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Court in Moore. Clearly, for its members, the village or tribe serves the same function in inculcating values that the family is perceived to do in Western civilization or that the Old Order Amish society does for its members.

Subsistence activities of the village or tribe (hunting, fishing, gathering) are not of recent origin, nor are they exercised primarily for the personal pleasure or sport of any individual. Rather, they are "an accumulation of wisdom"^{73/} of the historical and traditional means of preserving the group whose members function in a communal, sharing and exchanging system very different from the free-enterprise, capitalistic ethic of Western civilization. Through the exercise of these subsistence activities, the life skills, moral and cultural values, and religious beliefs of the group are passed down from one generation to another. See part A supra.

The "basic values that underlie our society"^{74/} apply equally to subgroups of our society. Just as "the Constitution prevents East Cleveland from standardizing its children -- and its adults -- by forcing all to live in certain narrowly defined family patterns," Moore, 431 U.S. at 506, the Constitution must equally prevent the state from standardizing lifeways and effectively outlawing a traditional subsistence society.

The functions of shaping and transmitting values, which the Moore plurality identified as justifying protection for the extended family, inhere in a wide variety of enduring relationships; governmental interference with any such

^{73/} See Moore, 431 U.S. at 503-4.

^{74/} Moore, 431 U.S. at 503.

relationship should be invalidated unless compellingly justified.

L. Tribe, American Constitutional Law 989 (1978).

This Court has already noted the fundamentally important role that subsistence hunting and fishing activities play in the lives of Native Alaskans:

For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions by those of different cultures, many Alaska Eskimos, Indians and Aleuts eke out a livelihood by reliance on fish and game. A few non-Natives have adopted similar means of livelihood. See generally, McPhee, Coming into the Country (1977). Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of these people. It has been claimed that their very lifestyle is threatened if they are deprived of this traditional method of obtaining the wherewithal for existence.

State v. Tanana Valley Sportsmen's Association, 583 P.2d 854, 859 n.18 (Alaska 1978); see also Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979).

The religious use of moose meat for an Athabaskan potlatch has been accorded the protections of the First Amendment, Frank v. State, supra, and rural villagers' constitutional right to be tried by a jury of their peers has been upheld in Alvarado v. State, 486 P.2d 891 (Alaska 1971).

The record before the Alvarado court included the testimony of an expert who characterized Native village economies as relying on "hunting, fishing, and gathering activities, strong kinship bonds, [and] isolation from those parts of Alaska that approximate mainstream America" 486 P.2d at 894 (Dr. Frederick

Hadleigh-West). It also included written evidence that "Eskimos, Indians, and Aleuts, spring from cultures very different from those of other Alaskans or other Americans In an economy based importantly on a pattern of life of subsistence fishing and hunting, the large majority of these Alaskans are unemployed or only seasonally employed." Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land 3 (1968). The court, finding that "an essential cultural difference" existed between Native villages and urban Anchorage, and "in all likelihood this difference will continue to exist in the future," concluded that Alvarado was constitutionally entitled to a jury of peers selected from his community, not from the community of greater Anchorage. Alvarado, 486 P.2d at 900.^{75/} Thus, this Court has consistently given constitutional protection to Alaska Native lifeways.^{76/}

IV.

THE STATE STANDS BEFORE THE COURT
IN A POSITION OF COMPLETE NONCOMPLIANCE WITH
THE SUBSISTENCE LAWS; THE JUDGMENT OF THE TRIAL
COURT DISMISSING THIS CASE WAS CORRECT

A. The Board of Game Has Not Adopted Subsistence
Regulations As Required By Law.

The state does not dispute the express requirement of the state subsistence law that the Board of Game "shall adopt regulations...permitting the taking of game for subsistence uses." AS 16.05.255(b). Yet, insofar as the Board is involved, the

^{75/} The court's prediction that there would continue to be cultural differences between Native villages and urban centers was accurate. See generally Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985).

^{76/} See also Aguchak v. Montgomery Ward Co., 520 P.2d 1352 (Alaska 1974).

substantial body of acquired knowledge about Alaska's subsistence lifeways (Argument III A, supra) has been largely ignored. Concededly, the Board, as presently constituted, does not appear to be hostile to the subsistence way of life, and it has on a number of occasions modified the western sporting regime in ways intended (without expressly saying so) to ameliorate the harshness of the application of that management system to subsistence lifeways.^{77/} But never as a priority. Indeed, since the Board's approach is premised upon the sanctity of the sport-hunting rules, subsistence has yet to gain even equal footing with sport and commerce (trophy hunting).

The system for which the state seeks this Court's approval is therefore one which turns the subsistence preference, and legislative design, upside down. The state's approach must be reversed, as the courts below have attempted to do.

Since it is the Western legal system which attempts to regulate the taking of wild resources, it is Western social research which bears the burden of explaining subsistence; unfortunately, to this point in the history of

^{77/}The state argues that these accommodating modifications of the sporting system constitute compliance with the law (State's Br. at 4-5, 15-16); that the Board's approach, "whereby the board incorporated management mechanisms into general game hunting seasons and bag limits so as to ensure a reasonable opportunity for the continuation of subsistence uses, and to give subsistence uses a priority where restrictions apply," is adequate. Id. at 15 (emphasis added). The crux of the state's case is its assertion that "separate subsistence regulations are not required, and that so long as a reasonable opportunity exists for subsistence hunting by all Alaska residents, non-subsistence uses need not be completely eliminated [or, if the facts of this case are indicative of the state's position, non-subsistence uses need not be curtailed at all, see note 79, infra]. Id. at 16 (emphasis added). As we show in part B, infra, this "sporting chance" theory of subsistence, which has its genesis in 5 AAC 99.010 and the scheme devised to strip the Madison plaintiffs of subsistence protection, is flatly wrong.

Alaska social history and policy development, the regulators neither understand, have much interest in, nor agree with the world view presented by social researchers. To the degree that the regulators can enforce their regulations on rural people, rural subsistence economies are in jeopardy.

Thomas D. Lonner, Perceptions of Subsistence and Public Policy Formation in Alaska 14 (ADF&G Technical Paper No. 68, undated).

Although a number of the state's sport-hunting rules are antagonistic to subsistence socioeconomic and sociocultural systems, the habitual imposition of arbitrary sport-hunting seasons, the individual-bag-limit concept, and biologically irrelevant sex restrictions are the principal components of the state's management system which regularly intrude into and disrupt, with criminal and property-confiscation sanctions, the peace and dignity of the Alaska subsistence way of life.

The basic problem here, as former Subsistence Division Director Lonner pointed out in the above quote, is that the state's management policy and the hard facts of customary and traditional subsistence use have yet to meet each other. Despite the mounting evidence that sport and trophy hunting rules are alien to true subsistence lifeways, the state clings desperately to the entrenched "sporting chance" management system with which it is comfortable (see note 77, supra) and stubbornly insists on treating subsistence as an individual- or individual-family-oriented recreational activity. This approach is wholly at odds with the lifeways of subsistence Alaska, as the facts of this case demonstrate.

B. The Customary and Traditional Subsistence Uses of Wildlife Resources By Respondent Eluska and His Village Are Unreasonably Restricted By the Arbitrary Closed Seasons and Individual Bag Limits the State Seeks to Apply

The courts below were eminently correct in their conclusion that the sport-hunting rules applied to respondent Eluska's hunting territory do not constitute subsistence hunting regulations and are therefore invalid as applied to him. Mr. Eluska is not only a subsistence hunter in the individual or household sense, he is a part of the subsistence-based socioeconomic and sociocultural system of the village of Akhiok.^{78/} Neither the regulation which the state seeks to apply

^{78/} Akhiok is a Koniag village of approximately 100 persons, 96% of them Natives, at the southern end of Kodiak Island. ADF&G Habitat Division, Alaska Habitat Management Guide, Southwest Region, Volume II: Human Use of Fish & Wildlife, table 47, p. 500 (1985). Akhiok residents, by custom and tradition, hunt and fish on a year-round basis for deer, hare, harbor seal, sea lion, halibut, dolly varden, steelhead, butter clams, king crab, tanner crab and dungeness crab; salmon and migratory birds are available and harvested seasonally, depending on migrations. Kodiak Area Native Association and ADF&G Division of Subsistence, Kodiak Island Area Local Fish and Game Resource Guide 84 (December 1983). There is significant sharing and exchange of harvested subsistence resources, primarily among Akhiok households, but also secondarily with Native families in the city of Kodiak. Game is the most widely distributed wild resource, with 85% of Akhiok households receiving wild game from other households in the village, and 65% of the households giving harvested game resources to other households in Akhiok and secondarily in Kodiak. Id. at 40 and 59. These facts are confirmed in respondent Eluska's affidavit filed in the trial court. [R. 7-9]. That affidavit establishes that Mr. Eluska is a life-long subsistence user (para. 2), that Akhiok is a subsistence-based village ("a substantial portion of the village's livelihood is provided and depends on customary and traditional subsistence activities," para. 1), that his is a 6-person household (para. 3), that store-bought food is not easy to come by, even if he could afford it (para. 4) that deer are plentiful enough to fill the village's subsistence needs without harm to the herd (para. 5), and that "[t]hese deer, as is customary among Native peoples, are shared throughout the community--passed out to relatives and friends. Likewise in any given year my family was provided with meat by others in the village who had taken a deer, seal or sealion." Para. 5. The state's brief (p. 9) (continued)

to David Eluska, nor the subsequent regulatory changes placing further restrictions on the traditional use territory of Akhiok, reflect any effort to accommodate, let alone provide a priority for, the village's customary and traditional uses of deer for subsistence purposes.^{79/} The state has been on express notice since at least December 1983 that the deer seasons and individual bag limits are too restrictive,^{80/} yet the state has made no (footnote 78 continued) transgresses candor when it implies that this is a "self-serving subsistence affidavit." If there is a self-serving affidavit involved in this case, it is the affidavit of Area Biologist Smith, filed by the state. [R. 62-63].

^{79/}The regulation in effect at the time of Mr. Eluska's alleged offense (the 1982-83 season) imposed the following restrictions: an individual bag limit of 7 deer, a six-month closed season (open season was 1 August through 31 January), with the further restriction that does could be taken only between 15 September and 31 January. The Board of Game imposed further restrictions for the 1983-84 season, reducing the individual bag limit to 5 deer, and shortening the season to close on 7 January. See state's Brief of Appellant at 4 n.1, filed in the court of appeals. The restrictions referred to applied alike to both subsistence and non-subsistence hunting. These restrictions have now been reclassified as "subsistence" and "genera." hunting regulations. Game Regs. (see note 2, supra) at 36 and 66. Both sets of regulations are identical, and there is otherwise no evidence that subsistence deer hunting in the unit has received any preferred treatment of any kind.

^{80/}The Kodiak Island Area Local Fish and Game Resource Guide (see note 78, supra), in the preparation of which ADF&G's Subsistence Division participated, identified a number of "issues and concerns," including (p. 90):

Rural residents report that the current seasons for hunting deer are too restrictive, because they depend on this resource as a major food source for most of the year.

Current bag limits do not permit traditional hunting in which a proficient hunter may supply a number of families with meat.

Clearly, "corrective action [was] indicated," but there is no evidence that the Subsistence Division "mad[e] recommendations to the department" or to the Board, as mandated by AS 16.05.094(5) and (6).

effort to accord the subsistence preference mandated by state and federal law.

This case involves a readily identifiable rural subsistence economic system of the type being regularly documented on an ongoing basis in the state's subsistence research. There is no justification for the state's continuing refusal to adopt a subsistence management program specifically addressed to these subsistence-based socioeconomic systems, to which the application of the individual-oriented western sporting regime is manifestly inappropriate. The alternatives to the sport-hunting rules are obvious, e.g., a village-based or regional approach with harvest-level guidelines designed to account for the needs and uses of the village or region as a whole, including its sharing and exchange components and trading patterns--a program, in short, which recognizes that "[i]n rural Alaska...one hunter may be responsible not only for supplying his own immediate family but also for a system of community sharing with elders and others who need meat but cannot hunt." Dennis D. Kelso, Subsistence Use of Fish and Game Resources in Alaska: Considerations in Formulating Effective Management Policies, Transactions of the 47th North American Wildlife Conference 635 (ADF&G Technical Paper No. 65, 1982).

Such alternatives are not only possible, they also are highly desirable, because the present system produces little more than bad, uninformed management and cultural disruption. "[A]rbitrary harvest limits have no place in a sensible management program ... The net effect could be impairment of both subsistence use pat-

terns and management plans. An alternative approach would be based upon potentially flexible harvest levels or ranges derived from longitudinal data on resource populations and harvests by humans. Such an approach would allow for possible variation in use without adversely affecting the population base." Id. at 636.^{81/} Such an approach would also provide a framework for giving subsistence users a meaningful role in the development and implementation of management measures, a result that would not only contribute to more effective and cooperative management (id. at 637-38), but would also comply with the legislative intent to ensure users such a meaningful role in the management regime.^{82/}

^{81/}The Alaska Eskimo Whaling Commission, for example, allocates the harvest level according to a community-based harvest quota or guideline. See, e.g., Rosita Worl, Cultural Norms, Laws, and Modern Resource Management Regimes (1981, Arctic Coastal Zone Management Newsletter 34: 15-17). There is no reason, with the possible exception of arrogance, why the state could not approach its exercise of game-management jurisdiction in the same manner. Of course, such an approach would require the state to reduce the level of rhetoric about "poachers," and to pay more respect to the reality that subsistence users have the most at stake by far, and further that just because their rules of self-regulation are not published in the Alaska Administrative Code is no indication that they are ineffective. See authorities cited at note 64, supra; Thomas R. Berger, supra note 61, at 70-72.

^{82/}Congress sought to insure that any implementing structure was designed "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." ANILCA § 801(5). Congress also expressed its desire "that the utilization of the public lands is to cause the least adverse impact possible upon rural residents who depend upon subsistence uses for their economic and physical well-being and cultural vitality." H. Rep. No. 96-97, 96th Cong., 1st Sess., pt. I at 279 (1979). Among other things, this means that Congress intended that "rural communities and cultures will not be burdened by implementation of a complex, and in many instances culturally disruptive, regulatory system, unless necessary in specific instances to protect and administer [park] unit values." 126 Cong. Rec. S11135 (daily ed. 18 Aug. 1980); id. at H10541 (12 Nov. 1980).

At bottom, the state's case rests upon a hope or a prayer that this Court will find that the state and national legislatures labored mightily over the subsistence issue, only to come up with a law that already existed: one that gives a subsistence user a sporting chance -- a "reasonable opportunity" (see note 77, supra) -- to harvest resources. As with its belief that "all Alaskans" are subsistence users (see Argument IIB, supra), the state's "reasonable opportunity" construction reads the "customary and traditional use" guideline right out of the law. We think it clear, and we submit, that the subsistence law is not so worthless; that the subsistence opportunity both legislatures sought to protect were "customary and traditional uses." As applied to subsistence-based socioeconomic systems like Akhiok, this standard must be applied to determine what is customary and traditional within that system, and then to provide for those uses -- unless sustained yield commands a restriction (it obviously does not in this case, given the liberal rules for both resident and nonresident sport and trophy hunting). The "opportunity" that the lawmakers promised Alaska's Native peoples was the opportunity to engage in "customary and traditional uses," not the "opportunity" to restructure their cultures.

C. Subsistence Hunters Charged With Game Violations
Should Not Be Denied Their Days In Court For
"Failure To Exhaust Administrative Remedies".

David Eluska did not petition the Board of Game for a change in seasons, or travel to urban Alaska to make sure that his petition would be considered. The state says that for this reason he should be punished with a criminal conviction. State's Br. at

20-28. As amici understand from personal experience, this is a ridiculous argument. The residents of Lime Village know what "exhaustion of administrative remedies" entails. After a Lime Village man was charged with taking a moose out of season and a village snowmachine was confiscated, lawyers representing the village petitioned the Board of Game for changes in the game regulations. Petitioning the Board of Game involved --

1. Preparation of a request for a change in regulations for submission to the Board by the December 18, 1984 deadline. The request had to be in writing, specifically stating what changes were requested, what existing regulations would be affected, and specific justifications for the proposed changes.
2. Receipt from the Board of Game of an 81 page booklet containing all proposed regulation changes to be considered at the March, 1985, Board meeting, and inviting written comments in support of a proposal to be submitted by a deadline of March 8, 1985.
3. Preparation and submission of written comments in support of proposed changes for Lime Village submitted by March 8, 1985.
4. Attendance at Board of Game meeting starting on March 20, 1985; the Lime Village proposal was not reached by the Board until March 27, despite an agenda date of March 22 for dealing with Interior proposals.
5. Review of final Board action taken on the Lime Village proposal (April 4, 1985).
6. Receipt of formal notice of adoption of Board regulation changes from the March, 1985 meeting (May 2, 1985).

These procedural steps consumed many hours of experienced attorneys' time, not to mention the added expense of transportation, lodging, and meals necessary for two four-day stays in Anchorage to be present at the relevant times when the Lime Village proposal was being addressed. (Staff reports, public hearings, and consideration of specific proposals happened on different days, so it was not possible for the Board to focus one day's meeting on the problems of Lime Village.) Despite these efforts, the specific objectives of the people of Lime Village were not obtained after this approximately five-month process.

It should also be noted that the Board has the absolute discretion to decide what areas of proposed changes it will and will not entertain at any given Board meeting. 5 AAC 96.610(b). The procedures for adopting game regulations are found in Part 7 of the Fish and Game Regulations within the section on Fish and Game Advisory Committees. There is no reference to an individual proposing game regulation changes. Rather, the whole section addresses itself to how the advisory committee system will work, and it is to the local advisory councils that the Board is instructed to respond with explanations of why proposed changes are not made. See generally 5 AAC 96.600-660.

This is not a scheme designed with the specific objective of having individual citizens petition the Boards for regulatory changes that they think might be beneficial. Thus it is certainly not a scheme well suited for the individual exhaustion of

administrative remedies.^{83/}

We do not intend to waste the Court's time by duplicating the Public Defender's legal arguments on the exhaustion-of-remedies issue, but do want to make five basic points. First, as shown above, state law requires the Boards to promulgate subsistence regulations, and the burden of changing regulations to make them adequate should be on the state. Second, exhaustion-of-remedies doctrines are not routinely applied if the penalty for failing to pursue administrative remedies is criminal liability. See McKart v. United States, 395 U.S. 185, 197 (1969).^{84/} Third, the doctrine is at its weakest when it would be used to deny people

^{83/}Public life in a village may not leave villagers with the time or energy to bring petitions to the Boards:

Municipal city council meetings, IRA Council meetings, church council meetings, regional native corporation meetings, Local School Advisory Board meetings, individual agency-issue meetings (BLM, ADOTPF, ADEC, NPE, USFWS, etc...), regional nonprofit organization meetings, Regional Strategy meetings, CZM and CRSA Board meetings, elders council meetings, Inupiat Iilitgusait meetings, and many others, all compete for villagers' time and attention.

Gregory D. Moore, A Review of Game Management in Northwest Alaska 18 (Kotzebue, January 1984). People living in the Bush are engaged in subsistence activities, or they are trying to capture the rare seasonal wage-paying job to support their subsistence activities. They lack both the time and the wherewithal to employ the lawyers, biologists, social scientists and other experts necessary to a successful petition to the Board of Game. No doubt that is one of the reasons the legislature put the burden on the state.

^{84/}"[U]se of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any review of an assertedly invalid order....Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon [the defendant] if he is denied judicial review."

rights which have a constitutional dimension. See Moore v. City of East Cleveland, 431 U.S. 494, 497 n.5 (1977); cf. Yakus v. United States, 321 U.S. 414, 446-447 (1944). Fourth, even if constitutional rights are not involved, "those cases that have denied certain nonconstitutional defenses to criminal defendants for failure to exhaust remedies did so pursuant to statutes that implicitly or explicitly mandated such a holding," Moore, 431 U.S. 494 at 497 n.5, and Alaska's fish and game statutes and regulations say nothing implicit or explicit about exhaustion. In fact, as shown above, the Board of Game's regulatory system seems designed to discourage individual attempts to secure changes in the regulations. Finally, it is important to recognize that in this case the state is asking this Court to order a dramatic expansion of the exhaustion doctrine. David Eluska was charged with violating a general game regulation. He was not the subject of an individual administrative enforcement proceeding, and there is no way he could have asked for an individual permit to do what he did.^{85/}

^{85/} Thus the cases the state cites in its brief are inapposite. In all but one of those cases the regulatory scheme at issue was challenged by (a) a participant in an administrative proceeding who had failed to pursue administrative remedies within the agency, or (b) a person, faced with a law or regulation of general applicability, who failed to use existing procedures to apply for an individual permit or variance. U.S. v. LaFroscia may be the one case which does not fit into this pattern. In that case a drug dealer, perhaps having no better criminal defense, challenged the regulation classifying the drug in question as a Schedule I controlled substance. After holding the governing statute constitutional and the specific rule valid, the district court also ruled that the defendant should have tried to take advantage of the "specific, detailed administrative procedures for decontrolling and reclassifying the various substances." U.S. v. LaFroscia, 354 F.Supp. 1338, 1341 (S.D. N.Y. 1973). Surprisingly enough, there is a procedure for getting controlled (continued)

Applying the exhaustion doctrine in this case would be like telling criminal defendants that in order to defend themselves against questionable statutes they must first ask the Legislature to revise the statutes in question.^{86/}

D. There Is A Subsistence Defense; It Is Always Available; Once Properly Raised It Must Be Overcome With Clear and Convincing Evidence; It Requires Dismissal of the Charge Against David Eluska.

The conflict between wildlife laws crafted to further the interests of sport, commerce and conservation and the needs of people who use wildlife as a primary food source is as old as the early English game laws. See Argument IA, supra, and authorities there cited. As those laws have evolved and been "democratized" into the Anglo-American wildlife jurisprudence of this century (Argument IA, supra), the conflict has persisted between the sport-dominated rules and the subsistence lifeways of both tribes^{87/} and individuals seeking to live off the land on their own.^{88/} Yet, with a consistency that bears powerful testimony to

(footnote 85 continued) substances reclassified, and "any interested party" may petition the Attorney General to invoke it. See 21 U.S.C. §811(a). In the twelve years since LaFroschia was decided no nationally reported case has cited or relied on the alternative holding the state now invokes.

^{86/} Chief Justice Burger's dissent in Moore, on which the state relies, does not take a position as extreme as the state's. And the Chief Justice's discussion of the exhaustion doctrine is by no means a collective statement by the United States Supreme Court. Six Justices directly rejected his reasoning. Moore, 431 U.S. 494, 497 n.5 (opinion of Powell, J., joined by Brennan, Marshall and Blackmun, JJ.); id. at 541 (Stewart J., dissenting, joined by Rehnquist, J.). Two other Justices reached the case's merits, thus indicating their unwillingness to apply the doctrine. Id. at 513-521 (Stevens, J., concurring in the judgment); id. at 541-552 (White, J., dissenting).

^{87/} See, e.g., Frank Waters, The Man Who Killed The Deer (1942).

^{88/} See, e.g., Jeff Long, Outlaw (1985).

the fundamental value of the hunting and fishing rights of indigenous peoples whose socioeconomic and sociocultural existence depends upon customary and traditional hunting and fishing and gathering, American Indians (Argument IB, supra) and Alaska Natives (Argument IC, supra) have generally been exempted from the rules regulating the recreational conduct of the dominant culture. This general exemption is rooted in the recognition, albeit an uneasy one, that peoples who had no say in the coming of the white man nonetheless should not "have been required to surrender...all of their wealth to the government for 'common use' in order to obtain citizenship."^{89/}

Against this general background, and in response to the inherent justice of the demands of Alaska's Native peoples, the 1978 Alaska Legislature and the 1980 Congress of the United States embarked upon the noble experiment of the subsistence-preference laws. Unlike their antecedents, which exempted Native hunting and fishing rights from the operation of western wildlife management laws, the subsistence-preference statutes took a different and unique, but equally just, approach: they superimposed upon the western scheme's allocation of the interests of recreation, commerce and conservation the overriding value of the subsistence way of life. They sought to reorder the priorities of the pre-existing system by imposing upon it a mandate to accord preference to the customary and traditional wildlife uses of subsistence lifeways; they sought to wrench from the prior system

^{89/} Thomas D. Lonner, The Spider and the Fly: American Dominion and the Survival of Alaska Native Subsistence 3 (October 1984, Alaska Native Review Commission).

an affirmative duty to protect those lifeways and the resources upon which they are wholly dependent. Argument II, supra. We have shown, moreover, that even if the legislatures had not heeded the claims of Alaska's Native peoples, their subsistence way of life would be entitled to constitutional protection in any event. Argument IIIB, supra. That the law-givers chose to extend the protection they afforded to non-Natives as well does not distract from the fundamental nature of the subsistence rights of Native peoples.

It is in this context that the Court must examine the justifications proffered by the state in support of its attempt to "inflict[] disgraceful punishment, if punishment could disgrace when inflicted upon innocence." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562 (1832). The state really has no justification. It merely offers up nothing more than platitudes about "the overall framework and unique characteristics of natural resources conservation measures" (State's Br. at 8-9) and the naked assertion that the subsistence defense recognized by the courts below "is without precedent in natural resources law." Id. at 11.^{90/} The state seems to have "come unglued." Cf. Frank v. State, 604 P.2d 1068, 1074 (Alaska 1979). The state's position is due to be treated as it was in Frank, and given "no credence." Id.

The sporting rules applicable to Akhiok's traditional-use area allow recreational hunters from Anchorage or trophy hunters from Tulsa to fly into the area anytime during a period of five

^{90/} The state also makes the silly argument that if its regulations are invalid under the subsistence law, then no hunting at all is permissible. State's Br. at 13.

months and one week and bag five deer the same day airborne.^{91/}
There is no overall harvest ceiling, and no restriction on the number of non-local hunters who may come into the area. Under the rules as written, non-local hunters are free to kill in one season every deer inhabiting David Eluska's hunting grounds. At the same time, Mr. Eluska and the people of his village are barred from hunting this customary food source for nearly seven months out of the year,^{92/} and they are subjected to an inappropriate individual

^{91/}The prohibition against same-day-airborne hunting does not apply to the taking of deer. 5 AAC 92.085(4).

^{92/}It would probably be more accurate to say that the state's rules purport to bar such food harvesting. See, e.g., Steven R. Behnke, Wildlife Utilization and the Economy of Nondalton 70 (ADF&G Technical paper No. 47, March 1982):

The role of hunting regulations in controlling wildlife harvests in Nondalton is difficult to assess. This study focussed on general patterns of resource use and harvest, but not on details of illegal harvest, an obviously sensitive and difficult area to research. People responded well to questions partially because potentially sensitive areas were avoided. Therefore this study has not been able to answer questions about the importance of harvests which are out of season or in excess of bag limits. Hunting regulations have probably played some role in restricting harvest of wildlife, however, regulatory seasons, for example, reduce the time during which animals can legally be taken. Bag limits are potentially restrictive in view of the customary patterns described above, since a small proportion of hunters take a large percentage of the wild resources. Compared to weather, technology and local economic conditions, legal restrictions do not appear to play a major role in determining how much fish and game is harvested by Nondalton residents.

In summary, it appears likely that the harvest levels of moose, (continued)

bag limit that refuses to recognize the resource-distribution components of their communal subsistence-based socioeconomic/sociocultural system.

There can be no evidence "that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer." Antoine v. Washington, 420 U.S. 194, 207 (1975). Furthermore, the application of the culturally inappropriate rules devised for western sport hunters to Native subsistence communities like Akhiok constitutes nothing less than deliberate racial discrimination.^{93/} Finally, the state is

(footnote 92 continued) caribou, and other resources used by Nondalton residents were primarily regulated by factors internal to the local economy and society, as well as by weather and travel conditions. Legal restrictions played a relatively minor role in determining harvest levels.

^{93/}The state's preoccupation with the equal rights of "all Alaskans" enables it to apply culturally hostile rules to Native Alaskan subsistence communities which should be recognized as "discrete minorities," United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), who are entitled to the law's protection rather than its opprobrium. In forcing the sporting rules of western culture upon differently situated Native villages, the state actually engages in an act of intentional racial discrimination. See Gregory D. Moore, supra note 83, at 10; Laurence H. Tribe, American Constitutional Law 993 (1979):

Equality can be denied when government fails to classify, with the result that its rules or programs do not distinguish between persons who, for equal protection purposes, should be regarded as differently situated. So it was with the majestic equality of French law, which Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris.

Cf. Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 279 (Alaska 1984) (Compton, J., dissenting).

plainly wrong in its assertion that the defense recognized by the lower courts is unprecedented. To the contrary, we have shown numerous instances in which the states are excluded altogether from regulating wildlife uses on Indian lands. See note 16, supra, and accompanying text. Moreover, even where the states do have arguable jurisdiction over Indian hunting and fishing practices, the exercise of that jurisdiction is strictly limited to imperative conservation measures. Antoine v. Washington, supra, 420 U.S. at 207. Some of these cases, like Antoine, have arisen in the context of criminal charges for game-law violations, and the courts have uniformly held that the state, in order to proceed with its proposed prosecution, bears the burden of persuasion on the issue of conservation necessity.^{94/}

There is thus compelling precedent for the judgments of the courts below, and the approach set out by the court of appeals should be endorsed as being basically correct. We think the court of appeals erred, however, in remanding this case for further proceedings, and that its judgment should accordingly be modified so as to affirm the trial court's dismissal of the state's action. The reason for this is the state's wholesale failure to comply with the affirmative duty imposed upon it by the legislature to adopt regulations permitting customary and traditional subsistence

^{94/} United States v. Michigan, 653 F.2d 277 (6th Cir. 1981) (state may not regulate Indian fishing absent a showing by clear and convincing evidence that irreparable harm will occur); State v. Peterson, 297 N.W.2d 52, 55 (Wis. App. 1980) (pretrial hearing required at which the state must establish subject-matter jurisdiction by proving that a given regulation is reasonable and necessary to prevent substantial depletion of the fish supply); State v. Gurnoe, 192 N.W.2d 892, 902 (Wis. 1972); People v. Leblanc, 248 N.W.2d 199, 214-15 (Mich. 1976); see also United States v. Washington, supra, 384 F.Supp. at 342; Cohen, supra at 462 n. 49.

hunting.^{95/} In light of this persistent defiance of the law, the state should be precluded altogether from even a reasonable opportunity to justify the prosecution of bona fide subsistence hunters.

Hopefully the outcome of this case will force the state to commence the process of identifying and protecting the customary and traditional uses of the state's wildlife resources, as well as the resources themselves. In that event, a subsistence-defense procedure such as the one set forth by the court of appeals might be appropriate. It is important to recognize (as the state apparently does, see State's Br. at 30-31) that the defense would still be available. We suggest that it should work like this: whenever the state brings a criminal or property-confiscation action against a subsistence hunter, the hunter, in order to raise

^{95/} There is not a single hunt in the state which is not restricted by the individual bag-limit rule, nor is there any big-game hunt which we have discovered that actually accommodates the customary and traditional harvest activities of Native subsistence villages. Nothing has changed as a result of the Board of Game's recent gambit of reclassification; the subsistence restrictions remain the same (see Game Regs), with the single exception of the new "tier II hunts." Game Regs. at 12-13 (to be codified as 5 AAC 92.054-.060). Under this system, the subsistence users who are entitled to the greatest protection are instead thrown into direct competition with urban sport hunters, and their subsistence rights are conditioned upon an individual-by-individual, hunt-by-hunt, five-dollars-per-hunt limited-entry-type application and permit procedure. The Court held in Madison that such an approach is contrary to legislative intent (696 P.2d at 178 n.17). The state proceeded to devise such a system anyway. The result, as predicted (id.), is "extremely controversial." We are now treated to the spectacle of such notions as a "subsistence" regulation for bats, shrews, rats, mice and porcupines (no closed season, no bag limit, except in Chugach State Park; same for the "general" hunt); all around the state, "one brown bear every four regulatory years" has supposedly been deemed adequate for those who actually do use brown bear for subsistence purposes; and self-defined urban sport hunters who have participated in certain hunts only on a random-drawing basis now find themselves, against their will, classified as "Tier I subsistence hunters." See generally Game Regs.

the subsistence defense, must establish his standing by an affidavit or other showing that he is either an individual subsistence user or a member of a village or other community with a subsistence-based socioeconomic system. In order to proceed with the prosecution, the state would then have to prove, at a preliminary hearing, that the rule it seeks to impose is a reasonable and nondiscriminatory one serving a compelling conservation necessity that cannot be served by any less restrictive means, or that the rule serves a compelling need to protect other subsistence uses having a higher priority and that no less intrusive method is available. Cf. Antoine v. Washington, supra, 420 U.S. at 207. In light of the fundamental nature of the right at issue here, the state should be required to meet its burden with clear and convincing evidence. United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981). See also Santosky v. Kramer, 455 U.S. 745 (1982); In re Walton, 676 P.2d 1078, 1089-90 (Alaska 1983) (Rabinowitz, J., dissenting).^{96/}

^{96/} This is not to say that even if the state is in full compliance with ANILCA and its own subsistence law, it necessarily has jurisdiction over all hunting and fishing. Native tribal governments in Alaska have jurisdiction over Indian Country and in such country their members are immune from state fish and game regulations except for laws necessary to perpetuate a species. The general rule is that within Indian Country the operation of state law is preempted absent Federal delegation of authority to the state. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1982); Williams v. Lee, 358 U.S. 217 (1958). See F. Cohen, Handbook of Federal Indian Law 270 (1982 ed.). "The principles guiding determinations of whether state jurisdiction properly may be applied in Alaska Native communities are the same as those used when the question arises concerning Indians elsewhere in the United States." Id. at 764.

Indian Country is the operative legal term for defining the relative spheres of state and tribal governmental authority. See generally Cohen at 27-46. Allotments are classified as Indian Country in 18 U.S.C. §1151(c), while "all dependent Indian communities" are Indian Country under 18 U.S.C. (continued)

Perhaps it is inevitable that the Alaska subsistence way of life

(footnote 96 continued) §1151(b). Lands held by Native Corporations pursuant to the Alaska Native Claims Settlement Act (ANCSA) have been set aside for the use of Native peoples and as such fit within the flexible "dependent Indian community" definition. Id. This was the view of the Associate Solicitor for Indian Affairs in an opinion holding village corporation lands to be dependent Indian communities and thus Indian Country. Liquor Ordinance, Village of Allakaket, Alaska, Op. Assoc. Sol. Ind. Aff. (Oct. 1, 1981). "Furthermore, subsequent to ANCSA, lands in Alaska actually owned by a Native government have been judicially treated as Indian Country over which a Native government may exercise jurisdiction." D. Case, Alaska Natives and American Laws 458 (1984), citing Johnson v. Chilkat Indian Village, 457 F.Supp 384 (D. Alaska 1978).

Public Law 280, as extended by Public Law 85-615, granted Alaska civil and criminal jurisdiction over Indian Country. 28 U.S.C. §1360; 18 U.S.C. §1162. However, the effect of P.L. 280 has been greatly limited by a Supreme Court holding that it did not extend state regulatory authority to Indian Country. Bryan v. Itasca County, 426 U.S. 373 (1976). It only provides for application of state law to govern disputes between private parties. Id. The Ninth Circuit has suggested that state fish and game laws are "regulatory." United States v. Marcyes, 557 F.2d 1361, 1365 (9th Cir. 1977); see also Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983). Under Bryan, then, they do not apply to Indian hunting and fishing in Indian Country.

ANILCA merely provides the means by which the state might acquire jurisdiction over public lands -- by adopting laws of general applicability protecting subsistence. There is no hint of an intent to grant jurisdiction over Indian Country to the state. Such a transfer of jurisdiction would undermine tribal self-government and could only be accomplished by clear legislative language. Bryan v. Itasca County, 426 U.S. at 388-390. Construing ANILCA to abrogate Native governmental jurisdiction and the corresponding freedom from state regulation would fly in the face of long-standing Federal policies favoring Native self-government. See Cohen at 361, nn. 118-120. Indeed, it would be anomalous to find a diminishment of tribal rights in a statute which has been specifically held to have been passed for the benefit of Alaska Natives. People of the Village of Gambell v. Clark, 746 F.2d 572, 581 (9th Cir. 1984).

These arguments were not raised below and do not directly apply to the facts of this particular case. We have sketched them for the Court's information and because no discussion of Native peoples' subsistence hunting and fishing should ignore the authority which they themselves may be able to exercise over what they do.

is destined to follow "the fate of the passenger pigeon."^{97/} As sad as that would be in the long run of history, it would be a present disgrace if the state were allowed to continue to hasten that end in open defiance of the express will of the Alaska Legislature and the Congress of the United States. Amici therefore urge the Court to forcefully infuse life into the legislative intent and thus afford people living a subsistence way of life the basic right to choose whether to continue their lifeway -- to determine their own future.

^{97/} Cf. Washington Dept. of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973). See Thomas D. Lonner, supra note 89. But cf. Carle v. Carle, 503 P.2d 1050 (Alaska 1972) (trial court's conclusion that the village way of life is succumbing to the predominant Caucasian urban society not borne out by the record).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed and modified, and the judgment of the trial court dismissing this action should be affirmed.

DATED: 30 September 1985

Respectfully submitted,

NATIVE AMERICAN RIGHTS FUND

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APPENDIX A

PETITION TO THE BOARD OF GAME
TO ADOPT EMERGENCY SUBSISTENCE
HUNTING REGULATIONS FOR CERTAIN
SUBSISTENCE VILLAGES AND INDIVIDUALS

Alaska Legal Services Corporation, on behalf of the villages and individuals described below, petitions the Board of Game to adopt emergency subsistence hunting regulations providing for the customary and traditional subsistence uses of these persons and villages.

1. Anaktuvuk Pass. For untold generations the western arctic caribou herd has been a primary, indispensable subsistence resource for the Nunamiut peoples of Anaktuvuk Pass, a subsistence-economy village in the Central Brooks Range. By long-standing custom and tradition, the people of Anaktuvuk Pass hunt these caribou on a year-round basis whenever they are present, and especially during the spring and fall migrations. The herd is healthy and growing, with an estimated population of approximately 200,000. Despite the customary and traditional subsistence harvest pattern of the people of Anaktuvuk Pass, the Board has chosen the arbitrary calendar date of 30 April to close the caribou hunting season in GMU 26(A) and 24. Sometimes, as happened this year, this restrictive closing date arrives before the caribou have begun their northerly spring migration. This arbitrary closed season attempts to deprive the people of a vital resource upon which they are more dependent than ever during times like these, when the winter is long and food supplies are depleted, and when wage-paying jobs are virtually non-existent. The closed caribou season violates the subsistence rights of the people of Anaktuvuk Pass. The Board should eliminate it.

2. Silas Tegoseak, individually and on behalf of persons similarly situated. Silas Tegoseak is an Inupiat Eskimo who follows a subsistence-based semi-nomadic lifeway which is his birthright. He lives part of the year in Fairbanks and part of the year in Barrow. He has a Native Allotment about 40 miles north of Fairbanks, on which he customarily and traditionally harvests some of the subsistence resources, particularly moose, which sustain him and his family and relatives. He has been criminally charged, under a sport hunting regulation adopted by the Board, with taking a cow moose on his allotment last September in GMU 20(B), in which the take is restricted to bulls. The attempt to apply this sport hunting regulation to Silas Tegoseak violates his subsistence hunting rights. The Board should adopt a subsistence hunting regulation permitting the customary and traditional subsistence uses of Mr. Tegoseak and persons similarly situated.

3. Evon Togiak, individually and on behalf of the people of Togiak. Evon Togiak is a 70-year-old Yup'ik Eskimo who resides in a 10-person household in his native village of Togiak, a subsistence-economy village in southwestern Alaska in which a wide variety of wild natural resources are harvested throughout the year. Moose, although not an abundant resource, is one of the resources customarily and traditionally harvested by Togiak people during the period, roughly, from mid-August through March. The Board has closed GMU 17(A) to all sport hunting of moose, but the Board has failed to recognize and permit the customary and traditional subsistence moose harvest of Evon Togiak and the

people of Togiak. As a consequence of the Board's failure, Mr. Togiak has been criminally charged with taking two moose out of season on 25 March, and the meat which his family needed for food has been confiscated by the state. The Board should adopt subsistence hunting regulations permitting the customary and traditional subsistence use of moose by the people of Togiak.

4. Lime Village. As the Board knows, Lime Village is a Dena'ina Athabascan subsistence-economy village on the Stoney River in the mid-Kuskokwim region of southcentral Alaska. As the Board has found, the people of Lime Village customarily and traditionally harvest moose and caribou throughout the year. See Findings on Lime Village Management Area, Alaska Board of Game #85-36-GB (4 April 1985). Despite these findings, the Board continues to impose upon Lime Village closed hunting seasons which, for no good reason other than bad legal advice, abridge the subsistence rights of Lime Villagers. Although we have requested an expedited trial in federal court to protect these rights, Bobby v. State, No. A84-544 Civil (D. Alaska), we again urge the Board to eliminate the restrictive hunting seasons for those persons domiciled in Lime Village.

On behalf of the above persons and communities, the Board is requested to adopt a general subsistence hunting regulation, such as the one which is the subject of our separate petition, and to

adopt specific regulations protecting the subsistence rights of
the persons and communities discussed above.

DATED: 6 June 1985

Respectfully submitted,

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APPENDIX B

PETITION TO THE BOARD OF GAME FOR
THE ADOPTION OF EMERGENCY
SUBSISTENCE HUNTING REGULATIONS

Alaska Legal Services Corporation petitions the Board of Game to adopt emergency subsistence hunting regulations like those attached hereto, with such improvements as the Board may make. This petition is submitted on behalf of a number of clients from around the state, some of whom are separately petitioning for specific relief.

The occasion for emergency regulation is apparent. "The time that has elapsed from 1978 to the present has provided more than adequate opportunity for the Board to carry out its statutory responsibility" to protect and provide for subsistence uses of the state's game resources. State v. Eluska, op. no. 456 at 11 (Alaska Court of Appeals 12 April 1985). Yet the state stands in virtually complete noncompliance with both the 1978 state subsistence law and the 1980 federal subsistence law. In addition, the state has taken the ludicrous position that under Madison all Alaskans are subsistence users, and that under Eluska it is impossible to distinguish a true subsistence user from a poacher. This combination of events creates a serious and immediate threat of irreparable harm to the legal rights of subsistence hunters and to the health of the game resources upon which they depend.

It is therefore incumbent upon the Board to take emergency action to commence compliance with the state and federal

subsistence laws. We request a written explanation in the event of denial of this petition.

DATED: 5 June 1985

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5 AAC 99.020. EMERGENCY SUBSISTENCE HUNTING REGULATIONS OF THE BOARD OF GAME.

(a) Purpose and Policy. The purpose of this emergency regulation is to initiate a process of identifying and protecting the customary and traditional subsistence uses of Alaska's game resources as required by the 1978 state subsistence law, AS 16.05.255(b) & 16.05.940(23), and the 1980 federal subsistence law, Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 1311 et seq. The Board recognizes that the Subsistence Division of the Department of Fish & Game and other state, federal and private persons and entities have conducted substantial research into the subsistence economies and lifeways of Alaska residents. The Board further recognizes that in many instances the current regulatory system is incompatible with and unnecessarily restrictive of customary and traditional uses of the state's game resources. It is the Board's policy to identify and alleviate such incompatibilities and unnecessary restrictions, and to accord first-priority preference to the beneficial uses of game resources for subsistence purposes. In implementing this emergency regulation, the Board is delegating authority to the Commissioner of Fish & Game and his designees to act in its behalf, as authorized by AS 16.05.270. All actions of the Commissioner under this emergency regulation will be reviewed by the Board at a public meeting to be scheduled within 120 days of the effective date of this regulation, and by the Board at its regular meetings on an ongoing basis until a Board-approved comprehensive regulatory system for subsistence hunting is in

place. At its public meeting to be held within 120 days, the Board will modify or alter this regulation as appropriate and adopt it as an interim regulation to be effective and continuously reviewed until a comprehensive Board-approved system is in place. All interested persons are invited to submit their views to the Board. It is the policy of the Board to involve local communities and individuals, local fish and game advisory committees, and regional fish and game councils in the decision-making and regulatory process to the maximum extent possible.

(b) Findings and Definitions. The Board finds that a state of emergency exists with respect to the management and protection of subsistence game resources and subsistence uses of game resources. This emergency situation results from court decisions which, among other things, hold that the Board has violated its duty to adopt subsistence hunting regulations as required by the 1978 state subsistence law, and which, as officially construed by the state, substantially impair the ability of management and enforcement officials to identify and protect legitimate subsistence uses and subsistence resources. Unless the Board acts on an emergency basis to protect the general welfare, there is a serious and substantial threat that game species in many parts of the state will be over-harvested by persons who do not properly qualify as subsistence hunters, and as a consequence the sustained yield of these species is jeopardized and the state's legal duty to manage game resources so as to accord a preference to legitimate subsistence uses is impaired. Based upon the research and other information currently available, the Board finds that

there is considerable variation in the nature and extent of customary and traditional subsistence uses of the state's game resources. By far the most common such use is that engaged in by communities and sub-communities having a subsistence economic system, frequently kinship-bound, with an elaborate division of labor and special roles in which a wide range of wild renewable resources are harvested both for personal and family use and for sharing, exchange and barter. Such subsistence economic systems usually exist as rural villages or towns ("subsistence villages"), but they may also exist within larger towns and cities as subsistence villages-within-towns ("subsistence subcommunities"). In addition, game resources are harvested for subsistence uses by a number of persons who live on their own in rural areas, who live in urban areas but whose ties are to subsistence villages or subcommunities, or who live in urban areas but who have been customary and traditional users of game resources for long periods, and perhaps others who need to be identified ("subsistence individuals"). All other uses of the state's game resources are "nonsubsistence uses."

(c) Criteria. The Commissioner shall identify subsistence uses of game resources, recognizing that subsistence uses are customary and traditional uses by Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing. Customary and traditional subsistence uses of game resources by Alaska residents will be identified by the Commissioner through application of the following criteria, with the understanding that a use pattern does

not have to strictly meet all criteria in order to receive protection under this emergency regulation and that the different criteria will carry different weight depending on the circumstances (e.g., whether being applied to identify subsistence villages, subcommunities or individuals):

(1) a long-term, consistent pattern of use, excluding interruption by circumstances beyond the user's control such as regulatory prohibitions;

(2) a use pattern recurring in seasonal cycles;

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

(4) the consistent harvest and use of game which is near or reasonably accessible from the user's residence;

(5) the means of handling, preparing, preserving and storing game which has been traditionally used by past generations, but not excluding recent technological advances where appropriate;

(6) a use pattern which includes the handing down of knowledge of hunting skills, values and lore from generation to generation;

(7) a use pattern in which the hunting effort or the products of that effort are distributed or shared among others, including customary trade, barter, sharing and gift-giving; customary trade may include limited exchanges for cash, but does not include significant commercial enterprises; a community for

purposes of subsistence uses may include specific villages or towns, with a historical preponderance of subsistence users, and in addition encompasses individuals, families, or groups who in fact meet the criteria described in this subsection;

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the wild renewable resources of an area, and which provides substantial economic, cultural, social and nutritional elements of the subsistence user's life; and

(9) a use pattern which arises out of kinship or similar ties to a subsistence village or subcommunity, or which arises out of such ties to a family or household engaged in customary and traditional subsistence uses of game resources.

The Commissioner shall apply these criteria in a flexible and realistic manner so that all villages, subcommunities and individuals who have historically used game resources for subsistence purposes will be recognized and protected as subsistence users who have a preference over nonsubsistence uses. Uses which do not meet these criteria will be classified as nonsubsistence uses.

(d) Classification and Mechanism for Implementation of Subsistence Preference. Applying the criteria set forth in subsection (c) of this emergency regulation, the Commissioner shall make the following determinations and take the following actions:

(1) Subsistence Villages. The Commissioner shall

identify all subsistence villages in the state and, working closely with these communities, shall determine approximate village harvest-level guidelines for all game species customarily and traditionally harvested by each such village, but not excluding new game species which may have recently moved, or may in the future move, into a village's traditional-use area. In designating subsistence villages, the Commissioner shall pay due deference to the National Park Service's designation of "resident zone communities" pursuant to 36 C.F.R. §13.43. Where necessary to protect one or more of a village's game resources from non-subsistence uses or other external pressures, the Commissioner shall attempt to identify and reasonably define the village's traditional subsistence hunting area, and impose such other restrictions as may be appropriate pursuant to this subsection and subsection (f) below. In approximating village harvest-level guidelines, the Commissioner shall take care to insure that the guidelines are flexible enough to encompass fluctuations in resource availability, harvest patterns, and the like. The purpose of such guidelines is not to restrict villages' customary and traditional uses, but rather to obtain information upon which to base sustained-yield analyses and determinations as to whether any nonsubsistence uses are to be allowed. Whenever the Commissioner determines it necessary for protective purposes to define and designate a village's traditional subsistence hunting area, he shall likewise be liberal and flexible, recognizing that two or

more subsistence villages may have overlapping traditional use areas. It is the intent of the Board that the Commissioner shall provide fully for the customary and traditional subsistence harvest opportunities of each subsistence village, subject only to the requirements of subsection (f) below. In particular, the Commissioner shall recognize that many current regulations derive from a management regime in which the primary objective was the regulation of non-subsistence uses, such as sport and commercial (guided/trophy) hunting, imposing such features as essentially arbitrary calendar-based seasons and individual bag limits -- features which frequently will be inappropriate for subsistence villages. The commissioner should replace these regulations with appropriate, realistic and flexible regulations, but he also should retain, on an interim basis, those regulations (e.g., certain controlled use areas, subsistence permit hunts) which he finds to be consistent and in conformity with this regulation. Unless necessary to restrict subsistence hunting pursuant to subsection (f) below, the Commissioner shall not impose a subsistence permit system upon subsistence villages. For the purposes of this emergency regulation, it is the Board's determination that all persons domiciled in a designated subsistence village, like all persons domiciled in a "resident zone village" designated by the National Park Service with respect to subsistence hunting in national parks and monuments, will be authorized to engage in customary and traditional subsistence

hunting -- unless it is necessary to restrict subsistence hunting pursuant to subsection (f). The Commissioner shall work cooperatively with all subsistence villages in an effort to develop mutually agreeable regulations, with mutually shared implementation obligations, in which the people of the affected villages enjoy the maximum possible degree of participation in the formulation and implementation of appropriate regulations, including particularly those pertaining to village harvest-level guidelines, harvest reports and reporting systems, protective traditional use areas, seasonal cycles, and any regulations required by subsection (f).

(2) Subsistence Subcommunities. The Commissioner shall identify and provide protection for subsistence uses of game resources by subsistence subcommunities in the same manner, to the extent possible, as required by subsection (d)(1) above for the designation and protection of subsistence uses by subsistence villages. In identifying and authorizing subsistence uses for these subsistence subcommunities, the Commissioner should strive to avoid a subsistence permit system, but he is specifically authorized to employ such a system if he finds that there are no practical alternatives. Otherwise, the Commissioner shall regulate subsistence subcommunities in the same manner required by subsection (d)(1) for subsistence villages.

(3) Subsistence Individuals. The Commissioner shall identify subsistence individuals utilizing the criteria set

forth in subsection (c) above, and shall authorize their customary and traditional harvest opportunities through the issuance of a single subsistence hunting permit. It is the intent of the Board that any application/permit system adopted under this or any other part of this emergency regulation shall be as simple and burden-free as possible, shall be cost-free to the permittee, and shall make ample provision for the receipt of oral applications from those who are not able or do not wish to make application in written form. To the extent applicable, the provisions of subsection (d)(1) above apply as well to this subsection.

(4) Interim Compliance. The Board recognizes that the identification of subsistence subcommunities, and of subsistence individuals in particular, is a difficult task that will require time and perhaps trial-and-error experimentation. At the same time, the Board finds that this regulation is sufficient to put all state residents who desire to hunt game resources on notice as to their subsistence or nonsubsistence status. Any such person who does not have a good-faith basis for believing that he or she is a subsistence user within the scope of this regulation shall be governed by the regulations for nonsubsistence use, i.e., those regulations currently in effect, as they may be modified by the Commissioner pursuant to this regulation. At its meeting to be scheduled within 120 days, and at each regular meeting of the Board thereafter until a Board-approved comprehensive subsistence hunting regulatory

system is in place, the Board will specifically review each village, subcommunity and individual which the Commissioner has denied subsistence recognition. In addition, any such village, subcommunity or individual may petition the Board for relief under subsection (i) below.

(e) National Park and Park Monuments. Under §808 of ANILCA, 16 U.S.C. §3118, subsistence hunting in national parks and park monuments is to be governed by a subsistence hunting program developed by each park or monument's subsistence resource commission. Those programs have not yet been adopted, but it is the Board's intent to incorporate the subsistence hunting programs into the state's subsistence management system to the extent those programs may contain components that are within the state's management jurisdiction. In implementing this interim regulation the Commissioner shall consult with the subsistence resource commissions wherever appropriate. Only those persons domiciled in resident zone communities designated by the National Park Service, or who have valid subsistence permits issued by the National Park Service, are authorized to hunt in national parks and park monuments.

(f) Implementation of the Subsistence Preference. After identifying subsistence uses and determining the approximate amounts of game necessary to provide full opportunity for Alaska residents to engage in these customary and traditional uses, pursuant to subsections (a) through (e) above, the Commissioner shall proceed as follows:

(1) He will adopt regulations that permit the

subsistence taking of game resources in amounts sufficient to provide for the customary and traditional uses he has identified, consistently with sound conservation and management practices. In no instance may the Commissioner permit subsistence taking which would jeopardize or interfere with the maintenance of a specific game population on a sustained yield basis.

(2) Whenever the Commissioner determines that game resources are sufficient, under the sustained-yield principle, to fully provide for subsistence uses and also to provide for nonsubsistence uses, and where current regulations authorize nonsubsistence uses, the Commissioner shall continue the current regulations in effect, with any modifications required by the circumstances, and designate them as governing nonsubsistence uses. The Commissioner shall take due care to provide an opportunity for non-subsistence uses only to the extent that such non-subsistence uses do not jeopardize or interfere with the conservation and development of game resources on a sustained yield basis, or with the conservation and development of these resources for customary and traditional subsistence uses.

(3) When circumstances such as increased numbers of users, weather, predation or loss of habitat may jeopardize the sustained yield of a game population or fail to provide fully for subsistence uses, the Commissioner will exercise his authority by restricting all nonsubsistence harvest

before subsistence uses are restricted. If all available restrictions for nonsubsistence uses have been implemented and further restrictions are needed, the Commissioner will restrict the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who:

- (i) live closest to the resource;
- (ii) have the fewest available alternative resources; and
- (iii) have the greatest customary and direct dependence upon the resource.

(4) Whenever the Commissioner determines under (f)(3) that it is necessary to restrict subsistence uses of game resources by subsistence villages and subsistence subcommunities in which a permit system otherwise would be inappropriate, he is authorized to implement such a system if he finds it necessary to accord priority to the preferred subsistence users he identifies pursuant to the criteria of (f)(3).

(g) Compliance with Federal Law. The Board has determined that this emergency regulation satisfies the requirements of both the federal and the state subsistence laws, and in particular that it will fully protect the subsistence priority of rural Alaskans as mandated by Title VIII of ANILCA, while at the same time protecting all subsistence users covered by state law. The Commissioner shall monitor the situation and immediately report to the Board any instance in which he determines that implementation

of this interim regulation will impair the subsistence preference mandated by federal law.

(h) Board Review. At each regular meeting of the Board until a comprehensive subsistence management system is in place, and at the meeting to be scheduled within 120 days, the Board will review this emergency regulation and all of the Commissioner's actions hereunder. At each such meeting the Board will consider recommendations from the public, the Commissioner, and any interested state or federal agencies, and will otherwise make such modifications to this regulation as the Board deems necessary and proper.

(i) Grievance Procedure. The Commissioner shall give appropriate public notice and meet all other requirements of law with respect to all actions he takes pursuant to this emergency regulation, and report all such action to the Board. Any person aggrieved by this regulation or any implementing action of the Commissioner may petition the Board for relief, and the Board will take prompt action on any such petition.

(j) Effective Date. This emergency regulation shall take effect on _____. As of that time, the provisions of 5 AAC 99.010 will be inapplicable to all matters within the jurisdiction of the Board of Game.

APPENDIX C

SUPPLEMENT TO
PETITION TO THE BOARD OF GAME
TO ADOPT EMERGENCY SUBSISTENCE
HUNTING REGULATIONS FOR CERTAIN
SUBSISTENCE VILLAGES AND INDIVIDUALS

The petition previously submitted on behalf of the villages of Anaktuvuk Pass, Togiak and Lime Village, and Silas Tegoseak individually, is hereby supplemented in light of the policies the Board is now pursuing.

As we understand the Department of Law-constrained policies which govern the actions contemplated and now being taken by the Board, (1) "all Alaskans" are deemed to be subsistence hunters entitled to the general subsistence preference; (2) the Board is precluded from recognizing and protecting the customary and traditional subsistence uses of villages and communities with subsistence-based socioeconomic systems as communities, but rather can only deal with individuals; (3) the Board cannot protect the rights of particular subsistence communities and subcommunities by such means as eliminating arbitrary closed seasons and individual bag limits without also eliminating such restrictions for all other Alaska residents, i.e., opening up a particular community's hunting grounds to all Alaskans; and (4) whenever the need to protect sustained yield or subsistence uses necessitates restrictions on general subsistence users, preferred subsistence users will be identified through a limited-entry-type application and point-award system which can be applied only to individuals, not to subsistence-based socioeconomic systems as communities or subcommunities.

Petitioners believe that these policies violate the federal

subsistence law -- the supreme law of the land -- but they recognize that there is apparently nothing the Board can do to comply with federal law so long as the Board considers itself bound by the views of the Department of Law. Nevertheless, should the Board devise some way of protecting the legal subsistence rights of petitioners, petitioners wish to emphasize that they would have strenuous objections to the Board opening up their tribal hunting grounds to any person who has not participated in their customary and traditional subsistence harvest pattern, and that petitioners would have similar objections to the imposition of an individual-based limited-entry-type system on their communities.

DATED: 13 June 1985

Respectfully submitted,

ALASKA LEGAL SERVICES CORPORATION

BY: Bill Caldwell

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Attorneys for Petitioners

APPENDIX D



United States Department

ATTACHMENT 1

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

FEB 25 1982

Honorable Jay S. Hammond
Governor of Alaska
Juneau, Alaska 99811

Dear Jay:

The Department of the Interior has completed its initial evaluation of the State of Alaska's subsistence management and use program. We are pleased to inform you that, with the exception of the concerns noted below, the State program appears to satisfy section 805(d) of the Alaska National Interest Lands Conservation Act (ANILCA). The material you have submitted to the Department demonstrates the State's desire to develop a workable subsistence program which meets the needs of Alaska residents and satisfies the objectives of ANILCA. We earnestly hope to be able to approve the State program as such action would be in accord with our commitment to States' rights, particularly the right to manage resident fish and game. The State's inability to provide such a program will, however, force us to assume fish and game management on Federal lands in Alaska. Such a step would run counter to our philosophy but enforcing the law is our sworn duty.

Our remaining concerns are enumerated below:

1. Section 805(d) states that the requirements of sections 803, 804, and 805 must be implemented through "laws of general applicability." To date, the State has not demonstrated that it has established "laws" which provide for all of the essential provisions of those sections. Policy Resolution 81-1-JB (Policy), for example, cannot be relied upon to satisfy Title VIII because it has not been promulgated as a regulation and thus is not binding on the Boards of Fisheries and Game.
2. The State program does not appear to provide an acceptable definition of the "subsistence uses" concept, as it is set forth in section 803. Title VIII and its legislative history establish that the federal definition of "subsistence uses" must be limited to "rural Alaska residents." Although the

State definition need not be identical to section 803, the State program must "provide for" this type of beneficial use by identifying rural subsistence users and extending the section 804 priority and section 805 participation scheme to those users. The approach adopted in the Policy does not satisfy this requirement because it fails to distinguish rural residents engaged in subsistence uses from other users who make "customary and traditional uses" of fish and game resources. As discussed above, any change made in the State program to accomodate the "rural residency" requirement must be promulgated as a "law of general applicability."

3. Finally, an important technical change should be made in the approach discussed in paragraph (e) of the Policy. To be consistent with section 804, the State program must provide that restrictions will be applied among rural residents engaged in subsistence uses when there is a threat to the sustained yield of a fish stock or game population or when there is a possibility that the continuation of rural subsistence uses will be jeopardized. Presently, only the sustained yield concern is reflected in paragraph (e) of the Policy.

To assist the State in achieving compliance with sections 803, 804 and 805, we have attached for your consideration an edited version of Joint Board Policy 81-1-JB. If enacted in its entirety as a regulation, the approach embodied in the suggested edited revision would comply with all applicable provisions of Title VIII. Then, the Department would be in a position to verify the State program's compliance with ANILCA.

The Interior Department is confident that these areas of concern will be resolved and that the Congressional intent that the State assume the lead role in the management of subsistence uses of fish and game resources on the public lands in Alaska will be realized. If the State requires further assistance in interpreting the requirements of ANILCA, please contact William P. Horn, Deputy Under Secretary, at (202) 343-5183.

I look forward to receiving the State's final submission.

Sincerely,

/s/ James G. Watt

SECRETARY

Enclosure

2

FEB 25 1982

EDITED VERSION

Proposed additions indicated by underscores
Proposed deletions indicated by slash marks

JOINT BOARDS OF FISHERIES AND GAME
POLICY ON SUBSISTENCE
RESOLUTION 81-1-JB

1. Definitions. For purposes of providing for the conservation, development and management of Alaska's fish and game resources,

(a) "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 byproducts of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption.

(b) "Rural 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, and for customary trade, barter or sharing for personal or family consumption.

2. Procedures. In applying a subsistence priority the Boards will provide for conservation and development of Alaska's fish and game resources pursuant to the following procedures:

(a) Each Board will assess the biological status of fish or game resources and determine whether a surplus may be harvested during a regulatory year consistent with the conservation and development of the resources on the sustained yield principle and compatible with the public interest;

(b) Each Board will identify rural and other subsistence uses of fish or game resources by reference to the following criteria:

(1) a long-term, consistent pattern of use (excluding interruption by circumstances beyond the user's control such as regulatory prohibitions);

(2) a use pattern recurring in specific seasons of each year;

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

(4) the consistent harvest and use of fish or game which is near or reasonably accessible from the user's residence;

(5) the means of handling, preparing, preserving, and storing fish or game which has been traditionally used by past generations (but not excluding recent technological advances where appropriate);

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

(7) a use pattern in which the hunting or fishing effort or the products of that effort are distributed or shared among others within a definable "community" of persons, including customary trade, barter, sharing, and gift-giving. Customary trade may include limited exchanges for cash, but does not include significant commercial enterprises. A "community" for purposes of subsistence uses may include specific villages or towns, with a historical preponderance of subsistence users and in addition encompasses individuals, families, or groups;

(8) a use pattern which includes reliance for subsistence purposes upon a wide diversity of the fish and game resources of an area, and in which that pattern of subsistence use provides substantial economic, cultural, social, and nutritional elements of the subsistence user's life.

After identifying rural and other subsistence uses based upon these criteria, each Board will determine the approximate amount of fish or game necessary to provide fully for opportunities to engage in these customary and traditional uses.

(c) Each Board will adopt regulations that provide an opportunity for the subsistence taking of fish or game resources in amounts sufficient to provide for the customary and traditional rural and other subsistence uses identified in paragraph (b) and consistent with sound conservation and management practices. In no instance may such taking jeopardize or interfere with the maintenance, on a sustained yield basis, of a specific fish stock or game population.

(d) These regulations may also provide an opportunity for non-subsistence uses of the resource, to the extent that such uses do not jeopardize or interfere with the conservation and development of fish or game resources, on a sustained yield basis, or with the opportunity for taking these resources for customary and traditional rural and other subsistence uses as provided in (c) above.

3. Priorities.

(a) When circumstances such as increased numbers of users, weather, predation, or loss of habitat may jeopardize the sustained yield of a fish stock or game population, or interfere with the opportunity for taking these resources for rural and other subsistence uses as provided in (c) above, each Board will exercise all practical options for restricting non-subsistence harvests before rural and other subsistence uses are restricted.

~~(b) If further restriction is necessary, the board shall give the highest priority to local residents in rural areas.~~

(b) If further restriction is necessary to assure the maintenance of fish stocks and game resources on a sustained yield basis or to assure the continuation of rural subsistence uses, each Board will give priority to rural subsistence uses.

(c) If additional restrictions are necessary among rural subsistence use allocations, the Boards will apply limitations and restrictions based on customary and direct dependence upon the resource as the mainstay of one's livelihood, ~~proximity to the resource~~ local residency, and the availability of alternative resources.

(d) In no event, however, will a Board allow uses which will jeopardize or interfere with the conservation and management of fish stocks or game populations on a sustained yield basis.

~~4. Councils/ In fulfilling their regulatory and administrative functions, regional fish and game councils/ may consider all uses and fish and game resources. Under 5 AAC 96.200, 5 AAC 96.250 and 5 AAC 96.610, the councils shall take appropriate action, within their authority, to provide for rural and other subsistence uses. Such action may include, but need not be limited to, the preparation of annual reports and recommendations on proposed regulations, and shall provide a forum for the expression of rural subsistence user views.~~

4. Councils. In fulfilling their functions under 5 AAC 96.200, 5 AAC 96.250 and 5 AAC 96.610, regional fish and game councils shall be authorized to consider and take action to provide for rural subsistence uses, including, but not limited to, the preparation of annual reports and recommendations on proposed regulations concerned with rural subsistence uses and the provision of a forum for the expression of rural subsistence user views. The councils may also consider, and take action to provide for, other subsistence and non-subsistence uses.

APPENDIX E

HOW DIRECTLY DEPENDENT ARE YOU ON HUNTING THIS GAME
POPULATION AS A PRINCIPAL MEANS OF SUPPORT FOR
YOURSELF AND/OR YOUR FAMILY? (Principal means of
support means that harvesting this animal is
important because the harvest of wild resources is
the primary way you feed yourself and/or your
family.) [CHECK ONLY ONE]

- a. Greatly dependent _____
- b. Moderately dependent _____
- c. Slightly dependent _____
- d. Not dependent _____

IN YOUR USUAL HUNTING AREA, HOW
AVAILABLE ARE OTHER KINDS OF BIG
GAME AND/OR FISH WHICH ARE
REASONABLE SUBSTITUTES FOR THE
ANIMAL LISTED IN THIS APPLICATION?

- a. Not available _____
- b. Slightly available _____
- c. Moderately available _____
- d. Greatly available _____

10. IS YOUR HOUSEHOLD'S INCOME LARGE ENOUGH TO PURCHASE
FOOD AND OTHER ITEMS AS REASONABLE ALTERNATIVES TO
TAKING WILD FISH AND GAME? [CHECK ONLY ONE] YES _____
NO _____

(Please keep in mind your assets, debts, family or household size, and other obligations.
"Reasonable alternatives" are things which can be used instead of wild fish and game.)

11. I AM AT LEAST TWELVE (12) YEARS OLD AND QUALIFY FOR A RESIDENT
ALASKA HUNTING LICENSE. YES _____
NO _____

No more than two individuals from a single household may apply for a caribou subsistence
permit. For all other species, no more than one individual from a single household may
apply for a permit.

12. WHICH ONE OF THE FOLLOWING STATEMENTS APPLIES TO
THIS APPLICATION? [CHECK ONLY ONE]

- a. This application is for caribou hunting. No more
than two members of my household are applying for a
permit for caribou. _____
- b. This application is not for caribou hunting. I am
the only member of my household applying for a permit
for this species. _____

13. I have enclosed payment for the \$5.00 (bison and muskox \$10)
application fee. YES _____
NO _____

WARNING: Making false statements on this application is a class A misdemeanor, punishable
by a fine of not more than \$5,000 and/or imprisonment of not more than one year.

CERTIFICATION

I, _____, do hereby certify that all of the information contained
in this application is complete, true, and correct to the best of my knowledge. I further
acknowledge that I am responsible for the truthfulness of the information.

SIGNED: _____

DATE: _____

Telephone Number

Social Security Number

STAFF ANALYSIS OF PROPOSED REVISIONS
TO STATE SUBSISTENCE LAW

INTRODUCTION

A. NATURE OF THE PROBLEM

Several recent State court decisions have altered the interpretation and implementation of the current State subsistence law. According to the Alaska Department of Law and according to the U.S. Department of the Interior, the State is now out of compliance with Federal statutes concerning subsistence in Alaska. The Department of Interior has notified the State that the Federal government will be required by Federal law to pre-empt State management on Federal lands if the Alaska Legislature does not bring the State back into compliance by June 1, 1986.

To understand the issues facing the Legislature, it is necessary to understand, first, the key elements of the Federal law and, second, the recent State court decisions.

1. The Federal Subsistence Law

The Federal subsistence law establishes a preference for subsistence use of wildlife on Federal lands, which are approximately two-thirds of the State and comprise about 220 million acres. The Federal subsistence law grants to the State the option of managing subsistence on Federal lands if the State adopts laws that are "consistent with" three points of the Federal law: (1) the definition of subsistence uses; (2) the preference for subsistence uses, and (3) the establishment of regional councils to assist the Board of Fisheries and the Board of Game in rulemaking.

The first policy question facing the Legislature is whether the State should be in compliance. Since that is a policy question for the Legislature, this report will not make a recommendation, but will try to identify issues and provide information that may be useful in reaching a decision.

2. The Recent State Court Cases

The most important is Madison v. State of Alaska, decided by the Alaska Supreme Court in February 1985. The chief issue in Madison was whether subsistence under State law was limited to rural Alaskans. The current State statute, passed in 1978, does not expressly limit subsistence to rural Alaskans. However, the definition of subsistence uses in Federal law limits subsistence on Federal lands to rural Alaskans.

Therefore, in 1982, the Board of Fisheries and the Board of Game adopted a regulation which limited subsistence to rural Alaskans. It was that regulation which the Alaska Supreme Court struck down in Madison. The Court did so because the current State statute does not limit subsistence to rural Alaskans and because, in the opinion of the

Court, floor statements by some State legislators showed an intent to allow urban subsistence.

The effect of the Madison case was to greatly expand the class of subsistence users by allowing urban residents to become qualified for subsistence. Because current State law, as well as the Federal law, affords a preference to subsistence use, the effect of the greatly expanded class of subsistence users is that sport hunters are barred from about 40 or 50 of the most popular hunts in the State. That resulted in an outcry for reform of the State subsistence law.

Finally, two additional court decisions deserve mention. In 1985, a trial court ruled in State v. Eluska that the failure of the Board of Game to adopt regulations specifically providing for subsistence hunting of a particular deer population was a valid defense to a criminal prosecution of an individual apprehended for taking the deer out of season. In January 1986, another trial court issued a similar decision, State v. Skuse, concerning a violation of a fishing regulation. These two cases have thrown into doubt the validity and enforceability of many State regulations concerning seasons, bag limits, and methods of harvest.

*Fishing
Smuggling
4000*

B. POLICY QUESTIONS

As mentioned above, the main policy question facing the Legislature is whether the State should be in compliance with Federal law. At least two issues are relevant to deciding this question. One is legal; it focuses on whether the State is legally out of compliance. The other is factual; it focuses on the potential impacts of splitting fish and game management between the State and Federal governments.

With respect to the legal issue, lawyers differ on whether the State is out of compliance. In other words, they interpret the effect of the Madison decision differently. Lawyers for the Alaska Department of Law, the U.S. Department of the Interior, and the Alaskan Federation of Natives believe that the Madison decision puts the State out of compliance. Lawyers for the Alaska Legal Services Corporation and the Native American Rights Fund believe that Madison does not put the State out of compliance. Regardless of whether or not the State is legally out of compliance, two points are important. First, the Federal government believes that the State is out of compliance and therefore it will step in on June 1 to administer subsistence and fish and game on Federal lands. Second, regardless of the compliance question, the Legislature is always free to amend the State subsistence law to either comply or not comply. A result of noncompliance is Federal intervention. If the Federal government intervenes, it is conceivable that it could legally reach beyond Federal land. Congress could use its power over Indians to extend the Federal subsistence law to Native lands. Congress could use its power over commerce to amend the Federal subsistence law to reach all wildlife involved in interstate commerce. Congress could perhaps use its power under the property clause to manage wildlife that use Federal land even when the wildlife are not on Federal land.

With respect to the factual issue, non-compliance could make fish and game management and law enforcement more difficult than it already is. The pattern of land ownership is fragmented. Fish and game do not pay attention to legal boundaries. It could be difficult to management populations that traverse lands subject of differing regulations. Different State and Federal regulations would also require users of wildlife to know whether they were on lands subject to State or Federal lands. It is impractical to mark boundaries. This makes law enforcement more difficult. Finally, that State regulatory process is much more open to public involvement than is the Federal. A sense of public participation and control could suffer if the Federal government intervenes to manage fish and wildlife on Federal lands. Thus, the question of State versus Federal control concerns jurisdiction more than it does land ownership.

In sum, the State can pretty much manage all fish and wildlife harvest if it complies with the definition of subsistence use, the preference for it, and regional council participation.

Other policy questions are addressed in the section by section analysis.

part 2

C. SUBSISTENCE AND SPORT CONCERNS ARE MATTERS OF PERSPECTIVE THAT DESERVE MUTUAL COOPERATION AND ACCOMMODATION.

Alaska is unique for its wildlife resources. It offers the best sport hunting, sport fishing and wildlife viewing opportunities in the United States. It also is the only state that has an ongoing subsistence culture. It also supports large commercial fishing, guiding, sport, recreational and tourism industries.

One assumption underlying the bill is that the State should maintain subsistence, sport, commercial, and nonconsumptive uses of wildlife. The bill tries to do that by striking a reasonable balance between them.

The State of Alaska has long recognized the special role that subsistence plays in the lives of many Alaskans. As early as 1961, the State sought to protect subsistence use of migratory waterfowl. Since 1973, the State has provided a statutory preference for subsistence uses. In 1978, major amendments were made to the law, which provided further protection of subsistence. The bill recognizes that the policy of affording subsistence a preference is sound and should continue.

However, subsistence has been controversial. It is perhaps the most divisive issue in the state. It is a political, social, and legal issue that affects the allocation of resources. It is also fundamentally a resource issue, in that the continued health of Alaska's fish and game is necessary to all users.

Subsistence has been a major political issue at least since 1978, when the current subsistence law was adopted. In 1982, Alaska voters considered a referendum to repeal the subsistence preference. They voted against repeal.

Subsistence has been a long-standing legal issue. In several court cases in the 1970's, and 1980's, Alaskans sought to protect what they viewed as their subsistence rights. In other cases, Alaskans have sought equal access to resources. Similar disputes occur in front of the Board of Fisheries and the Board of Game. However, until recently the results of court decisions in Madison, Eluska, and Skuse. ?

As a social issue, subsistence is capable of pitting Alaskans against Alaskans, rural against urban, sport against subsistence. It has obvious and unfortunate racial overtones. It engenders fear, about the loss of opportunities, in subsistence and sport users alike. These effects need to be avoided.

D. ONE APPROACH TO SOLVING THE CURRENT PROBLEMS

One way to approach subsistence is with a commitment to try to understand other peoples' concerns. Any bill concerning subsistence will call for difficult decisions by state lawmakers, the Board of Fisheries and the Board of Game. The decisions will be difficult because, for the most part, subsistence is an issue that asks lawmakers and board members to deal with cultures and values that may be different from their own and those of the constituents they represent.

The bill is a substantial reworking of the present State statute. Nevertheless, many of the key principles of the present statute are retained. It complies with the three points of Federal law.

The primary reason for rewriting the present statute is simply to make the law more clear. Both the Federal law and the current State law are broad conceptual statutes, that require translation into more specific guidance for daily operations and decision making. If the law can be made more clear, then perhaps Alaskans can at least agree on what it means and proceed to debate specific decisions about how to implement it. Several examples of concepts in need of clarity might be useful.

First, the Federal law and the current State law speak in terms of "customary and traditional" subsistence use, but they provide little guidance as to what is "customary and traditional." Second, the Federal law and the current State law speak of subsistence use of "wildlife", but whether the use and the preference go to all wildlife stocks and populations or just those that are customary and traditional is unanswered by both the Federal law and the current State law. Third, the Federal law speaks of subsistence as being for "rural" Alaskans, but it provides little guidance as to what "rural" means. Fourth, the Federal and current State laws both provide a preference for subsistence, but neither provides much guidance as to the meaning of what level of allocation is an appropriate preference. Fifth, the Federal law speaks of assuring an "opportunity" for subsistence, but what that "opportunity" means is unanswered.

The vagueness in the current State and Federal law is perhaps the source of much of the confusion and hostility that permeates the public subsistence debate and the debates that occur in front of the boards. As long as people cannot even agree on the terms they argue about, the

public debate will remain conceptual and unresolved. It will also be mostly irrelevant to the specific issues that confront the boards.

A danger in not making the law more clear is that it will lead to shifting political pressures on the boards, as Alaska grows and changes. Those pressures may lead to the erosion of subsistence, sport and nonconsumptive uses of wildlife. The people and the resources may suffer.

Therefore, one hope for resolving the subsistence debate may lie in agreeing on the meaning of the terms used in the statute and agreeing on a method of allocating fish and game.

This bill tries to define terms, provide guidance to the boards, and establish a method of allocating. It retains some vagueness, in behalf of affording flexibility to the boards.

An important point about this bill is that it tries to change the nature of future subsistence debates by making them debates over facts rather than concepts. The types of debates that will occur, if this bill is adopted, will be debates over factual questions, such as how much harvest of a particular stock is necessary for subsistence; whether or not a particular fish stock or game population is a subsistence stock, and whether or not a particular area is "rural". These debates are worth pursuing, and they will all occur in front of the boards.

The results of a debate over specific factual circumstances will inevitably be less than perfect. The boards will err. Sometimes subsistence will be given too much and sometimes too little. Courts might reverse specific decisions by the boards, but the legal framework of the bill will stand so long as it complies with the three points of Federal law.

If the Legislature adopts a statute that gives meaning to the phrases contained within it, then perhaps Alaskans can shed their fears about each other. Perhaps then the broad conceptual debate will simply fade away. Perhaps then, with the help of the boards, we can be confident that we will make decisions that will be fair to each other.

SECTION BY SECTION DETAILED ANALYSIS

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Personal use fish are stocks for which the board authorizes what are called personal use fisheries. Most are dip net fisheries for salmon. They generally have bag limits that are higher than sport bag limits. Personal use fisheries exist on the Copper River and on some sockeye salmon stocks on the Kenai Peninsula.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses. To date, this has rarely occurred.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds two new paragraphs to the authority of the Board of Fisheries. The first concerns special management areas. It gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas (which so far have occurred on two trout fisheries), and children's fishing areas. It is probable that the board has always had these authorities by implication, but the authority with respect to children's fisheries had been questioned by the Department of Law. This new paragraph makes that authority clear, and the fact that the paragraph lists several types of special fishing areas is not meant to exclude other types that are not mentioned.

The second new paragraph tracks the purposes of the Board of Fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish

and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. It is intended to be consistent with Federal law.

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations. This will require the Department to estimate the number of subsistence users who need the resource. It will require the subsistence division of the Department and the boards to look at local use patterns.

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The Federal legislative history also indicates that the boards, with assistance from the department and the regional councils, may consider local residency, economic dependence and the availability of alternative resources, in determining what resources and uses are customary and traditional. The boards should use this meaning of "customary and traditional" in identifying what stocks should be subject to subsistence.

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional as being harvested by all Alaskans under nonsubsistence regulations. Sport groups have often alleged that bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations are not subsistence stocks or are not customary and traditional subsistence stocks. Whether or not this is true in particular circumstances is not decided by the proposed legislation. That matter should be left to factual determinations made by

the boards. This bill gives them authority to make those determinations.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of that surplus is necessary to provide a reasonable opportunity for subsistence.

The determination of whether a harvestable surplus exists must be consistent with sustained yield, sound management principles, and the maintenance of healthy fish stocks and game populations. The "sustained yield" principle is derived from Article VIII of the Alaska Constitution, and "sound management principles" and "maintenance of healthy populations" are derived from the federal subsistence law. Like "harvestable surplus", these terms are terms of art within the profession of fish and wildlife management. They are somewhat vague terms, so a latter section of the proposed bill requires the boards, after consultation with the Department, to define them by regulation.

A reason for asking the boards, rather than the Department or the Legislature, to define them, is that they are technical terms of art requiring professional guidance. They also contain a mix of biological considerations, allocation considerations, and social considerations that are appropriate for the boards to balance. A second reason for defining them by regulation, rather than by statute, is that they will be difficult to define. Therefore, regulatory definitions can develop over time, rather than be locked in statute. A third reason for defining them is to protect the substantive interests of subsistence, sport, commercial, and non-consumptive users. The terms are currently in State and Federal laws, and if future experience shows that the terms are incapable of definition, then perhaps they should be stricken from our laws as meaningless phrases and perhaps our fish and game managers should then come up with other terms that have meaning. Finally, the result of leaving these terms undefined is that much litigation over allocation decisions focuses on procedural arguments, such as lack of public notice, rather than on the actual management decisions that prompt the litigation. Examples of this are the disputes in Cook Inlet over salmon allocation between sport, commercial and subsistence uses.

Federal law applies an additional limitation on subsistence in national parks and monuments that are open to subsistence. Subsistence is subservient to the "conservation of natural and healthy populations" of

wildlife in national parks and monuments. Although this standard was not included within the proposed bill, the boards and the Department should recognize the special Federal standard governing national parks and monuments, and subsistence within them, when the boards adopt regulations defining the terms sustained yield, maintenance of healthy populations, and sound management principles.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is reasonableness. Statutes and courts frequently use such standards, even though they may seem vague to the public at large. The standard means that the boards' decisions should be based on available information. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

The notion of a "reasonable opportunity to satisfy subsistence uses" does not guarantee a particular level of harvest.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with Federal law. It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the Federal law clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough surplus to allow a reasonable opportunity for subsistence. At Tier I the preference allocates enough of the resource to provide that reasonable opportunity, and any surplus that is left may go to other consumptive uses.

Tier II is when there is not enough harvestable surplus to provide a reasonable opportunity to subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, the Tier II hunts that have been closed to sport hunters will be reopened by section 6, 7, and 8 the bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some stocks that are presently

open only as Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the stocks are not customary and traditional subsistence stocks. Bison may be a case in point.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law, so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient.

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only be harvested under nonsubsistence regulations.

AS 16.05.258(f)

Subsection (f) provides authority for the boards to shift subsistence use of a resource to a limited extent. In making critical allocation decisions, the boards may recognize that subsistence is a flexible economy that depends on many resources that may to some extent be interchangeable among similar resources. This authority is not meant to allow the boards to prohibit subsistence use of a particular subsistence stock or population, but is meant to allow the boards to apportion and allocate subsistence reasonably among similar stocks and populations.

AS 16.05.258(g)

Subsection (g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h)

Subsection (i) is a technical amendment which protects the rights of military personnel, stationed in Alaska for more than 30 days, to hunt, fish and trap on military lands as provided in Federal law.

AS 16.05.258(i)

Subsection (i) requires the boards, after consultation with the Department, to define the meaning of "sustained yield", "sound management

principles", "maintenance of healthy populations," and "harvestable surplus." The reasons for doing so are discussed above under AS 16.05.258(b). In defining sound management principles the boards should take into account Federal law which requires, with respect to national parks, the "conservation of natural and healthy populations", as discussed above under AS 16.05.258(b).

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. If the board establishes such a process, then this section will require an appellant to sue the process before going to court.

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the restrictions on nonsubsistence users will no longer be necessary.

Whenever the boards adopt permit programs, the boards and the Department should work cooperatively with regional councils, local advisory committees, and the public affected in order to assure public input, understanding, and support.

The new subsections (d) and (e) provide for notice of the terms of a permit and allow the boards to seek the assistance of Native village or regional corporations, and other community services appropriate to assist them in providing public notice.

Under subsection (f) the Department will administer subsistence permit programs, the Department is authorized to secure the assistance of people outside the department, such as members of village councils, staff of Native corporations, or village stores. Subsection (f) is

modeled after current statutes governing the issuance of licenses and tags.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and tradition trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

The bill adopts essentially the House-passed definition of "rural area." It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the case economy in the area, such as commercial fishing.

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(b) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

2/18/56

McKie

a very quick read through - LIS

SECTION BY SECTION DETAILED ANALYSIS

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Personal use fish are stocks for which the board authorizes what are called personal use fisheries. Most are dip net fisheries for salmon. They generally have bag limits that are higher than sport bag limits. Personal use fisheries exist on the Copper River and on some sockeye salmon stocks on the Kenai Peninsula, in South east Alaska, and on the Naknek River

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses. To date, this has rarely occurred.

The classification of "subsistence fish" merely enables the board to classify fish to bring them under subsistence regulation.

Section 2

Section 2 adds two new paragraphs to the authority of the Board of Fisheries. the first concerns special management areas. It gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas (which so far have occurred on two trout fisheries), and children's fishing areas. It is probable that the board has always had these authorities by implication, but the authority with respect to children's fisheries had been questions by the Department of Law. This new paragraph makes that authority clear, and the fact that the paragraph lists several types of special fishing areas is not meant to exclude other types that are not mentioned.

clarifies/reiterate

The second new paragraph tracks the purposes of the Board of fisheries, as stated in the statute that established the board and as stated in Article VIII of the Alaska State Constitution. Article VIII gave the Legislature the authority over the conservation, utilization, and development of natural resources. The Legislature delegated that authority to the Board of Fisheries. This new paragraph is broadly worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Section 3 is identical to paragraph (13) in section 2, except that section 3 applies to game.

Section 4

Section 4 is a major portion of the bill. It adds two new sections to the Alaska Statutes. AS 16.05.258 sets out a method of allocating fish

and game among subsistence, sport, commercial, and nonconsumptive uses. It also contains important aspects of current subsistence law, such as the subsistence preference. (It is intended to be consistent with Federal law.) *but it isn't, not with (f) in, etc*

AS 16.05.259 addresses administrative appeals of decisions by the boards.

Because the first of these two new sections, AS 16.05.258, is important and long, the analysis of AS 16.05.258 is by subsection.

AS 16.05.258(a)

Subsection (a) requires the Board of Fisheries and the Board of Game to identify the fish stocks and game populations that are customary and traditional subsistence stocks and populations. This will require the Department to estimate the number of subsistence users who need the resource. It will require the subsistence division of the Department and the boards to look at local use patterns. *This is, of course, already occurring*

The legislative history of the Federal subsistence law says that in using the phrase "customary and traditional", Congress sought to protect uses that were "long-established and important" and in which such uses incorporate beliefs and customs which have been handed down by word of mouth for example, from generation to generation. The Federal legislative history also indicates that the boards, with assistance from the department and the regional councils, may consider local residency, economic dependence and the availability of alternative resources, in determining what resources and uses are customary and traditional. *NO That is to see who goes if hit everyone can*

Thus whether a fish stock or game population is customary and traditional should be measured by a mix of factors, that include not only the amount harvested, but also other factors such as: (1) whether or not the use is long established and important; (2) the season at which the resource is harvested; (3) its relation to other resources that are used for subsistence; (4) the uses to which it is put; and (5) cultural values associated with it.

There are two reasons for identifying customary and traditional stocks. One helps subsistence and the other helps sport. First, customary and traditional subsistence stocks should be the ones about which the boards ought to be most sensitive in allocating fish and game. They are the ones in which allocation errors could most infringe on subsistence, as a flexible economy and culture. Second, the identification of customary and traditional stocks leaves those that are not customary and traditional as being harvested by all Alaskans under nonsubsistence regulations. Sport groups have often alleged that bison; goats; many sheep populations; elk and transplanted game; and perhaps some steelhead and trout and brown bear populations are not subsistence stocks or are not customary and traditional subsistence stocks. Whether or not this is true in particular circumstances is not decided by the proposed legislation. That matter should be left to factual determinations made by

the boards. This bill gives them authority to make those determinations.

The boards should act with sensitivity in identifying subsistence stocks. They and the department should seek the assistance of regional councils and local advisory committees that are in place to assist the boards. However, the board may choose not to follow a regional council's recommendation if the board determines that the recommendation is not supported by substantial evidence. This requirement for substantial evidence is consistent with existing regulations governing the relationship between the councils and the boards, and this is consistent with Federal subsistence law concerning the regional councils.

AS 16.05.258(b)

After the boards identify subsistence stocks, subsection AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of that surplus is necessary to provide a reasonable opportunity for subsistence.

The determination of whether a harvestable surplus exists must be consistent with sustained yield, (sound management principles), and the maintenance of healthy fish stocks and game populations.) The "sustained yield" principle is derived from Article VIII of the Alaska Constitution, and ("sound management principles" and 2"maintenance of healthy populations" are derived from the federal subsistence law.) Like "harvestable surplus", these terms are terms of art within the profession of fish and wildlife management. They are somewhat vague terms, so a latter section of the proposed bill requires the boards, after consultation with the Department, to define them by regulation.

A reason for asking the boards, rather than the Department or the Legislature, to define them, is that they are technical terms of art requiring professional guidance. They also contain a mix of biological considerations, allocation considerations, and social considerations that are appropriate for the boards to balance. A second reason for defining them by regulation, rather than by statute, is that they will be difficult to define. Therefore, regulatory definitions can develop over time, rather than be locked in statute. A third reason for defining them is to protect the substantive interests of subsistence, sport, commercial, and non-consumptive users. The terms are currently in State and Federal laws, and if future experience shows that the terms are incapable of definition, then perhaps they should be stricken from our laws as meaningless phrases and perhaps our fish and game managers should then come up with other terms that have meaning. Finally, the result of leaving these terms undefined is that much litigation over allocation decisions focuses on procedural arguments, such as lack of public notice, rather than on the actual management decisions that prompt the litigation. Examples of this are the disputes in Cook Inlet over salmon allocation between sport, commercial and subsistence uses.

Federal law applies an additional limitation on subsistence in national parks and monuments that are open to subsistence. Subsistence is limited to the "conservation of natural and healthy populations" of

not really -
2. conservation units -
1. principles of wildlife conservation.

wildlife in national parks and monuments. Although this standard was not included within the proposed bill, the boards and the Department should recognize the special Federal standard governing national parks and monuments, and subsistence within them, when the boards adopt regulations defining the terms sustained yield, maintenance of healthy populations, and sound management principles.

Paragraph (2) in subsection AS 16.05.258(b) establishes a legal standard for determining how much of a fish stock or a game population is needed for subsistence. The standard is reasonableness. Statutes and courts frequently use such standards, even though they may seem vague to the public at large. The standard means that the boards' decisions should be based on available information. It does not permit the boards to be arbitrary, capricious, or prejudiced in allocating to subsistence. Conversely, it does not require the boards to satisfy desires of subsistence users that are unreasonable, that are inconsistent with available information, or that might be based on prejudice.

The notion of a "reasonable opportunity to satisfy subsistence uses" does not guarantee a particular level of harvest.

AS 16.05.258(c)

Subsection (c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. ~~Subsection (c) also contains the preference for subsistence.~~ It is consistent with Federal law. It is a redrafting of the current State law, AS 16.05.251(b) and AS 16.05.255(b). The redrafting is intended to make the preference more clear.

↳ not in combination with (f)

The current State law contains the so-called "Tier I" and "Tier II" levels of the preference. The U.S. Senate Committee Report on the Federal law clearly indicates that Federal law also contains the "Tier I" and "Tier II" levels. Tier I is when there is not enough harvestable surplus to accommodate all consumptive uses without interfering with sound management of the resource, but there is enough surplus to allow a reasonable opportunity for subsistence. At Tier I the preference allocates enough of the resource to provide that reasonable opportunity, and any surplus that is left may go to other consumptive uses.

Tier II is when there is not enough harvestable surplus to provide a reasonable opportunity to subsistence. When that occurs, other consumptive uses must be prohibited and subsistence must be restricted on the basis of three factors: (a) customary and direct dependence on the fish stock or game population as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resources. Alternative resources means other wildlife and alternatives purchased with cash.

Several additional points need to be made about this subsection. First, ^{almost all} the Tier II hunts that have been closed to sport hunters will be re-opened by section 6, 7, and 8 the bill. The Tier II hunts are reopened by limiting subsistence to rural residents who are customary and traditional subsistence users. Also, some stocks that are presently

↳ what? - 4 -

how?

must be wrong numbers

open only ^{as} Tier II subsistence hunters, and are therefore closed as sport hunts, may reopen because the stocks are not customary and traditional subsistence stocks. Bison may be a case in point.

Second, the subsistence preference is only a preference over other consumptive uses. This is consistent with Federal law, as stated in the policy and intent sections of the Federal law. (Catch and release fisheries, taking of fish and game for management purposes such as transplanting stocks or poisoning undesirable fish prior to stocking are not consumptive uses for purposes of the subsistence law,) so long as they do not interfere with reasonable opportunities for subsistence. Similarly, nonconsumptive uses in national parks or other areas, and administrative actions consistent with State and Federal law, may take precedence over subsistence.

AS 16.05.258(d)

Subsection (d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient. *This would be the normal situation*

AS 16.05.258(e)

Subsection (e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only be harvested under nonsubsistence regulations.

AS 16.05.258(f)

good
~~Subsection (f) provides authority for the boards to shift subsistence use of a resource to a limited extent. In making critical allocation decisions, the boards may recognize that subsistence is a flexible economy that depends on many resources that may to some extent be interchangeable among similar resources. This authority is not meant to allow the boards to prohibit subsistence use of a particular subsistence stock or population, but is meant to allow the boards to apportion and allocate subsistence reasonably among similar stocks and populations.~~

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Subsection (g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

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Subsection (i) is a technical amendment which ^{reiterates} protects the rights of military personnel, stationed in Alaska for more than 30 days, to hunt, fish and trap on military lands as provided in Federal law.

needs to be fixed
AS 16.05.258(i)

Subsection (i) requires the boards, after consultation with the Department, to define the meaning of "sustained yield", "sound management

Because removed - no need
- 5 -

Sub. has Federal priority over nonconsumptive taking, but not nonconsumptive use

principles", "maintenance of healthy populations," and "harvestable surplus." The reasons for doing so are discussed above under AS 16.05.258(b). In defining sound management principles the boards should take into account Federal law which requires, with respect to national parks, the "conservation of natural and healthy populations", as discussed above under AS 16.05.258(b).

AS 16.05.259

This new section grants to the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration. ~~If the board establishes such a process, then this section will require an appellant to sue the process before going to court.~~

strictly optional - are waived

Section 5

Section 5 amends AS 16.05 by adding a new section AS 16.05.261 which states that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense to the charge that the taking was done for subsistence use. Because the boards are required to identify subsistence stocks and populations, this section requires a person to first seek to correct erroneous decisions by the boards, through appeal, petitions for reconsideration, or court action, rather than permitting the person to violate the regulation. This eliminates the "subsistence defense" as arose in the Eluska case and the Skuse case.

Section 6

Section 6 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within an area, or for communities or villages, groups or individuals. The boards are required to adopt a permit program when the subsistence preference requires restrictions on nonsubsistence users. The reason for this requirement is so that the Department and the boards can more closely monitor harvest in order to prevent harm to the resource and to rebuild the stock or population to a point where the restrictions on nonsubsistence users will no longer be necessary.

Whenever the boards adopt permit programs, the boards and the Department should work cooperatively with regional councils, local advisory committees, and the public affected in order to assure public input, understanding, and support.

The new subsections (d) and (e) provide for notice of the terms of a permit and allow the boards to seek the assistance of Native village or regional corporations, and other community services appropriate to assist them in providing public notice.

Under subsection (f) the Department will administer subsistence permit programs, the Department is authorized to secure the assistance of people outside the department, such as members of village councils, staff of Native corporations, or village stores. Subsection (f) is

modeled after current statutes governing the issuance of licenses and tags.

Section 7

Section 7 amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Section 8 amends the definition of subsistence uses to state that it does not include harvests for commercial enterprises. The addition of the word "noncommercial" to the definition is not meant to prevent limited exchanges of goods for cash under customary and tradition trading practices, but it is meant to prevent subsistence harvest for substantially commercial enterprises.

Section 9

Section 9 addresses several other definitions. Fish stocks and game populations are defined as any species or subgroup of a species that is manageable as a unit.

The bill adopts essentially the House-passed definition of "rural area." It is defined as a community or area of the State where noncommercial, customary and traditional, taking and use of fish and game is a significant characteristic of the economy of the community or area. The focus should be on the significance of the noncommercial, customary and traditional harvest and use. It is not meant to preclude an area from being rural simply because there may also be significant elements of the case economy in the area, such as commercial fishing.

no - this is different - circular - "essentially" is misleading

The definition of subsistence hunting is similar to the definition of subsistence fishing discussed above. In the current statute the definition is located in AS 16.05.257, which is repealed. Also, in the current law, the definition is inappropriately located separate from the rest of the definitions. Therefore, it is necessary to readopt a definition.

Section 10

Section 10 repeals three portions of subsistence law. AS 16.05.251(c) concerns fish, and AS 16.05.255(b) concerns game. They are similarly worded in current law. They require the boards to adopt subsistence regulations and establish the preference in current law. In the bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

Hooray!!!

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Section 11 provides that the bill would take effect on June 1, 1986.

what has been removed
Stochon species clarinet
no subsistence defense

domicle - clarify

pinning - if it comes up - removed requirements

shift -
Rp

subsistence protected and has priority

guides serving at pleasure

SECTIONAL ANALYSIS
SCS FOR CSHB 288(SA)

Section 1

Amends the authority of the Board of Fisheries for classifying fish stocks. The categories added are "personal use fish" and "subsistence fish."

Section 2

Gives the Board of Fisheries authority to establish personal use areas, trophy management areas, catch and release areas, and children's fishing areas.

The second paragraph is worded so that the board's authority for conservation, utilization, and development of fisheries is tied to all aspects of regulating commercial, sport, subsistence and personal use fisheries.

Section 3

Is identical to the second paragraph of section 2, except that section 3 applies to game.

Section 4

The proposed AS 16.05.258 sets out a method of allocating fish and game among subsistence, sport, commercial, and nonconsumptive uses. It is consistent with federal law.

AS 16.05.258(a) requires the Board of Fisheries and the Board of Game to identify the fish and stocks and game population that are customary and traditional subsistence stock and populations.

AS 16.05.258(b) then requires the boards to determine whether a harvestable surplus exists and how much of the surplus is necessary to provide a reasonable opportunity for subsistence.

AS 16.05.258(c) requires the boards to adopt subsistence regulations for subsistence stocks and populations. Subsection (c) also contains the preference for subsistence. It is consistent with federal law.

AS 16.05.258(d) allows the boards to authorize nonsubsistence harvest of subsistence resources when the resources are sufficient.

AS 16.05.258(e) provides that fish stocks and game populations that are not identified as subsistence stocks and populations may only harvested under nonsubsistence regulations.

AS 16.05.258(f) provides authority for the boards to apportion and allocate subsistence reasonably among similar stocks and populations.

AS 16.05.258(g) provides that all takings of fish and wildlife, including subsistence harvest, are subject to reasonable regulation of seasons, limits, methods and means, and other such restrictions, including prohibitions of wanton waste.

AS 16.05.258(h) protects the rights of military personnel stationed in Alaska for more than 30 days, to hunt, fish and trap on military lands as provided in Federal law.

AS 16.05.258(i) requires the boards, after consultation with the department, to define the meaning of sustained yield, sound management principles, and harvestable surplus.

The proposed AS 16.05.259 addresses administrative appeals of decisions by the boards. It grants the boards authority to establish administrative appeal procedures, including requiring petitions for reconsideration.

Section 5

The proposed AS 16.05.261 says that in a prosecution for the taking of fish or game in violation of a statute or regulation, it is not a defense that the taking was done for subsistence.

Section 6

Amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits.

Section 7

Amends the definition of subsistence fishing to state that subsistence fishing may only be engaged in by rural residents domiciled in a rural area.

Section 8

Amends the definition of subsistence uses to state that only residents domiciled in a rural area may qualify for subsistence which does not include harvests for commercial enterprises.

Section 9

Definition section.

Section 10

Repeals AS 16.05.251(b) (fish) and AS 16.05.255(b) (game). They require the boards to adopt subsistence regulations and establish the preference in current law. In the proposed bill, these requirements and the preference are readopted in the new AS 16.05.258(c).

AS 16.05.257 is repealed because it is unused and is old law that predates the 1978 state subsistence law.

Section 11

Provides that the bill will take effect on June 1, 1986.

ALASKA FEDERATION OF NATIVES, INC.



411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

February 10, 1986

TO: AFN Board of Directors
FROM: Don Mitchell
SUBJECT: Abood Subsistence Bill

On February 4th the Senate State Affairs Committee unexpectedly reported a subsistence bill. A copy of the bill is attached. The bill is a substitute for HB 288, the bill passed by the House last session. Although it includes several of the concepts embodied in the House bill, the Abood bill makes a number of changes to title 16 which have nothing to do with subsistence.

BILL ANALYSIS

1. Drafting: Independent of its substantive effect the Abood bill has a number of technical drafting problems which should be remedied.

CS will define

Sec. 3 amends A.S. 16.05.251(a) to delegate the Board of Fisheries authority to regulate personal use fishing, but the bill includes no definition of "personal use fishing".

This doesn't make any difference

Sec. 4 establishes an elaborate methodology which the Board of Fisheries and Board of Game must each follow to adopt hunting and fishing regulations (including but not limited to subsistence regulations). The first step in this process is to identify "subsistence uses" of a fish stock or game population. The second step is to determine if the stock or population is healthy enough to sustain any harvest (for subsistence or any other purpose). The order in which these steps must be performed is nonsensical. If a stock or population which is the subject of "subsistence uses" cannot safely sustain a subsistence harvest no such harvest may be authorized. That being the case, identifying subsistence uses of a stock or population prior to determining whether the stock or population can safely sustain a harvest of any kind is a waste of time. The process should be reversed. An assessment of biological status should be the first step in the process for adopting regulations.

Sec. 7 establishes new definitions of the terms "subsistence fishing" and "subsistence hunting". The definitions state that subsistence fishing and hunting is hunting and fishing "by a resident domiciled in a rural area of the state for subsistence uses". However, the new definition of "subsistence uses" in the bill limits subsistence uses to "a resident domiciled in a rural area of the state". Consequently, inserting this phrase in the "subsistence fishing" and "subsistence hunting" definitions is redundant.

2. Shifting Subsistence Uses To Alternative Stocks And Populations: The bill repeals A.S. 16.05.251(b) and .255(b) - the sections which presently govern the adoption of subsistence regulations - and establishes a new section A.S. 16.05.258 in their place. The new section establishes a new process for subsistence rulemaking. Subsection (f) of the new section provides:

In making allocation decisions the boards may apportion subsistence use among species, stocks, and populations that are similar and reasonably available.

If this provision were to become law the Board of Fisheries, for example, may shut down the king salmon fishery at Tyonek on the theory that it was providing the subsistence priority by shifting subsistence fishing to reds or some other species of salmon less coveted by sportsmen. Similarly, the Board of Game would be authorized to shut down subsistence hunting for moose or bear in a particular area if it could find another species of game to move the subsistence hunting effort to. Needless to say, this provision makes a mockery of the subsistence priority. It is also inconsistent with the regulatory standards set forth in title VIII of ANILCA. The legislative history of title VIII indicates that the federal subsistence priority is stock and population specific. Consequently, if this provision is enacted, the State will continue to be out of compliance with ANILCA.

3. Curtailing Nonsubsistence Uses Before Curtailing Subsistence Uses: Proposed section A.S. 16.05.258(c) is ambiguous as to whether all nonsubsistence uses of a stock or population must be eliminated before subsistence uses can be curtailed. In pertinent part, subsection (c) states:

If a surplus is not sufficient to accommodate all consumptive uses of the surplus, but is sufficient to accommodate subsistence uses of the surplus, then subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy subsistence

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uses of the surplus, and may provide opportunities to satisfy other consumptive uses of the surplus.
(Emphasis added)

The federal subsistence priority requires all nonsubsistence uses of a stock or population to be eliminated before subsistence uses may be curtailed. If the language cited above authorizes the boards to do otherwise and the language is enacted, the State will continue to be out of compliance with ANILCA.

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4. Sustained Yield, Sound Management, and the Maintenance of Healthy Fish Stocks and Game Populations: The Alaska Constitution requires fish stocks and game populations to be managed on a sustained yield basis. Consistent with this constitutional mandate, sustained yield is the regulatory standard in title 16 which presently triggers the ability of the Board of Fisheries and Board of Game to adopt any hunting and fishing regulations. For reasons that remain unclear, in addition to "sustained yield" the Abood bill establishes two additional standards, i.e., "sound management" and "the maintenance of healthy populations fish stocks and game populations", each of which must be met before a board may adopt any hunting or fishing regulations, including sport and commercial as well as subsistence. See proposed A.S. 16.05.258(b). If a fish stock is at sustained yield the Board of Fisheries would have no legal authority to adopt regulations authorizing fishing on the stock unless it first determined that such fishing would also be consistent with "sound management" and "the maintenance of a healthy stock". Neither of the new terms is defined. Instead the bill instructs the boards to adopt regulations defining all three terms. The addition of these new biological standards has nothing whatsoever to do with the subsistence controversy or the holding in the Madison case which the legislation is ostensible trying to fix. However, if enacted into law, the new biological standards will have a profound effect on all hunting and fishing. Since no one in Alaska has complained about the "sustained yield" standard, why Abood wants to use the subsistence bill to make such a radical change in fish and wildlife management policy is perplexing.

5. Subsistence Permits: Sec. 6 of the bill requires the boards to issue subsistence permits "for areas, villages, communities, groups, or individuals" whenever the implementation of the subsistence priority requires a reduction in nonsubsistence hunting opportunities. The language of the section provides no flexibility. The boards must issue subsistence permits regardless of how stupid it may be to do so.

6. Limitation of "Subsistence Uses" to Residents of Rural Alaska: The only reason subsistence legislation is needed is to limit the class of hunters and fishermen eligible to engage in "subsistence uses" to residents of rural Alaska. The Abood bill

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appears to accomplish this goal, but in an unconstitutional way. On the one hand Sec. 7 satisfactorily amends the definition of "subsistence uses" in A.S. 16.05.940(23) to limit the purview of the definition to Alaska residents "domiciled in a rural area of the state". However, the bill then establishes a new definition of the term "domicile" which establishes a 12 month residency requirement. In addition to again taking the State out of compliance with title VIII (the legislative history of title VIII specifically prohibits durational residency requirements), a 12 month residency requirement is patently unconstitutional.

The above analysis highlights the provisions of the Abood bill which raise the most serious problems. The bill contains additional provisions which are either obnoxious or unnecessary but which do not conflict with the protection of subsistence hunting and fishing or with bringing the State back into compliance with the regulatory standards in title VIII of ANILCA. The Abood bill is now before the Senate Resources Committee chaired by Arliss Sturgulewski. The first work session on the bill has been scheduled for February 19th.

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
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Senate Committee on Resources

TO: Senate Resource Committee Members

February 26, 1986

FROM: Senate Resources Committee Staff

MEL

RE: SCS for CS for HB 288 (Resources) "An Act relating to the taking of fish and game for subsistence and personal use; and providing for an effective date." and suggested changes.

SECTION BY SECTION ANALYSIS

Section 1

Section 1 amends the authority of the Board of Fisheries for classifying fish stocks whenever the board finds it necessary for regulatory purposes. Two new categories are added. They are "personal use fish" and "subsistence fish." Small personal use fisheries exist on the Copper River and on some salmon stocks on the Kenai Peninsula, in Southeast Alaska, and on the Naknek River. In addition to areas where personal use fishing already occurs, it is envisioned that personal use fisheries would be particularly appropriate in certain areas of the state that were considered rural before the enactment of this bill.

Classifying fish for particular purposes does not imply that the uses are exclusive of other uses. However, allocation decisions, management concerns, or biological considerations may in particular circumstances require that use of a fish stock be reserved for particular uses or that certain uses be excluded.