsory secondary education would "gravely endanger if not destroy the free exercise of respondents' religious beliefs." 406 U.S. at 219. Considerations that obviously persuaded the Court that the Old Order Amish way of life deserved constitutional protection were the testimony of experts concerning "300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life," id., coupled with a recognition that the Amish society was increasingly beset by the encroachments of an alien way of life.

> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.

Id. at 217.

Yet, the Court reasons, "a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Id. at 224. "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." Id. at 226. The question, of course, is how far to go in providing constitutional protection for "penumbral" rights (in the First and Fourteenth Amendments) and the unarticulated rights reserved by the Ninth Amendment.

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[72] Or the court may, as in Griswold, rely on "several fundamental constitutional guarantees." 381 U.S. at 485.

More recently, the Court, surveying the "treacherous field" of substantive due process, emphasized that the limits of substantive due process must be drawn from "the teachings of history [and] solid recognition of the basic values that underlie our society." Moore v. City of East Cleveland, 431 U.S. 494, 503, quoting Griswold v. Connecticut, 381 U.S. at 501 (Harlan, J., concurring). The Court "expressly points to history and tradition as the source for 'supplying . . . content to this Constitutional concept.'" Moore, 431 U.S. at 503 n.12 (citation omitted).

For instance, in Moore, where the Court was considering whether the Constitution protects the composition of the extended family from a city's zoning ordinance, the role of the family in the Nation's history and tradition was emphasized. "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Id. at 504.

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.

Id. at 504-05. The Native Alaskan village or tribe is very like the extended family so cherished and protected by the highest