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Subsistence

Publications

(File 3)

The Fine Print of
SUBSISTENCE

By Leslie Barber
Illustration by Robert Chrestensen, staff

Larry Fitzwater was trapping wolverine in the Brooks Range wilderness near Ulu Lake one wintery January day. He noticed a plane was landing and walked over to greet its occupants, with whom he was acquainted.

Had he greeted them in 1979, the encounter would have been amiable. However, this was 1984. The land upon which Fitzwater had been trapping was now part of the national parks and preserves created in Alaska in 1980. The two acquaintances were park rangers. They arrested Fitzwater for illegally trapping in a national park. Trapping is legal in a national preserve.

In April, Fitzwater, of Bettles, was brought to trial in Fairbanks. He served as his own attorney. The park service testified that it had twice shown Fitzwater that the boundary between the park and the preserve was at the southern end of the lake. He claimed he thought the boundary between the park and the preserve was 15 miles away from the lake. The court found him guilty.

During sentencing, however, Fitzwater continued his defense by arguing that he was subsistence trapping. Subsistence trapping is legal in the park.

If he had been trapping in Kobuk Valley National Park, which is west of the Gates of the Arctic National Park and Preserve, the trial would have stopped with Larry's announcement that he was subsistence trapping. Subsistence hunting and trapping are legal everywhere in that park. However, Fitzwater was subsistence trapping in Gates of the Arctic National Park, where subsistence trapping is allowed only "where traditional."

The Park Service argued that since Fitzwater was not trapping in an area they considered "traditional" for Bettles residents, he was still guilty of illegally trapping in the park. Had he been a resident of Anaktuvuk Pass, his subsistence trapping would have been legal.

People supported families, maintained traditions and supplemented retirement incomes with local resources.

The judge accepted the Park Service argument, and Fitzwater was fined $500 ($400 of which was suspended) for illegally trapping in the park, even though what the law considered "traditional" had not been defined through regulations and no maps were available to show residents where they could and could not subsist. Fitzwater, like subsistence users for centuries, learned of the area through word of mouth from friends in Bettles who knew people in the lake area. The people themselves were surprised at the ruling.

The result was community-wide anger with the National Park Service. The Park Service responded with efforts to define on a map where residents of different villages could subsistence hunt. The map resulted in more public outcry. The Subsistence Resource Commission, composed of subsistence users of the park, requested that the mapping attempt be delayed for 18 months. In the meantime, the commission planned to examine the legality of limiting communities to separate subsistence areas and to collect research on where subsistence traditionally occurred in the park. The Park Service honored their request.

How is it that a simple act of subsistence — trapping a wolverine — which five years ago would have gone unnoticed, became the subject of legal repercussions, political controversy and strained relations between neighbors and fellow Alaskans?

Subsistence — living off the

land — has provided Alaskans an economic base for centuries. Eskimos, Indians and Aleuts lived entirely by subsistence until Russian and English traders arrived. Trappers, gold miners and homesteaders eked out an existence by relying on trapping, hunting, fishing, berry picking and log cutting for firewood and buildings. Even missionaries, schoolteachers and town merchants subsisted to survive in a land of high prices and uncertain shipments.

The growth of city life, more reliable transportation systems and greater employment opportunities in Alaska resulted in less need by many Alaskans to rely on subsistence, and the differences between subsistence, sport and commercial resource harvest blurred.

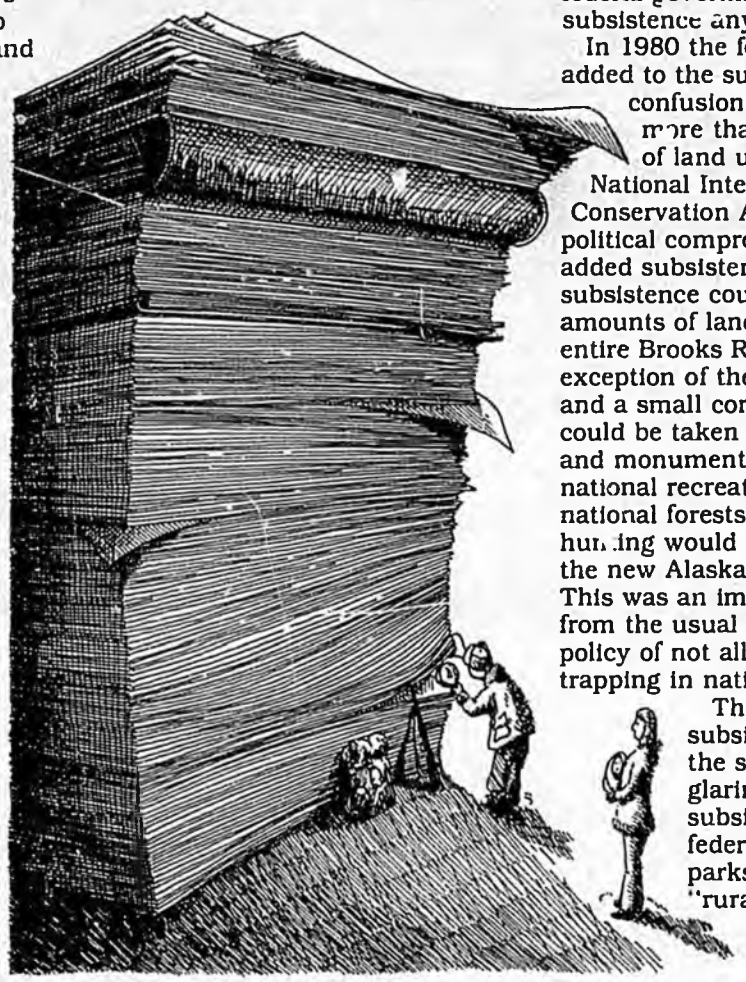
I came to Alaska in 1973, planning to "live off the land." After renting a small cabin, planting a garden and preparing to hunt and fish, I was told by my neighbors that I had to live here a year and earn below a certain income level to be eligible for a subsistence license.

Later, I learned what my neighbors were calling a "subsistence" license was actually a low-income sport hunting and fishing license. The only difference between the low-income version and the regular sport license was the price: 25¢ as opposed to $15. I had to live in the state for a year to qualify for resident sport hunting and fishing license or pay larger nonresident fees and hunt with a guide for sheep, grizzly and polar bears.

Fortunately, a neighbor took a liking to me and kept me supplied with salmon and moose. He also introduced me to the ways and reasons why rural Alaskans sometimes skirted the fish-and-game laws. People supported families, maintained traditions and supplemented retirement incomes with local resources when the supply boat or plane didn't arrive, when the supermarket's shipment stayed on the dock in Seattle, and when commercial fishing and logging turned sour.

The Alaska Native Land Claims Settlement Act in 1971 and the construction of the trans-Alaska oil pipeline in the mid-1970s brought money and jobs to the state. More people could buy snow machines, boats and rifles for subsistence, but had less time for it. This further blurred the distinctions between subsistence, sport and commercial economies.

If a commercial fisherman in Kotzebue spent the winter trapping, was he subsistence trapping, commercial trapping or recreational trapping? If he had a brother working for a local corporation, earning the same income that year and trapping only on weekends, was the brother's trapping subsistence, recreational or commercial?



In 1978 the state of Alaska decided to define subsistence to clarify some of the confusion and conflict and to prevent the federal government from doing it instead. Subsistence was defined by the legislature as 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 non-edible byproducts of fish and wildlife resources taken for personal family consumption and for the customary trade, barter or sharing for personal or family consumption."

So much for clarification. The federal government decided to define subsistence anyway.

In 1980 the federal government added to the subsistence confusion when it withdrew more than 100 million acres of land under the Alaska National Interest Lands Conservation Act (ANILCA). As a political compromise, Congress added subsistence to the act. If subsistence could continue, large amounts of land (such as almost the entire Brooks Range, with the exception of the pipeline corridor and a small corridor near Kotzebue) could be taken for national parks and monuments, wildlife refuges, national recreation areas and national forests. Subsistence hunting would be allowed in most of the new Alaskan national parks. This was an important departure from the usual National Park Service policy of not allowing hunting and trapping in national parks.

The federal act defined subsistence similarly to the state's law with one glaring exception: subsistence on such federal areas as national parks was limited to "rural" Alaskan residents. The federal government went even further and identified which Alaskan communities and areas were rural when making National Park Service regulations for Alaska.

The regulations defined rural communities as "significant concentrations" of people outside of Ketchikan, Juneau, Anchorage and Fairbanks, who had "customarily and traditionally engaged in subsistence within the park area." The rural communities and areas eligible for subsistence in national parks became known as "rural resident zones."

Now, the commercial fisherman living in Kotzebue may be subsistence trapping, but if he and

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The Glacier City recorder's home and office as it looked in 1919.
(Stephen Foster Collection; Archives, University of Alaska, Fairbanks)

Flying into the Past

By Ron Dalby, staff

I banked the helicopter into slow, tight circles above the confluence of the Glacier River and Bearpaw Creek. From inside the ship, six pairs of eyes peered vainly into the dense foliage 100 feet below. According to an old map, a fair-sized town once stood at the junction of the two streams. However, the brush and trees had grown so thick that nothing was visible. Finally, on the third time around, the intercom crackled with a voice from the back seat. One of the passengers had seen something through the trees. We decided to land.

The only landing site was a small gravel bar where the two rivers came together. Slowly I steered the ship through the twisting gap between the trees on either side of the narrow Glacier River. Just as we touched down, the two of us in the front seats glimpsed the remains of an old building about a hundred yards from the helicopter. When the rotor finally stopped, we all jumped out to explore. Within minutes we stumbled into a ghost town, a relic from Alaska's past.

My passengers in the helicopter were National Park Service personnel. Not the usual Park Rangers that everybody deals with, but historians, archaeologists and anthropologists who delve into the past. We were exploring the recent addition to then-Mount McKinley National Park. (The park has since been renamed Denali.) The land we were searching, along with millions of acres throughout Alaska, had recently been added to the national park system in the controversial Alaska National Interest Lands Conservation Act, or d-2 lands bill as it is known locally. This was early fall 1980 and the Park Service was interested in finding out what specifically was hidden in the new regions under its control.

Kantishna, in the western part of the park, has a long mining history dating back to the turn of the century. Gold is still actively mined at Kantishna, historically only one of

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his brother moved to Anchorage, they would be unable to continue because they would no longer be in a rural community. People living in Wiseman, a haul road community that bordered on the newly formed Gates of the Arctic National Park, could subsistence hunt, trap and fish in the park, but the people of Coldfoot, a community 15 miles south of Wiseman that also bordered on the park, could not. Coldfoot was not designated a rural resident zone community in the regulations.

If a person from Wiseman moved to Coldfoot, he lost his subsistence hunting rights in the park unless he could prove he had a tradition of hunting in the area of the park before 1980. Yet, if a Coldfoot person moved to Wiseman, he could hunt in the park without ever having hunted anywhere before.

The state was also required to have a subsistence law that complied with the federal law to exercise fish and game management authority on the federal lands. So, in 1981 the state defined rural as anywhere outside an organized municipality or not connected to the road system. However, the next year that was rescinded, based on fears that the phrase would be taken to court and ruled discriminatory. The joint Boards of Fish and Game revised the law so it continued to apply to rural residents, to be in compliance with the federal law.

On February 22, 1985, in a case involving subsistence fishing in Cook Inlet, the Supreme Court of the State of Alaska ruled subsistence uses cannot be limited to only rural subsistence users, and that subsistence uses cannot be limited unless all other uses have been eliminated. It now appears that, because of this ruling, all state residents who can show a history of "customary and traditional use" may be eligible for subsistence. The ruling also raised the question of how the state's compliance with the federal side of the equation may be affected.

Subsistence became further complicated because both the state and the federal governments based their subsistence laws on the phrase "customary and traditional" without defining it. As a result, each federal land manager, such as a national park superintendent, can define "customary and traditional." His interpretation determines who is allowed to subsist in that particular park, unless his opinion is overturned on appeal. Rigid and often misunderstood interpretations of "traditional" have led to accusations that subsistence regulations are racially biased.

Both the federal and state subsistence laws provide for subsistence priority regardless of race. Congress created its subsistence law "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents."

However, in some areas of the state, non-Natives have traditionally formed a very small minority of the subsistence population. Some National Park Service personnel do not consider them to constitute a large enough group to be considered "traditional," but rather an exception to the tradition. Therefore, non-Natives are sometimes disqualified from subsistence activities in which their neighbors, who are part of the dominant Native

Southcentral, Interior, Arctic and Western. Information given for each museum includes hours, admission fees, special activities and collections, and a description of the museum and its facilities. Members of Museums Alaska, Inc., receive "Guide to Museums in Alaska" as one of their membership benefits. For information on joining the association, write to Betsey Pitzman, Treasurer, Museums Alaska, Inc., 3779 Bartlett Street, Homer, Alaska 99603.

ONCE UPON THE KENAI. Stories from the People. 468 pages, more than 450 black and white photos. Hardbound, 8½ by 11 inches. Compiled and published by the Kenai Historical Society, Box 1348, Kenai, Alaska 99611. $30 includes postage and handling.

Most of the pages of this contemporary history book are filled with personal accounts of life on the Kenai Peninsula (North Kenai to Ninilchik, and Sterling to Cook Inlet)

prior to 1963. The story-tellers, about 250 in all, are grouped alphabetically in Section I — "Stories from the People." Section II contains "Place Histories" dealing with such topics as churches, schools, clubs, fish traps and banks. Andrew Berg's 1921-1935 diary is one of three diaries and documents featured in Section III, which also includes a 1934 survey of Kenai fishermen. A surname index is provided at the end of the book.□

subsistence will eventually die out in the parks? Will this be the result of the federal law set up for the "continuation of the subsistence life?"

The whole thrust of the subsistence title of ANILCA is:

> "The Congress finds and declares that -- the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic traditional, and social existence."

More confusion was added to the subsistence issue when the federal government agreed that the state would manage fish, game and subsistence on federal lands, but that it would take over that management if it were not satisfied with the state's management. A Memorandum of Understanding between the Alaska Department of Fish and Game and the National Park Service was written stating that Alaska is "the primary agency responsible for management of subsistence uses of fish and wildlife on state and park service lands, pursuant to applicable state and federal laws." In 1982, the Secretary of the Interior issued a letter stating that the state subsistence law complied with the federal law. However, that compliance was based on the state's honoring the federal law's limiting of subsistence to rural residents. The recent state supreme court ruling prevented the state from giving rural subsistence fishing preference in Cook Inlet.

The federal parks are required by law to manage wildlife for "natural and healthy populations" while the state is required by its constitution to manage wildlife for "sustained yield." Opinions vary on whether these two phrases are compatible.

"Natural and healthy" prohibits habitat manipulation, such as planting or burning, and control of predators, such as wolves. Depending upon who is interpreting the phrase, natural and healthy may or may not allow for sport, personal and subsistence hunting, fishing and trapping. Hunting and trapping for sport, personal and subsistence use has traditionally not been allowed in national parks. Sustained yield allows all of the above.

Some people see "natural and healthy" and "sustained yield" as being in conflict. That is true only if one sees hunting and trapping as

group, can participate in the rural zone.

For example, non-Native trapping methods are not considered traditional in the western Gates of the Arctic, but Eskimo trapping methods are. Only a minority of non-Natives have traditionally inhabited the western region of the Gates of the Arctic, and only a small segment of that minority trapped there. One non-Native trapper was denied permission by the Park Service to build a line cabin on his trapline there, but told he could put up a tent. According to the Park Service interpretation, non-Natives build individual base cabins and then construct smaller shelter cabins along their trail, but Eskimos trap in and out of villages with tents. Also, non-Natives "own" traplines. Eskimos consider any trapping area free taking for anyone who gets there first.

This contrasts with the Denali National Park. There, the minutes of the Subsistence Resource Commission show that "it is generally known that you do not use someone else's trapline." The Denali Commission is attempting to assure that such trapping can continue to be passed on as it has been traditionally, even to newcomers.

The boundaries of a rural community or area are also controversial. The regulations state only "the following communities and areas are included . . ." The size of a community or area is left to interpretation.

One park, such as Gates of the Arctic, may define a community by its legal boundaries; another may define a community as including all or portions of the area surrounding the community. For example, the Denali commission is attempting to define Lake Minchumina as all the area within two miles of the lake.

One couple living between Gates of the Arctic and the rural community of Wiseman was not allowed to subsistence trap within the park, even though they had been trapping in the park the two previous years, because they were not living in Wiseman. In Wiseman, they would have automatically been eligible to do so. They resolved the problem by moving to Wiseman, eight miles farther away from the park than they already were. The irony is that if they had stayed where they were, they would not have been able to use their traplines, but someone from the Lower 48 could have moved into Wiseman and used them. Similar situations exist in other areas of the state.

Who, then, can subsistence hunt in a national park? According to the National Park Service regulations, which are subject to the interpretation of each superintendent and/or park staff, only those people living in the park or in a rural community or area of the park, or those people who have obtained a special use permit, can hunt in a national park. People must show they have traditionally used the park for subsistence to obtain a special use permit. Sound intricate? The intricacies promise to grow worse.

The federal subsistence law is "to provide the opportunity for rural residents *engaged in a subsistence way of life to continue to do so.*" Does this mean that only those residents subsisting prior to the law have the right to continue? Or does this mean that any rural resident who becomes engaged at any time in a subsistence way of life is guaranteed the right to the continuation? Will the result of conflicting and restricting interpretations of the subsistence regulations and law be that

unnatural acts. In the Gates of the Arctic, subsistence hunting has been practiced for thousands of years. The animal populations have evolved with hunting. To limit hunting would be an unnatural occurrence in those animal populations. Subsistence is even considered a natural part of the ecosystem by the congressional history on subsistence.

Nevertheless, conflicting interpretations of these two phrases have resulted in such problems as the lack of agreement between the state and federal governments on a working definition for "natural and healthy," as applied to hunting and trapping bag limits and seasons for federal lands.

As a result, if the moose population is low, wolf control can be used on state land but not on park land. Yet the people who subsist in the park also depend on a healthy moose population. And the moose and wolves blithely cross the boundaries between state and federal lands, regardless of their management.

Alaskans are left with a plethora of subsistence interpretations with the potential to pit neighbor against neighbor.

Until the governmental agencies involved, or the courts, ultimately decide such issues, Alaskans are left with a plethora of subsistence interpretations with the potential to pit urban populations against rural, non-Natives against Natives, and neighbor against neighbor.

In the meantime, how does a person, who wants to subsist, avoid the "who is eligible to subsist and where" quagmire in which Larry Fitzwater found himself?

The best answer is to check with the Alaska Department of Fish and Game or the federal agency administering the land upon which one wishes to subsist. Subsistence can be likened to surgery — a second opinion can't hurt. If not satisfied, still puzzled or faced with a legal action (like Fitzwater), get help through the various agency and legal channels.

People having subsistence-use problems with the federal land agencies, such as National Park Service, can appeal through the hierarchy of the federal land-managing agency. Several national parks have Subsistence Resource Commissions that will try to solve subsistence problems involving their particular work. Alaskans also have a unique agency, the Citizens' Advisory Commission on Federal Areas, which was designed by the state legislature as an ombudsman for Alaskan citizens or organizations having problems with federal land agencies. These commissions will mediate and advise on subsistence problems involving federal lands.

On problems on state land that are not being satisfactorily resolved by a state agency, the state Ombudsman's Office can be approached. The Boards of Fisheries and Game will listen to problems involving subsistence fishing, hunting and trapping. The Bureau of Indian Affairs will assist Natives with subsistence problems. Alaska Legal Services will aid people with low incomes with subsistence legal actions and questions. This list of agencies and legal channels is by no means complete.

Appeals and legal solutions are slow and complex processes. The earlier a question or potential conflict is checked out, the more likely the results will be pleasant. Too often, a problem reaches an agency too late: the appeal deadline has passed, the trial has already been held, or the paperwork was signed without a reading or understanding of the consequences contained in the fine print.

At a time of increasing competition for resources, Congress and the state legislature went to great lengths to protect continued subsistence opportunities. But Alaskans will have to work to ensure that those opportunities are not lost in the mass of rules and procedures spawned by the laws.□

When she's not busy pounding out stories for ALASKA® magazine, Leslie Barber works for the Citizens' Advisory Commission on Federal Areas.

SEIZED BY THE RUSSIANS
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layer of grease. We were thankful just to be alive.

When the others wouldn't eat, a soldier came in and took me by the shoulder and led me into their room so they could see that I was still alive. Then he yanked me back into the room with Charley.

On the sixth day of our captivity at 9:15 p.m., when the officers and interpreter were gone, a soldier came into the room and motioned me to follow him, pointing to me and holding his hand to his ear to indicate a telephone call.

Startled, I followed him to a room where there was an ancient telephone that looked to be about one model later than the hand-cranked style. I picked it up and heard, faintly, words in Russian.

"Hello, hello," I said, speaking and alternately listening for about a minute. Then I heard someone speaking English. It turned out to be Susan Arnold, calling from the U.S. Embassy in Moscow! People knew where we were. It was a tremendous relief.

Later the next morning, we received a telephone call from Alaska's Sen. Ted Stevens, calling from Washington, D.C. The connection (or the telephone equipment) was poor, but I understood that Senator Stevens wanted to know if any of us were hurt and what we were charged with. He told me that he had the State Department in Moscow working for our release.

"Korean jet 707 tried to escape," he answered, "Boom! Five Americans. No problem."

"If you are being held on a technical violation, they should release you soon," he told me.

I told him that the Russians had tried to get me to sign many papers that said we had intentionally violated the Soviet boundary.

"Don't admit to anything you didn't do," he warned.

"We aren't going to sign anything," I told him.

"Is there anything you want me to tell your parents?"

"Everybody's fine."

I was taken back to my room, and minutes later the interpreter and an officer arrived. The telephone call had been a miracle. How they even found the number was incredible, let alone the timing. It was obvious the officers knew nothing about it. I think the guard who led me to the phone got into trouble over it, for we never saw him again after it was learned that I received a call.

The call came at a good time, for we were feeling low, having gone days without more than a few catnaps and without proper food. The stress was building, and we were wondering if we were going to get out. But now that our government knew we were here, we were encouraged.

After I had been questioned again, with the same questions over and over, the officer and the interpreter left. Later, when the officer learned about the phone calls, he was so angry he screamed. It didn't help his humor any when Charley and I refused to talk, answer or do

N A R R A T I V E

Objective: To redefine "subsistence user" in the most narrow and precise manner possible as a means of determining those individuals eligible for qualification as a "subsistence user" under a rewritten Alaska State statute.

Background: Since 1981, the State of Alaska has defined a subsistence user in a sufficiently broad manner so as to allow the largest possible number of individuals in Alaska (except residents in the urban centers, i.e., Anchorage, Fairbanks, Juneau, etc., which are excluded by Congressional action) to qualify for the subsistence privilege set forth in Title VIII of ANILCA. Recent legal decisions in the Alaska Supreme Court have resulted in the striking of certain provisions of the state's subsistence program. Thus, the state's subsistence program is in disarray and under threat of take-over by the federal government.

At least part of the "problem" with the state's subsistence program lies in the Boards of Fish and Game having attempted to define those who might qualify as a "subsistence user" sufficiently broad so as to allow the maximum number of Alaska residents to benefit from the subsistence privilege. The Boards knowingly chose this course and direction. The Boards of Fish and Game apparently were persuaded that the best interest of the largest number of Alaskans lie in maximizing the number of Alaskans who could qualify for the subsistence privilege. Time

has demonstrated that this decision may not, in fact, have been in the best public interest.

Some argued, at the time the Boards of Fish and Game instituted the state-managed subsistence program, that the public interest would be better served if the definition of subsistence user was constructed along the most narrow parameters possible. That is, define subsistence user such that only those individuals, resident in Alaska who:

1) actually rely upon taking of wild fish and game and other natural resources for sustenance*; and

2) who demonstrated a customary and traditional reliance on subsistence taking for such sustenance, would fall within the definition of subsistence user.

One advantage of this more narrow approach would be to reduce the number of individuals affected by the subsistence program during the course of its normal operation. Large numbers of people would only be affected in the event it becomes necessary to restrict taking of any particular species within a particular

* Sustenance: "means of sustaining life; nourishment, means of livelihood." American College Dictionary of the English Language, Random House, NY, NY.

region of the state because of declining fish or wildlife population levels. Restrictions on taking are infrequent events, unlikely to occur under sustained yield management practices. Thus the state would be able to go about its business of managing resident fish and game on state lands without having to provide the subsistence opportunity to the hundreds of thousands it now has to appease under the broadly defined program presently in place. Stated another way, a narrower definition would continue to provide the priority to those who truly need it and were entitled to it when they needed it the most, that is when fish and wildlife population levels forced invoking the priority system.

This approach is, of course, diametrically opposite of that taken by the State of Alaska in its program established in 1981 and in the program established following the recent Supreme Court decision.

Issue: When considering such a narrowing of the definition of subsistence user the question that immediately arises is, "What criteria will be used to make the determination that an individual actually depends upon subsistence taking for subsistence?"

It is fairly well agreed that the State Department of Fish and Game (along with other agencies of both state and federal government in Alaska) can accurately determine which communities and groups of residents within the state have customarily and traditionally relied on taking of wild natural resources as a means of

sustenance. The issue, then, lies in determining who must rely on subsistence resources in order to survive in an absolute sense, i.e., "sustenance".

Since a strictly "needs based" system for determining eligibility is generally agreed to be outside the bounds of the present federal statute, other factors must be considered.

This paper addresses only the issue of criteria that might be used to ascertain who actually relies on subsistence taking of wild resources for sustenance.

There are, in fact, numerous criteria and numerous potential sources of data and information one could use to ascertain who actually relies upon subsistence for sustenance in Alaska. Alaska state government agencies such as the Alaska Departments of Fish and Game; Commerce and Economic Development; Labor; Community and Regional Affairs; and others have, over the past several years, compiled statistical information which could be factored into a formula for defining eligibility. Additionally, federal agencies such as the Bureau of the Census and the several federal land managing agencies (National Park Service, Bureau of Land Management, Fish and Wildlife Service, and Bureau of Indian Affairs) all have data and information bases that could input to the determination. A group of individuals, familiar with the kinds and sources of information and data being considered and who where given precise parameters within which to function could easily develop criteria of the type outlined below, and, using

that material, construct proper components of a qualification system.

The first action that must occur, however, is for those who are framing this program and those who will manage it, to depart from the prevailing mind set that entire communities and groups of people must be allowed to qualify. Instead, it must be accepted that guidelines for the subsistence privilege will be based upon individuals meeting whatever criteria are established. For example, individuals living in Bethel, not the entire population of Bethel, will qualify. The same will be true for all geographic locations in Alaska except those which Congress precluded from the privilege. Once a person qualifies for the subsistence privilege, he would be granted a "subsistence license." The system contemplated here would obviously require establishment of a whole new bureaucracy (or at least a "beefed-up" bureaucracy over that currently in place) within state government to administer the subsistence program. It should be pointed out though, that the State of Alaska currently receives some $1.0 million annually from the federal government to help defray the costs of the subsistence program. One important component of the system would probably have to include some sort of an appeals mechanism to rule on cases where a potential subsistence user is denied the privilege by the state bureaucracy. There seems to be no way to avoid this bureaucratic system, when the alternative is considered.

The following considerations (among others) should be evaluated:

1. Community population size. A policy decision could be made by the Legislature that the population size of the community or place in which a person resides will be a major factor in determing ones eligibility for subsistence. The premise for this determination lies in the presumption that once a village or community reaches a certain population level, say 500 persons (it could be 350 or 675-whatever the Legislature determined), the local infrastructure of community services, transportation, and communication and the existing internal systems for procuring non-subsistence foods, etc., will have reached a level of development where it is unlikely that the vast majority of residents in that community will, of necessity, rely upon subsistence taking for sustenance. Obviously, exceptions to the "rule" will occur and for them the state will have to provide. But, since this program is based upon individuals, not entire communities of people, this should not be allowed to be a bar to the program being effective.

2. What kind of commercial enterprises are available in the immediate vicinity? Does the community have a general merchandise or food store? What are the sources of heating fuels, goods, and personal services? Is the volume of retail trade in that store such that the residents of the area rely upon the store for purchase of the majority of their foodstuffs and other essential necessities, and thus taking the wild resources is really supplementing the food supply as contrasted with it being the principal source? What is the proximity of the community to these sources?

3. Level of receipt of government aid programs. Are large numbers of residents of the community recipients of "welfare" or other government subsidy? Do the data associated with this factor demonstrate, either independently or in conjunction with other data, that subsistence is the means of sustenance in the community? Care must be taken in applying these data and drawing conclusions from their application. The data in this case could mean entirely different things to different people.

4. Employment data and income levels. Are levels of employment and income in the community sufficiently high to indicate that the community exists on a "cash economy" as contrasted with a so called "subsistence economy?" Is the applying subsistence user above or below the established "poverty level" of income?

5. Availability of employment opportunities. Is there any indication that employment is available within the community? What is the geographic proximity of employment opportunities to the community in which the applicant resides?

6. Are there any evidences of "importation" of income to the community from sources outside the community; i.e., family members working on the North Slope and bringing income into the economy of the community?

7. ADF&G harvest record data could supply indications of the level of taking of fish and wildlife resources by local people as subsistence. This would provide an indication of the extent to which any individual should quality for the subsistence privilege.

Conclusion: Clearly, there are numerous other criteria that could be factored into this determination. The above list does not approach completeness. These are cited merely as ideas to foster thinking as to how one would approach narrowing the number of individuals eligible for the subsistence qualification.

And, it is clear that some subjective decisions will, of necessity, have to be made in not only arriving at those criteria to be written into either law or regulation, but as well by the bureaucracy in administering whatever program it is the Legislature finally imposes. Those who will be critical of the premise that the category of users should be narrowed in number and those who will be critical of the application of some subjective criteria and judgement-making should be reminded that the task of the elected Legislature is to make those very kinds of decisions through the political process under which our government works. It is within the prerogative of the Legislature to make the laws and the rules--and thus the policy decisions associated therewith--so long as those decisions withstand the test of constitutionality and public opinion.

I. DOMESTIC FISHERIES, REGULATION, AND THE COMMERCE CLAUSE

A. Ownership of Animals *Ferae Naturae*

The roots of western man's inharmony with his environment and his attitudes toward exploitation of natural resources were already evident in the Old Testament.[1] Whatever their origin there is deep-seated tradition in our law that every man, as an individual, has an equal right to pursue and take to his own use all such animals as are *ferae naturae*, i.e., of a wild nature, the property of no one, but liable to be seized by the first occupant. Traditionally, also, the sovereign has asserted ownership of migratory species, under a variety of theories. In Roman law, animals *ferae naturae* were considered to belong in common to all the citizens of the state. Speaking to English common law, Blackstone asserted that such animals were prerogative property vested in the King alone. The original 13 colonies succeeded to the rights of the Crown, from which has developed in American law theories regarding the ownership of wild game and fish. The rule of law which American courts have consistently recognized is that animals *ferae naturae* are owned by the States, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. The property right is a *common ownership . . . to be exercised . . . as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.*[2]

But the "ownership" is not unqualified. It is the law that whoever claims title to animal *ferae naturae* must first reduce them to possession.[3] Where statutes speak of title to game and fish as being in the State, they speak to the State's police power to regulate the taking and use of wild game and fish, do not affect a landowner's interest in land,[4] and have generally involved the relationship between a State and an individual, not between a State and the Federal Government.[5] The ownership theory is not without modification. "To put the claim of the State upon title is to lean upon a slender reed," said Mr. Justice Holmes, because wild animals are in the possession of no one and "possession is the beginning of ownership."[6] The ownership theory has been characterized as "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[7]

B. State Authority To Regulate Fish and Wildlife

Most of the Federal case law to date has dealt with the authority of the States to regulate the exploitation of wildlife by individuals, and has consistently held that as between the State and the individual the State can control and regulate the common property in game and fish within the jurisdiction of the State. In *McCready* v. *Virginia*, 94 U.S. 395 (1876), at issue was the power of the State of Virginia to prohibit citizens of other States from planting oysters within the internal or tide

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[1] White, Lynn Jr., "The Historical Roots of Our Ecologic Crisis," 155 *Science* 1203, March 10, 1967; Baer, Richard A. Jr., "Land Misuse: A Theological Concern," *The Christian Century*, Oct. 12, 1966.

[2] *Geer* v. *Connecticut*, 161 U.S. 519, 529 (1896); *Martin* v. *Waddell*, 16 Pet. 367; *McCready* v. *Virginia*, 94 U.S. 391; *Smith* v. *Maryland*, 18 How. 71; *Manchester* v. *Massachusetts*, 139 U.S. 240; *Lawton* v *Steele*, 152 U.S.133; *Ward* v. *Race Horse*, 163 U.S. 504; *Patsone* v. *Pennsylvania*, 232 U.S. 138; *United States* v. *McCullagh*, 221 Fed. 288; *United States* v. *Shauver*, 214 Fed. 154; *Silz* v. *Hesterberg*, 211 U.S. 31; *Kennedy* v. *Becker*, 241 U.S. 556. See also *Commonwealth* v. *Agway, Inc.*, 210 Pa. Superior Ct. 150 (1967).

[3] *Pierson* v. *Post*, 3 Caines 175 (N.Y., 1805). See also *Koop* v. *United States*, 296 F.2d 53 (C.C.A. 8, 1961).

[4] See *McKee* v. *Gratz*, 260 U.S. 127, 135 (1922).

[5] *Geer* v. *Connecticut*, *supra*; *Ward* v. *Race Horse*, *supra*; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928).

[6] *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920).

[7] *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

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[discussing Geer v. Connecticut*] . . . it is there held the power of the state over game within its territorial limits is not terminated by the act of the individual in reducing it to his exclusive and lawful possession, but, on the contrary, the power of the state follows the game into the hands of the lawful exclusive possessor, and in the assertion of its title held therein in trust for all the people of the state it may so control its use and disposition as to absolutely forbid and prohibit its coming under the protection and control of the commerce clause of the national Constitution. And the reason for the rule is apparent. If the state, either by its laws, or in the absence of prohibitive laws, once permits game to come under the authority of the commerce clause of the national Constitution, then all state control or authority thereover of necessity must cease to exist, and its trust title for the common good of all the people of the state be cut off and destroyed . . .*

Speaking after enactment of the Migratory Bird Treaty Act and before *Missouri* v. *Holland*, the District Court for the Western District of Missouri said:

Primarily the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals ferae naturae *to possession. [Citations omitted] And in the absence of treaty there appears to have been no delegation of paramount authority to the federal government. Under the foregoing authorities, therefore, as well as on principle, this act, in the absence of treaty, would be unconstitutional, as exceeding the legitimate powers of Congress, and so it has been held in cases substantially identical. United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 288. That this power in the state is subject to any valid exercise of authority under the provisions of the federal Constitution is clear; and that a valid exercise of the treaty making power may be recognized as such a valid exercise of authority has been foreshadowed by necessary implication or by express reservation in the decisions of the Supreme Court of the United States. [Citations omitted.]*

Eight years after *Missouri* v. *Holland*, the Supreme Court held that the commerce clause *could* reach shell fish shipped and sold in interstate commerce. In *Foster-Fountain Packing Co.* v. *Louisiana*, 278 U.S. 1 (1928), Foster-Fountain challenged the Louisiana Shrimp Act, which asserted the State's ownership of shrimp within its waters and provided that shrimp caught in its waters must be headed and hulled before being shipped out of the State. Distinguishing this case from *Geer* v. *Connecticut* because the Shrimp Act expressly authorized shrimp meat and bran to be shipped and sold in interstate commerce, the Court said, 278 U.S. at 12:

Consistently with the Act all may be, and in fact clearly all is, caught for transportation and sale in interstate commerce. As to such shrimp the protection of the commerce clause attaches at the time of the taking . . . But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. *Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the State is deemed to own or control the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. [Emphasis added.]*

The paramount authority of the commerce clause was challenged again in 1948 when citizens of Georgia sued to enjoin South Carolina State officials from enforcing statutes of that State regulating commercial shrimp fishing in the three-mile maritime belt off the coast.[14] One of the statutes challenged

[14] *Toomer* v. *Witsell*, 334 U.S. 335 (1948).

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waters of that State, which power was upheld by the Court. *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891), is cited as authority for the State of Massachusetts to control and regulate the catching of fish by individuals within the bays of that State. The authority of the State to control and regulate its own citizens in their exploitation of resources beyond the territorial sea, in the absence of Federal legislation, was confirmed in *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), as was the authority of the State to control and regulate such exploitation by both citizens and noncitizens of the State while in the territorial sea boundaries of the State (*Toomer* v. *Witsell, supra*). For the effective enforcement of hunting and fishing restrictions, the State may forbid the possession within its borders of certain gear, such as nets, traps, and seines *(Miller* v. *McLaughlin*, 281 U.S. 261, 264 (1930)). The State may also forbid the transportation outside the State of game killed therein *(Geer* v. *Connecticut, supra)*, and to make illegal the possession, during the closed season, of game imported from abroad *(Silz* v. *Hesterberg*, 211 U.S. 31 (1908)).

C. Treaties and Regulation

"No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [migratory] birds, but it does not follow that its authority is exclusive of paramount powers."[8] It is well settled in American law that as between a State and the Federal Government, laws passed pursuant to the valid exercise of the treaty-making power of the Federal Government[9] are the supreme law of the land. This was expressly confirmed in the landmark case of *Missouri* v. *Holland*, which held that the Migratory Bird Treaty[10] and the Migratory Bird Treaty Act[11] passed pursuant thereto were supreme law of the land, supervening State laws and creating rights superior to those of the States or their citizens.

D. Commerce Clause and Regulation

However, before the enactment of the Migratory Bird Treaty, there was doubt and uncertainty as to the power of the Congress to deal with the hunting and killing of game birds. In 1913, the Congress passed a law deeming migratory birds to be "within the custody and protection of the government of the United States," and asserted the authority of the Department of Agriculture to adopt suitable regulations to prescribe closed seasons and to prohibit the killing of migratory birds.[12] This Act was first contested in *United States* v. *Shauver*, 214 Fed. 154 (D.C.E.D. Ark., 1914). On initial hearing, counsel for the Government did not contend that power to enact the legislation was under the commerce clause, but under the power to make regulations respecting the property of the United States.[13] Citing numerous cases to the effect that "animals *ferae naturae* . . . are owned by the States, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common," the court stated that it was "unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state," and declared the Act unconstitutional. On rehearing, the court dismissed the case after counsel for the Government contended that the Act was authorized by the commerce clause.

To similar effect was *United States* v. *McCullagh*, 221 Fed. 288 (D.C. Kan., 1915), decided nine months after the *Shauver* case, and testing the same Act. Holding the Act unconstitutional, the court stated, 221 Fed. at 292:

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[8] Mr. Justice Holmes in *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920).

[9] U.S. Const., art. I, §8, cl. 3.

[10] 39 Stat. 1702 (Dec. 8, 1916)

[11] Act of July 3, 1918, 40 Stat. 755, as amended, 49 Stat. 1556 (June 20, 1936), 16 U.S.C. 703-711.

[12] Act of March 4, 1913, 37 Stat. 828.

[13] Art. 4, §3, cl. 2, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . "

required all boats licensed to trawl for shrimp in the State's waters to dock at a South Carolina port, unload, pack, and stamp their catch before shipping or transporting it to another State. The Court declared this statute unconstitutional. Concurring with the Court's decision, Mr. Justice Frankfurter said, 334 U.S. at 409:

. . . When a State regulates the sending of products across State lines we have commerce among the States as to which State intervention is subordinate to the Commerce Clause. That is the nub of the decision in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1. South Carolina has attempted such regulation of commerce in shrimp among the States. In doing so she has exceeded the restriction of the Commerce Clause.

The line to be drawn between the legitimate exercise of the State's police power to regulate the taking and use of animals *ferae naturae*, and the paramount powers of the United States under the commerce clause is not clear. However, the Supreme Court has enunciated certain general principles regarding the States' police power.[15] In each case involving the commerce clause, the courts must balance the adverse effect on interstate commerce imposed by a State law against the local benefits which the law was designed to achieve. In holding that a Maryland law prohibiting the use of purse nets in the tidal waters of the State had a rational basis and that the interference with interstate commerce was "merely incidental," the District Court in *Corsa* v. *Tawes*[16] said:

. . . in the absence of conflicting Congressional legislation under the commerce clause regulation of the coastal fishery is within the police power of the individual states . . . Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit . . [citing the Submerged Lands Act of 1953].

Doubtless catching menhaden and processing them into useful products is a legitimate occupation and in commerce the interstate aspects of which cannot be interfered with arbitrarily. But the same Constitution which puts interstate commerce under the protection of Congress recognizes the sovereignty of the states in local regulation for the protection of their natural resources. If the adverse effect on interstate commerce is only incidental and indirect and is outweighed by the local benefits which the statute is designed to achieve, the commerce clause will not render the enactment invalid. . .

E. Submerged Lands Act

To fill out a consideration of the Federal-State powers to regulate fisheries, attention must be given to the Submerged Lands Act of 1953,[17] which provides in part:

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . .[18]

The Act defines "natural resources" to include minerals and "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . . "[19] Finally, the Act provides:

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[15] See, for instance, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

[16] 149 F. Supp. 771, 773, 776 (D. Md., 1957), *affirmed*, 355 U.S. 37 (1957).

[17] Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. 1301-1315.

[18] 67 Stat. 31, 43 U.S.C. 1311(a).

[19] 67 Stat. 29, 43 U.S.C. 1301(e).

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States . . . [20]

We have been unable to find any case law or administrative interpretations of the section quoted immediately above, but would like to make two observations about the section. The effect of *United States* v. *California* was to invest the United States with a proprietary interest, to which Mr. Justice Frankfurter alluded in his dissent.[21] This seems to have been confirmed in *United States* v. *Louisiana*,[22] where the Court stated:

Since the Act concededly did not impair the validity of the California, Louisiana, *and* Texas *cases, which are admittedly applicable to all coastal States, this case draws in question only the geographic extent to which the statute ceded to the States the federal rights established by those decisions. . .*

While the ownership of certain lands within state boundaries has been held to be an inseparable attribute of the political sovereignty guaranteed equally to all States, . . . the geographic extent of those boundaries, and thus of the lands owned, clearly has nothing to do with political equality. A fortiori *this is true in the case of maritime boundaries beyond low-water mark, since,* except as granted by Congress, the States do not own the lands beneath the marginal seas. *[Emphasis added.]*

Regulatory authority over natural resources in the navigable waters within the seaward boundaries of the States has not been completely relinquished by the Congress, and could be asserted if necessary to do so in the best interest of rehabilitation of the U.S. fisheries. The "proprietary rights of ownership" and "title" to natural resources granted by the Submerged Lands Act, as they pertain to migratory species of fish, are subject to the limitations previously discussed regarding title to animals *ferae naturae*, which may be part of the meaning of the phrase "if any it has" in 43 U.S.C. 1311 (b), where Congress relinquished "all right, title, and interest of the United States, if any it has, in and to all said. . . natural resources."[23] This also includes relinquishment of the public trust in which the State holds "title" to animals *ferae naturae* once a State permits the shipping and sale of such resources in interstate commerce.[24] Patently, the Congress has not relinquished the power to regulate interstate commerce in recognizing, confirming, establishing, and vesting proprietary rights of ownership and rights of management over such natural resources in the States. Congress could assert regulatory powers pursuant to the Commerce Clause if it found that the failure of the States to manage the marine fisheries imposed an undue burden upon interstate commerce.

F. Conclusions and Summary

Summing up the discussion of the power of the Federal Government to participate in the regulation of United States fisheries, we conclude (1) that when enabled pursuant to a treaty, the Federal Government has clear authority to regulate fisheries, which authority would supervene any State laws on the subject, and which could be exercised exclusively if the Congress were so to choose and (2) that the commerce clause could be invoked to warrant Federal regulation or participation in regulation of species shipped and sold in interstate commerce.

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[20] 67 Stat. 32, 43 U.S.C. 1314.

[21] 332 U.S. 19, 45 (1946).

[22] 363 U.S. 1, 7, 77 (1959).

[23] 67 Stat. 31, 43 U.S.C. 1311(b).

[24] Cf. *Foster-Fountain Packing Co.* v. *Louisiana*, 278 U.S. 1 (1928); *Toomer* v. *Witsell*, 334 U.S. 335 (1948).

In the one case in which Congress sought to regulate migratory birds without a treaty, two District Courts held the Act unconstitutional in the exercise of the States' ownership of animals *ferae naturae* and their police power to regulate the taking and use of such animals. However, subsequent Supreme Court decisions have found that when shrimp are caught for shipment and sale in interstate commerce the trust upon which the State owns or controls the shrimp for the benefit of its people is lost, and the protection of the commerce clause attaches at the time of the taking. The Supreme Court and lower Federal courts have oft stated that in the absence of Federal legislation, the State may regulate the taking and use of migratory species. Despite giving title to "natural resources" in the waters within the boundaries of the States, and Congress' vesting of the right and power of the States to manage the natural resources in accordance with State law under the Submerged Lands Act, the power of Congress to regulate interstate commerce has not been diminished. The proprietary right to the living resources has been affirmed, to the extent it existed, but the authority to regulate interstate commerce has not been relinquished by the Congress.

While asserting that there is ample authority under the commerce clause for the United States to regulate U.S. fisheries, we contend that measures short of Federal regulation can be invoked toward removal of inhibiting institutional barriers, and for the rehabilitation of U.S. commercial fisheries on sound scientific, economic, and legal concepts. The issue of how such change can be achieved is a very sensitive political question that hits at the very roots of American federalism. The question is not whether Congress has the power to create change, but whether Congress will assert the power and how.

II. ORGANIZATIONAL ALTERNATIVES FOR FISHERIES

A. A Statement of Fisheries Problems

1. Federal Authority

Regulation of the fisheries in the United States is exercised by the States under existing law; the Federal Government acts in a research, advisory, and coordinating role. Inasmuch as there has been no substantial change since the following excerpt was included in a Senate Report of the 79th Congress, it is *à propos* here:

. . . In the States, the Federal Government acts, for the national interest, as a research, advisory, and coordinating agency wherever several States are concerned with a common conservation problem. It engages in fishery restoration and management activities, including propagation, independently in waters under Federal jurisdiction, and in collaboration with the States in other waters where national interest is involved. It develops and disseminates knowledge about whole fishery resources (i.e., as opposed to local segments of them). It collaborates in the conservation of species shared betwee. the United States and other nations. It promotes the fullest and most widespread utilization of the commercial fish catch, and the achievement of the highest standard of quality of the fishery products.

The foregoing is a statement of an ideal. The Federal Government has never done justice to these functions because its fishery conservation agency. . . has never been given broad enough direction by the Congress to permit it to carry out a unified program to suit the needs of the country as a whole. Without a fundamental plan, the Service has evolved by a process of tacking on projects one by one, which have generally been thrust upon it to meet particular crises, often as the result of pressure by special groups. The appropriations to the Service are based principally on the support of these projects. Thus the Federal Service is helpless to execute a dynamic program based on national needs; instead, it can only carry on with its agglomerate of activities inherited from the past, and wait for further crises which its timely services would otherwise have averted. . . .[25]

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[25] "Fishery Resources of the United States," Sen. Doc. No. 51, 79th Congress, 1st Sess. (1945), Committee on Commerce, at p. 132.

LET'S GO SUBSISTENCE FISHING

(A ~~Discussion Paper~~)

10 April 1985

Bill Caldwell

LET'S GO SUBSISTENCE FISHING

(A Discussion Paper)

You and I, no matter where we live in Alaska or what we do, are subsistence fishers. So I am told. Solely because we are residents of Alaska. So let's plan a subsistence fishing trip. Maybe several thousand of us from all over the state can take set gill nets and find a nice spot along Cook Inlet, near a village heavily dependent upon a subsistence economy. Let's time our trip to overlap with the overlap of the king, coho and sockeye runs. I don't know how to fish with a set gill net, but no matter. I'm sure that in no time we can learn from a true subsistence fisher how each of us can catch a freezer-full of salmon in just a few days. And we can have a grand party at the same time. Scatter a few truckloads of beer cans along the beaches. Kill a few bears in self-defense. Invade Indian country. Maybe photograph some Indians in their natural habitat of sport fishermen and oil refineries. We could have a ball, in blatant defiance of the federal subsistence law.

Is this possible? Well... apparently our state supreme court has conferred this fundamental right upon us. Madison v. Alaska Dept. of Fish & Game (22 Feb. 1985). Or so it is said by a number of distinguished observers and participants. These people have considerable experience dealing with the subsistence issue and deciphering opinions of the Supreme Court of Alaska, but I am not convinced. Nay, I am persuaded of the opposite.

"Sport fishing" has been consistently defined as fishing "for personal use" with hook and line held either in the hand or attached to a pole or rod. Id., §(21). "Commercial fishing" has always meant taking fish "with the intent of disposing of them for profit...." Id., §(5).

2. Prior to the mid-1970's, subsistence fishing occurred side-by-side with sport and commercial fishing in Cook Inlet, with little apparent conflict, the subsistence take being viewed as de minimus. (Between 1971 and 1977, an annual average of only 87 subsistence permits were issued, with an average annual catch of only 405 salmon. The commercial harvest, in contrast, averaged about two million fish per year. The subsistence take is understated, however, "since many people did not obtain permits and some commercially caught salmon were used for subsistence." Madison slip op. at 3 n.1.) But the rapid population growth of Anchorage and the Kenai Peninsula brought tens of thousands of sport fishers into direct competition with the Cook Inlet commercial fishery for access to king and coho stocks. Kenai Peninsula subsistence fishers, lacking political clout, bore the brunt of the sport/commercial conflict.

3. In 1976 the Board of Fisheries arbitrarily closed the southern district of Cook Inlet to subsistence fishing for the 1977 season. Residents of Homer sued and won an injunction restoring "subsistence net fishing."

4. In December 1977 the Board, without regard to subsistence fishing needs, adopted a comprehensive management policy for Cook Inlet salmon stocks. The policy, which apparently favored sport

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I.

The Ratio Decidendi of the Madison Decision

In order to determine whether all five of our supreme court justices decided simultaneously and unanimously to go fishing when they should have been at work, I have reviewed the briefs filed by the state and AFN, and I have read the Madison opinion quite a few times. The result is that I have come to see the Madison judgment as a basically correct and just response to a nine-year effort by the Board of Fisheries and the state qua state, acting in a highly partisan manner on behalf of sport and commercial fishing interests, to screw the subsistence users of Cook Inlet--Native or non-Native, rural, urban or anything in between.

A. The legislative, administrative, judicial and factual background. The following chronological summary of the events leading up to the Madison decision is derived primarily from the AFN and state briefs in Madison, the Madison opinion, and the 1981 supreme court opinion in Kenai Peninsula Fisherman's Cooperative Ass'n v. State, 628 P.2d 897 (1981).

1. From 1960 until 1978 "subsistence fishing" was defined by the legislature as fishing "for personal use...with gill net, seine, fish wheel, long line...." In conjunction with the 1978 subsistence law (AS 16.05.251(b)), the definition of "subsistence fishing" was changed to fishing with gill nets, etc., "for subsistence uses." AS 16.05.940(22). "Subsistence uses" was defined as "the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption...." AS 16.05.940(23).

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3. In 1976 the Board of Fisheries arbitrarily closed the southern district of Cook Inlet to subsistence fishing for the 1977 season. Residents of Homer sued and won an injunction restoring "subsistence net fishing."

4. In December 1977 the Board, without regard to subsistence fishing needs, adopted a comprehensive management policy for Cook Inlet salmon stocks. The policy, which apparently favored sport

over commercial interests, basically sought to allocate the spring and fall king and coho runs for sport use, while allocating the summer sockeye runs to commercial use. See Kenai, 628 P.2d at 899-901. In a suit by commercial fishers, this 1977 policy was declared invalid because the Board violated the Administrative Procedure Act. Id. at 904-06. The policy had also been adopted in regulatory form in 1978 and 1979.

5. The Cook Inlet regulations governing the 1978 season closed the central district to commercial fishing after 15 August, although the subsistence season remained open. Commercial fishers, accustomed to taking some of their catch for personal use, therefore applied for subsistence permits. Combined with enhanced public awareness of the state's subsistence fishing provisions, this resulted in a significant increase in the number of Cook Inlet subsistence fishing permits. (Subsistence permits numbered 323 with a catch of 3,735 salmon in 1978, compared to a commercial harvest of over five million fish. In 1980, when household rather than individual permits were issued, there were 1,331 subsistence permits with a catch of 14,775, compared to a commercial catch of over four million. Madison at 9 n.7.)

6. The Board's unsurprising response to the perceived "increase" in subsistence fishing, now being identified as such, was to impose restrictions. For the 1979 season, the Board limited access to subsistence fishing by reducing the length of gill nets, fishing periods and available shoreline, and it changed the subsistence season in the central district from August 1 - September 21 (the coho run preferred by sport interests) to June

23 - August 15 (the sockeye runs being managed for commercial interests).

7. Even more stringent restrictions on subsistence fishing were imposed by the Board for the 1980 season: the entire shoreline of the Kenai Peninsula in the central district was closed to subsistence fishing, although a few miles of dangerous, inaccessible beach in the southern portion of the northern district were opened to subsistence; in the southern district, the Board further reduced the allowable length of subsistence gill nets and closed the Homer Spit and the shoreline east of the Spit to subsistence fishing. This harsh action, aimed at a miniscule portion of the Cook Inlet salmon harvest, spawned three successful lawsuits against the Board, by residents of Tyonek, Homer and Kenai.

8. Meanwhile, the legislature in 1978 had enacted the state subsistence law, mandating that the Board protect subsistence as the priority use. AS 16.05.251(b) (attached as Appendix A). In response to its litigation setbacks in the summer of 1980, the Board now seized upon the new law, contrary to its spirit, as a means of accomplishing its goal of curtailing the subsistence fishery. At its December 1980 meeting, the Board, in violation of the Administrative Procedure Act and the open public meetings law, established characteristics for identifying "customary and traditional uses" of Cook Inlet salmon, and adopted criteria for applying the characteristics.

9. At its March 1981 meeting, the Board adopted as a formal regulation a revised version of its criteria, ten in number, for

identifying "customary and traditional uses." 5 AAC 01.597 (attached as Appendix B). The Board also determined to apply all of the ten criteria, so that any user or user group, subcommunity or community, had to measure up to each of the criteria in order to qualify as subsistence users. Any personal-consumption gill net user not qualifying for subsistence consideration under the criteria would simply be thrown into "equal" competition with the sport and commercial interests, to be dealt with at the Board's discretion. As the above history reveals, this meant, in practical effect, that those who had for many years been taking Cook Inlet salmon with gill nets for personal and family consumption would receive no consideration from the Board -- they would be accorded the lowest priority imaginable. And that is precisely what happened. The Board rigorously applied its ten criteria and determined that throughout the whole of Cook Inlet only three communities (Tyonek, English Bay and Port Graham), and no individuals, groups or subcommunities, qualified for the subsistence fishery. Thus, for the 1981 Cook Inlet season, the Board prohibited all fishing with gill nets for personal and family consumption, except for the three villages found to satisfy all ten criteria. This action "eliminated from the protection of the subsistence statute the majority of Cook Inlet fishermen who formerly fished under subsistence regulations" (Madison at 12), including such groups as the Kachemak Bay Subsistence Group (they had "shown the existence of a community of interest," but their members "were either too widely dispersed or were too heterogeneous to be considered identifiable as a community") and

the Kenaitze Indians of Kenai (who had "made an adequate showing of handling salmon by traditional modes (e.g., using all parts of the fish, including the heads, fins, tails and eggs; drying, smoking)," but were nonetheless excluded). State's Brief at 43.

10. Residents of Homer (the Gjosund case which was decided by the supreme court as part of the Madison opinion) and Kenai (Madison) sued the Board and obtained preliminary injunctions, from the Kenai and Homer superior courts, preserving at least some of their subsistence fishing opportunities for the 1981 season. Among several appealing causes of action, the plaintiffs in both cases alleged that the "ten criteria" regulation was invalid under the state subsistence law.

11. At its March 1982 meeting, the Board responded to the lawsuits and court injunctions by creating a "personal use fishery" (5 AAC 77.001), which was opened in the central district (Kenai) for the June sockeye run (residents would have preferred the fall coho run), and in the southern district (Homer) for the fall coho run. "Thus, 'personal use fishing' joined 'commercial fishing' and 'sport fishing' as activities which can be regulated by the board in its discretion" (State's Brief at 14) -- and by now we know what that means.

12. At that same meeting, the Board also met jointly with the Board of Game and adopted a joint, uniform regulation designed to facially comply with the federal (passed December 1980) and state subsistence laws. 5 AAC 99.010 (Appendix C). This joint regulation, containing eight criteria for identifying "customary and traditional uses" of both fish and wildlife, was drawn largely

from the Board's Cook Inlet "ten criteria" regulation (Appendix B) of the previous year. There are at least two major differences: (1) The joint regulation does not require, as did the Board's Cook Inlet regulation, that a use pattern must satisfy all eight of the criteria in order to receive recognition as a "customary and traditional use." (2) The joint regulation limits subsistence protection to "rural" Alaskans, whereas the Cook Inlet regulation did not contain the express limitation "rural" (although everyone seems to agree that, as applied, it had that effect, and the "rural" limitation on subsistence was expressly articulated in the Board's new "personal use fishery" regulation).

13. The Joint Board's spring 1982 subsistence regulation was submitted to the Secretary of the Interior as part of the state's package designed to show paper compliance with Title VIII of ANILCA. In May 1982, that renowned advocate of the subsistence way of life, James Watt, certified the state's compliance, and therefore the state's duty to protect the subsistence way of life of, at the least, rural Alaskans, with special emphasis on Alaska Natives. (The state's voters confirmed this duty the following November when they rejected, by a substantial margin, an initiative to repeal the state's subsistence law.)

14. The two Madison lawsuits proceeded to final judgments, one of which was appealed to the supreme court by the state and one by the plaintiffs. Both superior courts held, however, that the Cook Inlet "ten criteria" regulation was not invalid under the state's subsistence law. Under these criteria, the Madison plaintiffs did not qualify as "customary and traditional"

subsistence fishermen because theirs was not "a use pattern established by an identified community... having preponderant concentrations of persons showing past use" (Madison at 25-26), i.e., because they weren't part of an "identifiable subsistence community or group." Id. at 26.

B. Summary. To my eye, the series of events described above paints a picture of a Board of Fisheries decidedly hostile to any aspect of the subsistence way of life, and resolutely insensitive to those who, regardless of how they ought now to be classified, had been classified for at least two decades as subsistence fishermen. The ten criteria which the Board devised were, in the abstract, a good start at giving some practical content to the legislative guideline of "customary and traditional use." But the Board then determined to apply the criteria in a very mean-spirited way. The Board had acquired a mindset, a charitable description of which would be that the Board didn't want to be bothered with these pesky subsistence claims; it wanted to get on with the politics of sport vs. commercial fishing uninterrupted by this subsistence nonsense. Those who were true subsistence advocates apparently were able to take enough advantage of this scenario (which included violations of the APA and the open-meetings law) to get the Board to adopt criteria that bore some relation to the various degrees of subsistence (and/or "personal use," as you prefer) lifeways on the Cook Inlet. Unfortunately, the reasonableness of the criteria belied the manner in which they were implemented.

If it is not farfetched to view the subsistence laws as

protective, rather than destructive, of the subsistence way of life, then surely the Board of Fisheries was in need of some firm-handed redirection, if not out-right reversal. I have been understanding both the federal and state subsistence laws as positive laws designed to afford affirmative maximum protection to subsistence uses (however they may be defined) of Alaska's wild renewable resources; to impose upon all state and federal resource managers the affirmative duty to identify and protect subsistence resources and their users. It is only after subsistence has been fully secured that sport and commercial may enter the picture. The process followed by the Board, however, turned this statutory framework upside down. The Board proceeded <u>first</u> to protect sport and commercial interests as much as possible, in accordance with the prevailing politics of the day, and then it sought to restrict subsistence uses to the maximum extent feasible in the face of an ongoing series of lawsuits and judicial injunctions.

Under the subsistence law the Board should have been shielding the subsistence fishery from sport and commercial pressures. Instead, it was doing the opposite. The "customary and traditional use" guideline was intended, by both Congress and the state legislature, to receive a liberal interpretation and application; it was to be accorded breadth, depth and flexibility. Instead, the Board seized upon the guideline to <u>restrict</u> subsistence uses. The Board gave "customary and traditional use" a strict and narrow meaning, and then applied its criteria in a rigid, inflexible manner. Rather than fulfilling its affirmative obligation to identify and protect customary and traditional

subsistence uses, the Board reversed the process contemplated by the law and imposed upon subsistence users a heavy burden of persuasion that their use patterns met all of the Board's "customary and traditional use" criteria. The state richly deserved losing this lawsuit.

II.

The Madison Decision

The supreme court's 22 February Madison decision is not a work of art, but neither is it the product of hasty decision-making and sloppy thinking. I believe these guys really were at work when they should have been, and I don't begrudge anybody a fair amount of fishing time. If they are due any criticism at all, it should be grounded in their dispassionate discussion of the facts vis-a-vis the Board of Fisheries.

As the supreme court saw the facts, it recognized that in Cook Inlet "the subsistence salmon fishery is most visible in the smaller, more isolated villages, where the subsistence group represents a larger percentage of the population." Slip op. at 3. At the same time, however, the court found that there existed "a core group of residents of each Cook Inlet community [which] has traditionally fished for Cook Inlet salmon for subsistence." Id. For reasons I will return to, it should be emphasized that the court was dealing with a subsistence use pattern by persons, whether they lived in "rural" or "urban" communities and areas, who harvested resources nearby--near to where they lived. The case did not involve a traditional use pattern by persons who didn't reside in the harvest area.

Throughout its opinion, the court emphasized that the purpose of the subsistence law was the protection of subsistence uses, and that the Board had perverted that legislative purpose. "Under a statute designed to protect subsistence uses, the board has devised a regulation to disenfranchise many subsistence users whose interests the statute was designed to protect." Id. at 27. In arriving at its judgment, the court rejected the Board's principal contention that the 1978 subsistence law required, or at least authorized, the Board to curtail the previously recognized class of subsistence users by limiting the subsistence priority to "individuals residing in those rural communities that have historically depended on subsistence hunting and fishing." Id. at 15-16. The court thought the Board's argument evidenced "a fundamental misconception about the [law's] structure." Id. at 16.

As the supreme court explained to the Board, and as appears from the plain meaning of the statute, the state subsistence law confers priority rights upon two potential tiers of subsistence users. Id. The first tier is that broad class of all subsistence users, however they may be defined. The second tier consists of that subclass of "preferred subsistence users" who have the greatest customary and direct dependence on the resource in question, who live closest to it, and who have the least access to alternative resources. All subsistence uses have priority over sport and commercial uses. Before any restrictions may be placed on subsistence uses, sport and commercial uses must be eliminated. Subsistence uses may be curtailed only upon findings that

sustained yield necessitates restriction and that the elimination of sport and commercial uses is not adequate to protect sustained yield. Only then may the Board begin to restrict subsistence uses by the application of criteria designed to afford top priority to second-tier preferred users. Id. at 16-17. The court's understanding of the statute's operation seems unassailable.

The court rejected the state's contention that the Madison plaintiffs should not receive the priority protection afforded to first-tier (i.e., all) subsistence users, and that they should be satisfied with their new status as "personal use" fishers, with no priority rights over sport and commercial interests (and we know what that means). The court concluded that the law's "customary and traditional" guideline does not authorize the Board to define first-tier subsistence users solely in terms of their area of residence, since the statute only speaks to area of residence in connection with identifying second-tier preferred subsistence users, and because "customary and traditional" refers to "uses," not "users." Id. at 17-18. The court reviewed the legislative history, and found that "there is no indication that legislators understood the 1978 subsistence law to restrict subsistence use to either a rural or a community context." Id. at 22.- The court thus held that the Board's interpretation of the law was incorrect (id. at 23).

Finally, the court held that the manner in which the Board applied the subsistence law, like its interpretation of the law, was erroneous. The court noted that the Board had not followed the suggestion of Tom Lonner, then director of ADF&G's subsistence

division, that "customary and traditional use" determinations should be made on a case-by-case basis, and that Lonner's warning that the Board's ten criteria "might not suffice as a test" of individual subsistence applicants was ignored. Id. at 24-25. The court further found that "[u]nder the board's regulation, many individual users who have historically depended on subsistence fishing are eliminated from subsistence use at the outset." Id. at 26-27. The court therefore declared the regulation invalid as being "inconsistent with the legislative intent to provide guidelines for the protection of subsistence fishing..., because it operates too restrictively in its initial differentiation between subsistence and non-subsistence uses." Id. at 27.

That is the essence of the Madison decision. It gives broad protection to any resource-harvest activity that arguably qualifies as a subsistence use. It thus gives the law a liberal interpretation, as the legislature intended. Even the few footnotes and passages which the proponents of the governor's bill emphasize and exagerate really create no cause for panic within the subsistence community. Nor should the sport and commercial interests be alarmed, unless they are so greedy as to want it all for themselves.

III.

Is The State In Compliance With Federal Law?

It is fatuous to suggest that Madison places the state in noncompliance with the federal subsistence law, Title VIII of ANILCA (Appendix D). First of all, the state supreme court is without power, at least in the non-constitutional context, to

place the state in noncompliance with Title VIII. Once the state was certified as being in compliance, at least on paper (the 1978 subsistence law and the 1982 joint subsistence regulation), with Title VIII, then the state became obliged, by operation of supervening federal law, to implement the subsistence preference mandated by Congress, "unless and until [such state laws are] repealed." §805(d). The state supreme court has no authority to "repeal" laws, an act which can be accomplished only by the legislature or the voters. Furthermore, the Madison court has not purported to repeal the subsistence law; it has merely given it a broader and more protective scope then the Board of Fisheries wanted to deal with.

If the Madison court had in fact construed the state subsistence law in a manner that materially conflicts with the substantive guarantees of Title VIII, there would be a simple remedy: a suit in federal court under §807 to enjoin the state to implement the subsistence preference as contemplated by Congress. I do not believe that such a lawsuit could succeed, because I cannot read Madison as creating a conflict with Title VIII. It is true that Congress defined the subsistence uses which it protected as "the customary and traditional uses by rural Alaska residents" (§803)(emphasis added), whereas state law does not contain the "rural" limitation, but there is no evidence that Congress intended to preclude the state from protecting a broader class of subsistence uses -- so long as the state provides maximum protection to the class identified by Congress. The Madison decision does just that.

While the court construed the state law (correctly, it seems) as according priority to a broader class than "rural Alaska residents," the court also made it abundantly clear that the law affords maximum, first-priority protection to "preferred subsistence users," who are to be identified by the legislative criteria of "customary and direct dependence on the resource, local residency, and availability of alternative resources." Madison at 16. These criteria are identical in both the federal and state laws, and they undoubtedly provide maximum protection to rural Alaska residents. Moreover, the court expressly stated that characteristics like the Board's ten criteria could be employed "to distinguish first-tier general subsistence users from second-tier preferred subsistence users, since most of the [ten] criteria relate to either 'customary and direct dependence' or 'local residency,' two of the three criteria set out" in the subsistence laws. Id. at 16-17.

Thus, the supreme court has construed state law as giving a general subsistence-use priority to all historical subsistence uses, some of which may be engaged in by persons who might not properly be classified as "rural" residents. Nonetheless, the court has also made it clear that Bush Alaska is due to receive first-priority protection. That is all that Congress has required. Whether users such as the Madison plaintiffs should be given priority over commercial and sport interests, as the court held, or be treated as "personal users" with no priority over sport and commercial users, as the Board of Fisheries contended, is not a question that Congress addressed in Title VIII. The

Madison holding does nothing to dilute the federal mandate -- it in fact reinforces it -- and the issue was therefore properly resolved as a question of state policy. (I also note that neither AFN's brief nor the state's brief even suggests that the state would be in noncompliance with Title VIII if the court construed state law as giving a subsistence preference to those classified by the Board as "personal users.")

IV.

Are All Alaskans Now Subsistence Users?

Of course not. The supreme court said no such thing. The fact that the court rejected the Board's narrow and rigid restrictive interpretation of the "customary and traditional use" standard hardly signifies that the court read the standard right out of the law. It is understandable how those who were committed to and who vigorously defended the Board's approach would now have a difficult time accepting the possibility that theirs was not the only reasonable means of resolving the issue. But the rest of Alaska should not be stampeded by the defeatist hyperbole that all Alaskans, apparently including those many Alaskans who don't harvest wild resources and don't want to, are now subsistence users under Madison.

In holding that the 1978 law's "customary and traditional use" standard did not authorize the Board to restrict first-tier subsistence users to either a rural or a community context, the court relied heavily upon the remarks, during debate, of Representative Nels Anderson, the floor manager of the subsistence bill. As the court summarized that part of the debate concerning

the "customary and traditional" standard (at 21):

> Anderson argued for the retention of "customary and traditional" for use as a guideline. His major concern focused on the potential pressure put on resources by newcomers. In his view, the words "customary and traditional" recognized and protected a historical subsistence use by both native and non-native Alaskans. The words were not intended to restrict subsistence use.

The court found additional evidence of the intended scope of the "customary and traditional" guideline in Anderson's response to the expression of concerns that the subsistence preference might not protect Fairbanks residents who had developed a custom of travelling to the Chitina Dip Net Fishery to catch salmon for personal and family consumption. Anderson responded to these concerns with assurances that (Madison at 22)

> where people from Fairbanks make it a custom to go down to the Chitina area and if it was determined that that resource was down to the point where only subsistence would be allowed, those people would be taken care of under this section.

But does this make "all Alaskans" subsistence users? Would residents of Juneau, where there is not "a custom to go [up] to the Chitina area," also be entitled, if they now desired, to receive a subsistence preference in the Chitina Dip Net Fishery? I don't see how this legislative history can be read as protective (or rather, creative) of a non-existent use pattern. Nor do I read Madison as so holding. Rather, the court simply determined the following from the legislative history (at 23):

> The legislative history indicates that the legislature intended to protect subsistence use, not limit it. The words

> "customary and traditional" serve as a guideline to recognize historical subsistence use by individuals, both native and non-native Alaskans. In addition, subsistence use is not strictly limited to rural communities. For these reasons, the board's interpretation of "customary and traditional" as a restrictive term conflicts squarely with the legislative intent.

Thus, "customary and traditional" does not encompass all Alaskans. While "not strictly limited to rural communities," it is not without boundaries. It is a guideline designed to identify and protect "historical subsistence use."

In the above hypothetical, it seems to me that the Board of Fisheries would have little difficulty in determining that there is no historical use pattern in which it is the custom of Juneau residents to travel to the Chitina fishery. Hence, they would not be entitled to a subsistence preference over sport and commercial fishers. (Of course, if there were such a historical use pattern, then Juneau residents, like Fairbanks residents, would be entitled to a first-tier subsistence preference. And, too, a Juneau resident could move to Fairbanks and then participate in the Chitina dip net fishery on a first-tier priority basis over sport and commercial harvests.) While this determination has the effect of favoring Fairbanks residents over Juneau residents, it is not because of their respective residencies, but rather because of the existence or non-existence of a historical subsistence use pattern.

Let us take the example of Lime Village for a somewhat different application of the "historical subsistence use" guideline. By longstanding Native custom and tradition, Lime

Villagers have hunted moose and caribou in their traditional-use area on a year-round basis, in conjunction with the harvest of numerous other wild renewable resources. Theirs is a thoroughly non-wasteful, true subsistence economy, predicated upon a widespread system of sharing and exchange which distributes harvested resources throughout the households of the village. Under the most stringent "customary and traditional" criteria, all would recognize Lime Villagers as the paradigm class of second-tier preferred subsistence users, entitled to maximum protection under the subsistence law -- the first people to be protected, the last to be restricted, in the event the sustained yield of moose and caribou is in jeopardy.

The use pattern of moose and caribou in the Lime Village area involves two other general classes of users, both nonresidents of the area: (1) other Alaskans who enter the area primarily by airplane to hunt moose and caribou in the fall for personal and family consumption, and probably for sport (trophies) as well; (2) non-residents of Alaska (and perhaps some urban Alaska residents) who participate in guided fall sport hunts for trophy animals (the wanton-waste law insures plenty of meat for the guides, their assistants, families and friends). The first pattern of non-local uses might arguably qualify as first-tier subsistence uses under the Madison decision, while the second pattern would have to be classified as sport or commercial, or both. In the event of a threat to sustained yield, the second use pattern would have to be curtailed or eliminated first, and then the first use pattern, before any restrictions could be imposed upon the preferred use

pattern of Lime Village.

At present, the moose and caribou populations are healthy, with no known threat to sustained yield. The two non-local fall use patterns have been fully accommodated for many years by the sport hunting regulations adopted by the Board of Game. There has been no occasion, at least in recent years, to place any restrictions on the Lime Village use pattern. Yet the Board of Game, by virtue of the same sort of perverse reasoning (although apparently not with the evil motive) employed by the Board of Fisheries, has restricted the subsistence uses of Lime Villagers by the imposition (with criminal and property-confiscation sanctions) of arbitrary calendar-based hunting seasons and individual bag limits which are wholly incompatible with their subsistence way of life.

The Board of Game is not insensitive to the needs of Lime Villagers, nor to their way of life. And the Board seems to recognize that the most direct, reasonable and realistic way to protect the village's subsistence use pattern would be to establish a non-restrictive village harvest level which accords with their traditional take, with no closed seasons, individual bag limits or other restrictions imposed upon those domiciled in Lime Village. The other two classes of users (nonlocal) would continue to be fully accommodated through existing regulations. But the Board is told, and it has acted upon the advice, that under Madison it cannot employ this approach unless it opens up the Lime Village hunting territory to all Alaskans, for all seasons; hence, the Board must stick with arbitrary seasons and

bag limits. In other words, a decision which condemned the use of the subsistence law as a restrictive device is being used, in Wonderland fashion, to justify unnecessary and inappropriate restrictions on the subsistence rights of the people of Lime Village.

Providing an appropriate village harvest level guideline for Lime Village, and eliminating restrictive closed seasons and individual bag limits for those domiciled there, would not violate the subsistence law as construed in Madison. This would be protective action, not restrictive. It would constitute simple and straightforward "recogni[tion of the] historical subsistence use" pattern of the people of the village, in accordance with the "customary and traditional" guideline. Madison at 23. And it would not constitute a "grandfather rights system," which the supreme court eschewed. Id. at 26-27 n.17. Anyone from Fairbanks, Anchorage or elsewhere who desires to participate in the historical subsistence use pattern of Lime Village is free, subject to means and inclination, to move there and participate. No one, under this system, would be restricted from participating in one of the three historical use patterns (a second-tier subsistence use pattern, a first-tier pattern and a sport/commercial pattern) extant in the Lime Village traditional use territory. No restrictions on historical subsistence use. And that is what, and it is all, that Madison is about.

In sum, Madison does not ipso facto convert all Alaskans into subsistence users. To be sure, the court broadened the protected class considerably beyond the limits set by the Board of

Fisheries. Yet, the "customary and traditional use" guideline retains significant substance. In order to qualify for first-tier subsistence protection from sport and commercial interests, one must still be engaged in, or seeking to engage in, a "historical subsistence use."

V.

Is The Governor's Bill Necessary Or Appropriate?

The governor's bill (House Bill No. 288) is being sold on several grounds, none of which are particularly persuasive. For one thing, it is said that Madison creates a situation of total chaos with respect to implementation of the subsistence law. For the panic-prone, this assertion may have appeal, but it is based on not a little bit of sophistry, some of which I have attempted to dispel in the foregoing pages. I find it hard to believe that the boards of fish and game are incapable of developing a reasonable mechanism for implementing the subsistence law as construed in Madison.

It is also said that the governor's proposal is necessary to allow the boards to continue implementing the subsistence law as they had before Madison. If this means that the Board of Fisheries would be authorized to continue to do as it did to the Madison plaintiffs, then the proposed bill is an outright disgrace. Moreover, if the intended implication is that the boards had been adequately protecting even the rural subsistence way of life prior to Madison, the implication is contradicted by the evidence.

Stripped of the attendant sophistry and hyperbole, the gut

issue presented by the governor's bill is whether those whom the Board of Fisheries sought to classify as "personal users" should have a priority over sport and commercial users. In other words, should Alaskans who seek to harvest fish and game for personal and family consumption, but who are not living a Bush lifeway, have a preference over those who harvest for sport or profit? That is the issue, and it should be the sole focus of debate.

From the perspective of those Natives and non-Natives engaged in the Bush subsistence way of life, the governor's bill offers nothing, and to the extent that it would by implication give approval to the pre-Madison management regime, it is potentially harmful. From the perspective of the Native peoples of Alaska, the bill also offers nothing positive, and is probably harmful in that it would take away the protection Madison offers for the growing numbers of urban and semi-urban Natives. This leaves me doubting either the necessity or the propriety of the governor's bill.

VI.

Conclusion

I'm sure I must be missing something. Maybe the governor's bill really is a good idea. It just seems that the reasons offered to support it are all wrong. Wrong about Madison. Wrong about how the subsistence law ought to operate. Wrong about the politics, even. The governor's proposal is unabashedly restrictive. Contrary to the spirit of the subsistence preference, it proposes to reduce the number of Alaskans who are classified and protected as subsistence users. The beneficiaries,

without apology or explanation, are the sport and commercial interests, and from the publicity I've seen, it is not at all clear that they are as passionately concerned with the subsistence competition (as distinguished from their brawl with each other) as the advocates of the governor's bill seem to believe.

Certainly it is possible -- despite the actions of the great majorities of our state and national legislatures, the vote of a clear majority of Alaskans at referendum, and the unanimous judgment of our supreme court -- that the sport and commercial political backlash, combined with the voices of those who can see only with their anti-Native blinders on, will bring about a repeal of the subsistence preference. Maybe the best political posture in the face of this threat, be it distant or near at hand, is to treat subsistence as a very small, insignificant part of the demand for Alaska's renewable resources; as a quaint, romantic way of life, barely hanging on from the old days in only a few remote regions where the people have not yet received the message that free enterprise capitalism, underwritten by government, is the true meaning of life.

Perhaps the approach represented by the governor's bill is politically expedient and, in the short run, politically wise. I'm glad I'm not a politician (it's embarrassing enough to be a lawyer). I still see a policy of restricting the number of Alaskans who qualify for some degree of subsistence protection as counterproductive in the long run. Such a policy undervalues the importance of subsistence, dealing with it as something to be restricted rather than protected. The Madison court took the

opposite approach, and its decision has instinctive appeal for that reason alone.

All of this energy might be better expended in an effort to develop an approach to implementing the subsistence law as construed by the supreme court. (In order to do that, however, the state will have to put aside its draconian interpretation of Madision.) The boards' joint subsistence regulation (Appendix C) is a basically sound structure which does not need a major overhaul to comport with the Madison ruling. The court expressly stated that "customary and traditional use" criteria, like the eight criteria listed in 5 AAC 99.010(b), are appropriate for identifying and protecting second-tier preferred subsistence users. The boards simply need to slightly broaden the scope of the criteria so that they will encompass all uses of the first-tier class. This can be done by eliminating the "rural" restriction and by adding a few additional criteria designed to cover all historical subsistence use patterns. Also, the joint regulation, unlike the Cook Inlet regulation struck down in Madison, does not require a use pattern to meet all of the criteria in order to qualify for subsistence protection. This should be made explicit in the regulation, so that all of the various degrees of subsistence use will be identified and protected.

More importantly, the boards should begin actually implementing the approach mandated by the regulation, which has received little more than lip service to date (except when it has been resorted to and perverted as a restrictive device). The

procedures mandated by the regulation are relatively simple and straightforward:

1. The boards' first obligation is to identify subsistence uses of fish and game, using appropriate criteria. Although all subsistence uses have not yet been studied and identified, there is a substantial body of data available. The boards should direct the Subsistence Division to dust off all of those subsistence studies and begin compiling some sort of systematic listing, beginning first with areas having the greatest user competition in relation to resource abundance. §§99.010(a)&(b).

2. The boards are then required to determine the approximate amounts of fish and game "necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses." §99.010(c). (The "reasonable opportunity" guideline has been frequently used as a restrictive standard and should be eliminated. The boards should allow for all customary and traditional opportunities, not some arbitrary opportunity which the boards subjectively determine to be reasonable.) Again, the Subsistence Division should compile this information and present it to the boards.

3. The boards are next required to "adopt regulations that provide an opportunity for the subsistence taking of fish or game in amounts sufficient to provide for the customary and traditional uses" which have been identified. §99.010(d). The Department, including the subsistence and other appropriate divisions, should be directed to present such proposed regulations to the boards.

4. If the sustained-yield status of resources is determined

adequate to permit non-subsistence uses, then the boards may exercise their discretion to permit sport and commercial uses. §99.010(e).

5. If sustained yield would be threatened or jeopardized by sport and/or commercial uses, however, then those uses may not be allowed. Moreover, if sustained yield is not sufficient to provide for all identified subsistence uses, then the boards must implement "a series of graduated steps" to restrict first-tier subsistence users in accordance with the criteria for giving maximum protection to second-tier preferred subsistence users. §99.010(f).

Under the framework established by this regulation, the boards, as required by both the federal and state laws have the affirmative duty to identify and protect subsistence uses and users. The burden to protect is on the state, rather that the burden of proving entitlement to protection being placed on the users.

Although this is the reverse of the approach followed by the Board of Fisheries, it is the one now mandated by Madison, it has been the law since 1982, and it should be implemented without further delay or excuse. Someone in power should get this process started.

Meanwhile, let's go fishing.

Bill Caldwell
10 April 1985

Sec. 16.05.251. Regulations of the Board of Fisheries.

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

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
(2) local residency; and
(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 2 ch 218 SLA 1976; am § 4 ch 151 SLA 1978; am §§ 1, 2 ch 110 SLA 1980)

Sec. 16.05.255. Regulations of the Board of Game.

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

(1) customary and direct dependence upon the resource as the mainstay of one's livelihood;
(2) local residency; and
(3) availability of alternative resources. (§ 3 ch 206 SLA 1975; am § 5 ch 151 SLA 1978)

APPENDIX A

Sec. 16.05.940. Definitions. In this chapter

(22) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

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

5 AAC 01.597

CHARACTERISTICS OF SUBSISTENCE FISHERIES. (a) The Board of Fisheries finds that certain customary and traditional practices and procedures associated with the utilization of fish in the Cook Inlet Area can be used to identify subsistence uses. Based on testimony to the board, the following characteristics are those that should be evaluated in the identification of subsistence fisheries:

(1) a long-term, stable, reliable pattern of use and dependency, excluding interruption generated by outside circumstances, e.g., regulatory action or fluctuations in resource abundance;

(2) a use pattern established by an identified community, subcommunity or group having preponderant concentrations of persons showing past use;

(3) a use pattern associated with specific stocks and seasons;

(4) a use pattern based on the most efficient and productive gear and economical use of time, energy and money;

(5) a use pattern occurring in reasonable geographic proximity to the primary residence of the community, group or individual;

(6) a use pattern occurring in locations with easiest and most direct access to the resources;

APPENDIX B

(7) a use pattern which includes a history of traditional modes of handling, preparing and storing the product without precluding recent technological advances;

(8) a use pattern which includes the intergenerational transmission of activities and skills;

(9) a use pattern in which the effort and products are distributed on a community and family basis including trade, bartering, sharing and gift-giving; and

(10) a use pattern which includes reliance on subsistence taking of a range of wild resources in proximity to the community or primary residency.

(b) The board will identify established geographic communities which may be participating in a subsistence system. The board will then apply all of the characteristics in (a) of this section to the communities and to subcommunities, groups and individuals within the communities to determine which uses are customary and traditional and therefore, which communities are eligible for the subsistence priority.

(c) For purposes of this section, a "community" is generally considered to be several households of full-time residents who all reside in a specific geographic area because of common interests.

5 AAC 99.010. JOINT BOARDS OF FISHERIES AND GAME SUBSISTENCE PROCEDURES.

(a) In applying a subsistence priority, the boards will provide for conservation and development of Alaska's fish and game resources according to the following procedures:

(1) 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;

(2) Each board will identify subsistence uses of fish or game resources, recognizing that subsistence uses are customary and traditional uses by rural Alaska residents for food, shelter, fuel, clothing, tools, transportation, making of handicrafts, customary trade, barter and sharing.

(b) Customary and traditional subsistence uses by rural Alaska residents will be identified by use of 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 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 who in fact meet the criteria described in this subsection; and

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

(c) After identifying subsistence uses based upon the criteria set out in (b) of this section, each board will determine the approximate amount of fish or game necessary to provide fully for reasonable opportunities to engage in these customary and traditional uses.

(d) 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 uses identified in (b) of this section, and consistent with sound conservation and management practices. In no instance may the subsistence taking jeopardize or interfere with the maintenance of a specific fish stock or game population on a sustained yield basis.

(e) Each board will, in its discretion adopt regulations that provide an opportunity for non-subsistence uses of the resource, to the extent that the non-subsistence 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 subsistence uses as provided in (d) of this section.

(f) 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, each board will exercise all practical options for restricting nonsubsistence harvest before subsistence uses are restricted. If all available restrictions for nonsubsistence uses have been implemented and further restrictions are needed, each board will reduce the take for subsistence uses in a series of graduated steps, by giving maximum protection to subsistence users who:

(1) live closest to the resource;

(2) have the fewest available alternative resources; and

(3) have the greatest customary and direct dependence upon the resource.

(g) 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.

APPENDIX C

TITLE VIII — SUBSISTENCE MANAGEMENT AND USE

DEFINITIONS

16 USC 3113.

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

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

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

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

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

PREFERENCE FOR SUBSISTENCE USES

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

16 USC 3114.

Priority criteria.

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

(2) local residency; and

(3) the availability of alternative resources.

APPENDIX D

16 USC 3115.

SEC. 805.

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

Implementation.

JUDICIAL ENFORCEMENT

Civil actions.
16 USC 3117.

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

Hearing.

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

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

FROM: The Hunt
John G. Mitchell
Penguin Books
1980

Book Four

YUNGNAQUAGUQ

War in the Woods

No one can be certain of the figures, for it is difficult to count what one cannot readily see, and Alaska is so huge, wall to wall, some people measure it by time zones instead of miles. In such a land, and in its waters, the state of the art of taking census of wildlife populations cannot be far removed from the science of counting fingers. Still, people try. One of the latest attempts came up with thirteen million waterfowl, two hundred thousand caribou, one hundred fifty thousand moose, ditto the walrus, forty thousand Dall sheep, ditto the Sitka black-tailed deer, and three million seal of several species. On a statewide basis, no one much bothers keeping track of snowshoe hare, porcupine, beaver, and ptarmigan, which are likewise edible and generally plentiful. And only Saint Peter knows how many millions of char, grayling, halibut, lake trout, pike, chinook, coho, sockeye, and sheefish are swimming around in the Great Land's lakes and rivers and bays. By any measure, it is a movable feast—seemingly enough to sustain the expectations of Alaska's licensed hunters and fishermen, their household kin, and a visiting corps of sportsmen from Outside; enough, too, to feed some thirty thousand bush Alaskans for whom the rifle, the snare, and the net are the primary tools of daily life. Yet for all the bountiful appearances, some of Alaska's game species are stretched against the hard thin line of human demand. And the numbers are such that not a few of the resource users may have to do without in the years ahead. It has already come to

that, swiftly and surprisingly, in this last great wild hunting ground of the United States.

When shortages come, hard decisions cannot be far behind. When a renewable resource is pressed to the line, how does one decide who is to get the so-called surplus? To whom goes the moose of Nowitna? To the poverty-level Athapaskan Indian who lives out there, or to the dentist from Fairbanks who arrives by chartered plane? Who gets the salmon off Angoon? The villagers, or the trawlers from Sitka and Seattle? Where and when should the migratory geese of the Kuskokwim fall? In the spring, on the subsistence hunter from Eek? Or in the autumn, on the blind of the sport hunter at Lake Berryassa, California?

In Alaska, the word "subsistence" goes by a hundred different definitions, depending on the definer and whether he is white and rich and asphalted in the city or red and poor in the bush, or vice versa, and to what degree he may or may not believe that the old ways are now compromised by gasoline engines, nylon nets, and telescopic sights. "I guess the word 'subsistence' does not yield to a consensus definition," says David Johnson, a game biologist in Kotzebue. "If it doesn't yield, I wonder if it even exists as such."

"Subsistence is bullshit," says Darrell Farmen, an Anchorage taxidermist and member of the State Board of Game.

Tom Lonner is chief of the Department of Fish and Game's Subsistence Division. He says, "Complexity is something most people cannot deal with. So they simplify in favor of bias and they say, 'Subsistence does not exist.' "

"Please try to fathom our great desire to survive in a way somewhat different from yours," say the Eskimo elders of Nightmute, "and thus see why the hunters will continue to go out."

"Subsistence is based on need," says John Schaeffer, the executive director of the Northeast Alaska Native Corporation. "Who needs the resource more? Who is going to starve if the resources are made available to the subsistence hunter before they are made available to some trophy hunter? That is the whole point of the game. It is not just food for the stomach. It is food for the soul."

"There was an Eskimo in Togiak," says Ohio congressman John Seiberling. "He summed it up in one sentence. He said, 'We must hunt or die.' "

The Yupik Eskimos have their own special word: *Yungnaquaguq,* the means to perpetuate life. And they ask, "Does one way of life have to die so another can live?" The answer from the hunter's gun has always been *yes.* One life must end to nourish another. It could be different with people and their traditional life styles, if only the clock will allow it.

There was a time in Alaska, and a recent time at that, when the questions and answers came a little easier. Then, according to the state constitution, fish and game were to be "reserved to the people for common use," and all regulations governing disposal of natural resources were to "apply equally to all persons." Then, state game laws could define subsistence hunting as "the taking of game animals by a state resident for food or clothing for personal or immediate family use." Which was simplicity itself, for under that definition, everyone in Alaska—rich or poor, urban or rural, red or white—could consider himself a subsistence hunter. And almost everyone did; or did until the mid-1970s, when the U.S. Congress began redefining "subsistence" in the process of drafting legislation for the National Interest d-2 Lands of Alaska (the approximately 100 million acres to be set aside as parks and refuges under Section d-2 of the Alaska Native Claims Settlement Act of 1971); and when, simultaneously, the once great numbers of the Western Arctic caribou herd came tumbling down.

The crash of the Western caribou herd, from 250,000 animals in 1970 to barely 50,000 six years later, left many Alaskans with a feeling of déjà vu. They had been here before: the Nelchina herd, northeast of Anchorage, falling from 70,000 to 8,000 in ten years; the Fortymile herd on the Klondike Plateau, down from 50,000 to 6,000; and the 12,000 moose of the Tanana Flats south of Fairbanks quartered to 3,000 in less than a decade. After those earlier crashes, they had listened to the game managers speak of calf losses due to severe winters

and "too many" wolves. Yet hardly anyone spoke of too many hunters. Hardly anyone noticed—in the context of available game—that Anchorage was now the third-fastest-growing city in the nation, or that Fairbanks was fairly brimming with thousands of oil workers newly arrived from the hunting grounds of Texas and Oklahoma. And when the moose biologists went to the Game Board to ask that the season be closed in the overharvested Tanana Flats, the Game Board refused.

But the disaster in the Western Arctic was something else. Out in the bush of that region, sourdough loners and Native villagers depended on caribou meat for their tables. True, a trapper could mush down the Wulik River to the little store at Kivalina and trade in his food stamps for beefsteak. But at six dollars a pound, or more, after air freight? And the villagers could simply eat fish. But for how long?

Seeing a clear need for some kind of preferential regulation, the Game Board decided to issue permits for the taking of three thousand caribou bulls. Each bush village would receive a quota based on recommendations by Native corporations and village councils, and the councils in turn would issue the permits on the basis of need, considering such factors as family size, alternate food sources, and employment opportunities—the last consideration being somewhat moot, as jobs in the bush are rare. In any event, most of the Natives of the Northwest were willing to work with the new regulations. But not the Tanana Valley Sportsmen's Association of Fairbanks. On behalf of a white man who claimed he was denied a caribou permit at Nuiqsut, the sportsmen filed a suit in the state's Supreme Court seeking to overturn the new regulations on the issue of "common use" and constitutional rights. The court found in favor of the plaintiffs. The caribou permit hunt was closed in the Northwest. And sportsmen's hats sailed into the air at Fairbanks, where there are always alternate sources of food and some jobs for skilled workers, and usually cash rather than food stamps, and where beefsteak is not quite so dear as in Nuiqsut or Kivalina.

Federal policy for managing the d-2 lands in Alaska

brought further complexity to the subsistence puzzle. Most of the villagers living in the bush are Indians, Eskimos, and Aleuts, and there was much concern in Washington this time to do right by them after more than a century of broken treaties and abrogated rights for aboriginal Americans in the Lower Forty-eight. There was also a huge disdain both Inside and Outside for Alaska's competency in managing fish and game on federal lands. Many Outsiders of the environmentalist persuasion felt it was bad enough that the game herds should collapse, but even worse that the state's response more often than not should be war on wolves. It was this same skeptical constituency which helped shape the first d-2 bill to reach the floor of the U.S. House of Representatives. Arizona congressman Morris Udall's H.R. 39 would have given subsistence users priority over other consumptive users on some 100 million acres of federal land, whenever harvest restrictions became necessary (as in the case of the Western Arctic herd). And in its original version, H.R. 39 would have taken from the state, and handed over to the Secretary of the Interior, sole authority for managing subsistence uses of those lands. Though the Udall measure died in the U.S. Senate in 1978, Washington's message to Juneau was loud and clear: Either protect subsistence on federal lands or lose what the state has viewed as its traditional right to manage resident fish and game on these lands.

This time Alaska responded with something more substantial than a war on wolves. Out of the state legislature came House Bill 960, amending the old inclusive definition of subsistence to mean "the customary and traditional uses in Alaska of wild, renewable resources for such 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, . . . and for the customary trade, barter, or sharing for personal or family consumption." Within the Department of Fish and Game, the measure established a Subsistence Division with special advisory responsibilities; and it further authorized the boards of fish and game to make subsistence "the priority use." In ex-

treme cases, allocation of a resource could be restricted to local residents demonstrating "customary and direct dependence upon the resource as the mainstay of one's livelihood."

Not everyone was pleased with House Bill 960. Most of the villagers were, for the law staked out their prior right to local resources. And the feds were pleased, if only for the sake of the Eskimos and Indians. And there was satisfaction as well for some Outside environmentalists, although others with a certain anthropomorphic friendship for animals would continue to wonder why Eskimos couldn't eat food stamps instead of seals and caribou. But the urban sport hunters of Alaska were *not* happy. And the big-game guides with clients from Houston and Stockholm and Frankfurt am Main were definitely not happy. And some of the sourdough loners out in the bush were not happy either, remembering, however inappropriately to any clear understanding of the law, that there had been this white man who had gone in vain to Nuiqsut for a permit. And now it is getting ugly, out there in the woods.

Shots have been fired at floatplanes. One hunting party returned to its aircraft to find it demolished by an ax. An adventuresome Outsider, floating the Koyukuk, had his raft shot from under him and hid in the bush for two nights awaiting police rescue. Silent strangers glower at each other from passing canoes. Athapaskans radio the game warden to demand that he "check out" Eskimos coming upriver with rifles and moose tags. Eskimos on the coast complain that Indians net too many spawning-run salmon upstream. The Alaska Outdoor Association of Anchorage warns its sporting followers that their "rights" are being "given away to the Alaskan Natives and/or the so-called subsistence users." The Real Alaska Coalition, headed by guide Ken Fanning, calls for a "Monumental Trespass" by sport hunters on some fifty million acres of d-2 land designated national monuments under the Antiquities Act. National Park Service regulations allow only subsistence users to hunt within most of these monuments. Yet Fanning is telling all Alaskans to "go out into the monuments and do everything" they did in the past.

It could get even uglier. The hunting population of Alaska,

in the bush as well as in the cities and towns, keeps growing. Native youths are coming home to their villages from regional high schools and colleges, and from some jobs that no longer exist, to indulge a sense of place and cultural identity, and to await the disposition of awards—slim, on an individual basis—accruing from the Alaska Native Claims Settlement Act of 1971. Civilized ways will follow them home, to be sure; and, to some extent, an increasing dependence on the cash economy. There will have to be cash for subsistence. One cannot pour seal oil into a snow machine and expect the engine to start; nor stuff fox pelts into the breech of a .30/06 and have something come out the other end. But the sports in Fairbanks and Anchorage say: Baloney. If you want to subsist, go back to the dogsled and the bow and arrow.

One day, perhaps, after the Antiquities Act monuments have evolved by law into d-2 national parks, in a time of traditional life styles balanced even more precariously against the march of technology and urban ways, there may also be trouble between the subsistence hunter and his sometime ally, the preservationist from Outside. Half a dozen Alaskans of as many persuasions have shared with me this vision, and I subscribe to it. The vision is of this group of wilderness backpackers, all from Outside, topping a tundra rise in the Gates of the Arctic, at the foot of the Arrigetch Peaks. Suddenly they are brought up short by what is before them. But not by the sawtooth crags of the Arrigetch. By this Eskimo hunter kneeling over a head-shot caribou, and by the steam that is rising from the animal's body as the Eskimo's knife opens the gut to the autumn air. And the backpackers, as might be expected since they hail from such cities as Berkeley and Santa Barbara and Greenwich and Palm Beach, turn away with disgust and a vow to urge their congressmen to outlaw *all* hunting in Alaska's new national parks. For they each have this certain friendship for animals, and the conviction that food stamps and tourism and scenery should be more than enough to nourish an Eskimo's soul.

. . .

Bob Willard is a Tlingit Indian from Angoon. We have come to the Viking Café in Juneau to speak of his people and subsistence. It is May. Salmon are moving again through the jade-green Chatham Strait. They are schooling up for the spring run. The open boats of the fishermen are trolling the shoals of Admiralty Island, probing the fjords of Chichagof and the coves of Kuiu. It is harvest time in the Southeast. Yet here at dusk in Juneau is this Tlingit, talking politics in a white man's café.

Politics have been a good part of Bob Willard's life away from Angoon. For four years, by appointment of former Governor Keith Miller, he served as the state's human rights commissioner. He has worked with the Sealaska Corporation, one of thirteen regional profit-seeking entities established by the Alaska Native Claims Settlement Act. And he is chairman of the legislative affairs committee of the Alaska Native Brotherhood, an organization founded by Tlingits in 1912 to help Indians achieve citizenship and voting rights in the new territory. At that time, the laws governing such things stipulated that Indians must first sever their tribal relationships. To obtain the right to vote, a Tlingit was expected to adopt the civilized ways of the whiskey-soaked white men who had plundered the land of its gold, spoiled the salmon streams, and spread smallpox and syphilis through the villages. Somehow the Tlingits survived all of it. Even the franchise.

"In 1890," Willard is saying, "twenty-two of the chiefs met up near Haines to talk about driving the white men out. They were very angry. The whites were ravaging the creeks and taking the timber and changing the life style of the people. But it was September." And now Willard laughs. "It was harvest time. It is almost always harvest time in the Southeast. The Tlingits were too busy to fight. Otherwise we would have thrown you all out." Willard looks at me closely and smiles. "It's still not a bad idea, you know. We're just not that serious about it. Yet."

Willard speaks cautiously of the new national monument on Admiralty Island which would be designated as wilderness under various d-2 scenarios. Angoon is likewise on Admiralty

Island, and Willard says its people are in favor of wilderness so long as it keeps out the big pulpwood operators from the mainland and protects the villagers' traditional use of deer and bear and berries and roots, and sawlogs for the winter stoves. "But we do not forget what happened at Glacier Bay," he adds. "We don't want Admiralty to be turned into another Glacier Bay. When that place was set up as a national monument, the government told the Tlingits they would have exclusive subsistence use. The government said the Tlingits could go in there and hunt. But later, somebody changed the rules. Later, the people had to check in their rifles before the rangers would let them go into the monument. We sure don't want that again."

Resource regulations are monumentally abhorrent to the Tlingits, as, indeed, they are to most Native peoples of Alaska. And most of the bad feeling is directed not at the federal government but at the state's Department of Fish and Game. As "IRS" spells trouble to many enterprisers of the cash economy, so does the bureaucratic "Fish 'n' Game" to the practitioner of bush subsistence. Let Juneau send a biologist to Angoon to catalogue the villagers' wild harvest, and it is as if King John had dispatched the sheriff of Nottingham into Sherwood Forest to audit the assets of Robin Hood. "We have it all catalogued," says Bob Willard. "But we won't give it up. The more you speak of numbers, the more you get regulated."

Once, in Kivalina on the Chukchi Sea, I sat by the shore with an Eskimo woman, awaiting the return of her husband from a seal hunt off Cape Krusenstern. And she told me this story of the state's Fish 'n' Game man coming from Nome to ask her for a list of the Kivalina hunters. "What is it you want of them?" the woman inquired of the stranger. He said he had come to discover how many caribou the hunters were taking. She gave him a list of names, and he went away, knocking at doors. Later, the woman met the stranger on his way to the airstrip. "Did you find what you came for?" she asked. The man had a sad look on his face and he shook his head no. "If I were a hunter," said the woman, "I wouldn't tell a game warden anything either." The man from Nome said, "But I'm not a game warden. I'm a wildlife biologist." And the woman said, "That

doesn't make any difference. I'm not a fool. I'm an Eskimo."

Now, in the Viking Café in Juneau, Bob Willard suddenly remembers again that it is harvest time in the Southeast. "Wait a minute," he says. "I wonder what I'm doing here. This is May. There's no *r* in the month. I could be taking all the clams I can use. The abalone's ready. The seaweed, too. The table is set. What am I doing in here with you guys when I could be out *there?* The trend is to go home. We see our people coming back."

And what about Bob Willard?

"Next year," he says. "My job here is just about done. Next year, I'm going to hunt and fish and do what I was made to do. I'm going home to Angoon."

In the morning, a floatplane took me from Juneau to Angoon. We landed on a bay behind the village, taxied to a pier where half a dozen fishing boats were moored. Some of the boats, or rather their operators, are licensed to fish commercially; and because of the resulting cash income from salmon and shellfish, and the sharing ways of the people, who regard themselves as being all of one family, five hundred strong, Angoon is not altogether the sort of village that one might consider typically bush. Nor is it urban, for the old ways of setting the table with the fat of the land and the sea still prevail.

At a conference table in one of the public buildings, I spoke with some of Angoon's elders and the leaders of its village corporation, Kootznoowoo, Inc. Charlie Jim, Sr., said: "You people don't eat what we eat. What would you think if *we* made the rules and I said to you, 'Listen—we limit you people to one cow and three chickens.' Too many laws are made behind our backs. This thing hurts."

George Jim, Sr., who is seventy-seven and leader of the Tlingit's Shark Clan, said: "We use it all." Because someone had mentioned allegations of waste. "We use it all. We dry the fish and put it away for wintertime. And the eggs. We use it all. And seal, we use the skin for shoes. Bear, for wintertime. Deer, we dry it. Just the way we always been using it."

Daniel Johnson said: "In each region of Alaska, it's different. Each region will have to define its own needs, its own way of life. We've lost some of it. But we're still holding on to the most crucial parts of it. And we're being cut down by the regulations. On deer, before, there was no limit to what we could smoke or salt. Now, we are limited to the same as the sport hunters. Now, they are taking the happiness out of the people."

Jimmy George, who is ninety and leader of the Tlingit's Killer Whale Clan, said: "We try to obey the United States because they adopted us. But they treat us as foreigners. What's going to happen to us? They never listen to us. They do not hear what we have to say."

And Jimmy George's wife, Lydia, said: "My generation is lost between the two cultures. But the younger people—they will try to make our history work for us."

And Edweel John said: "The people who make the regulations—do they know what the word 'subsistence' means? Do you? We do. All our people do. Did the state define the word 'subsistence'? They can't. They don't know nothing. But you take *me* out, partner, out in the cold. I still know what to do. I know where I'm *at*. The old-timers taught me. Jimmy George. George Jim. My dad. They taught me how to get along. *Subsistence!* You can't define subsistence. It's *our* way of life."

Then Charlie Jim of Kootznoowoo put in again: "Our people, when they had nothing but their regular food—no false teeth, no eyeglasses, no sickness among them. All right. When the others came moving in on us, we began to eat white people's food. I remember one chief said our people began to live on cow's milk instead of their mother's and that's why they're crazy. Today, some of our children can't speak their own tongue. But we still remember. We're not eating up everything from Alaska. When we were living here—the Natives, alone—there was always enough food. Where did it all go? There is no man alive who can say we can't have what is here. This is our food. We were made to have it."

Tom Lonner holds the third-toughest job in Alaska, after those of the governor, Jay Hammond, and the Commissioner of Fish and Game, Ronald Skoog, who is Lonner's boss. Possibly it is just as tough to be a wildlife biologist from Nome on assignment to Kivalina, but I doubt it. For Lonner is a sociologist in a bureaucracy that plays by the rules of biopolitics. He is chief of the Subsistence Division of the Alaska Department of Fish and Game, and his job is to close the widening gap that prevails between the regulators in Juneau and what he refers to as "the unseen economy" of the bush.

As Lonner saw it when I spoke with him at his office in Juneau, the gap must be filled with information. What, he asked, is the true level of need in rural Alaska, in all of Alaska? How great is the harvest in pounds of food and cash equivalents? What is the level of human effort involved in subsistence? To what extent does subsistence offset the burden of welfare? These are difficult questions in Alaska—as difficult for the traditional Fish 'n' Game man lacking rapport with the villagers as for the Native hunter, who fears that sharing data with Fish 'n' Game will only lead to further regulation, and who, when asked why he needs more game than the law allows, simply replies that this is his food, and that he was made to have it.

Over the years, various Native, state, and federal researchers have attempted to piece together estimates of the subsistence harvest in pounds of food and cash equivalents. All of these studies were of a regional or local nature, and the figures were often drawn from calendar forms distributed to villagers who may or may not have been diligent in computing their harvest of wild foods. In any event, the ball-park figure appears to fall somewhere between 800 and 1,600 pounds per person per year. Which coincides, at the middle of that range, with Lonner's own estimate of 40 million pounds of wild edibles annually statewide.

A few examples. One household survey conducted by the University of Alaska in 1972 determined that a large majority of the people of Akiachak and Mountain Village, both in the Yukon-Kuskokwim Delta region, obtained more than three quarters of their meat and fish by hunting and fishing. Those

who tended to rely on protein obtained from the village stores were generally older people incapable of hunting or fishing. In 1973, the U.S. Fish and Wildlife Service surveyed a number of Yukon-Kuskokwim villages. At Tuluksak, they found that 180 villagers, in an average year, harvested 10 moose, 6 bears, 500 beavers, 2,000 muskrats, 2,000 geese and ducks, 3,000 ptarmigans, 16,000 whitefish, 8,000 salmon, 3,000 smelt, 8,000 pounds of berries and wild rhubarb, as well as various pounds and numbers of other critters and plants. The per capita consumption of this food was computed at 1,619 pounds. Apprised of Tuluksak's prodigious appetite, the Alaska Department of Fish and Game scoffed, and said the figures were inflated. And perhaps they were, especially when one considers the fact that the average person in Anchorage annually consumes only about 260 pounds of store-bought fish and meat. On the other hand, one must remember that the person in Anchorage also eats great quantities of potatoes, rice, vegetables, and dairy products, while the Kuskokwim Eskimo generally does not. Moreover, much of the wild meat and fish is dried before it is eaten, and in the drying process loses up to three quarters of its original weight. And one must remember, too, that meat in the bush often spoils for lack of proper storage, and that even though snowmobiles have largely replaced the sled, sled dogs are still maintained—and fed—by some village families.

As for cash equivalents, the Fish and Wildlife Service figured that the Tuluksak villager's 1,619 pounds of wild food carried a value, if it had passed by the cash register of a market in Bethel (the regional center), of $2,146. That was in 1973 dollars. Today the value would be well over $3,000.

"If subsistence should ever collapse in this state," Lonner was saying, "the replacement food will have to come in by air and it will cost at least a hundred million dollars a year. Who's going to pay for it? From whose treasury will the dollars flow?"

I asked him how long he felt subsistence could last, given the growing demand from all quarters on a renewable but finite resource. And he said: "No one knows. Alaska is like a desert. The richness of life you see is only at the oases. A couple of bad winters and you can lose an oasis. Ecosystem management

doesn't go on here. There's this vast system. You stick your fist in it and the ripples go out. But you never see where they end up. And we've only begun to try."

I worry for Lonner, as I worry for the economy of the bush, and for the wildlife which supports it. I worry for Lonner because I do not detect, among the rank and file of the Game Division of the Department of Fish and Game, much enthusiasm for what he believes in and for what he is charged by the legislature to do. For better or worse, game managers in Alaska, as elsewhere, still pay their dues to the sportsmen. Both manager and sport tend to be cut from the same bolt of cloth. They speak the same language. They mourn the diminishment of favors for the great middle class. Certainly there are sensitive and perceptive men at headquarters and in the field, but there are more who say, in effect, that subsistence hunters have neither the right nor the need to be treated preferentially in the allocation of scarce resources, and who openly proclaim that the issue of subsistence must surely fall somewhere between baloney and a sinister plot. Or so it would seem when Game Division Director Ron Somerville is quoted in the Anchorage *Times* as having told a gathering of the Alaska Outdoor Association that the subsistence issue is "a front to cover the deals and the unholy alliance between the Natives and preservationists." And so it would seem when Game Board member Jim Rearden is quoted in the Fairbanks *Daily News-Miner* as saying that subsistence would not be a real concern in the villages if it were not for the agitations of "full-time, paid employees" of such "special-interest groups" as the Rural Alaska Community Action Program (RurAL CAP) and the Alaska Federation of Natives. So the war goes on. And no end in sight.

Delta Springtime

The way the old Yupik Eskimos used to tell it, Raven created the earth and then raked the land with his talons, and that is how the great rivers of the Yukon and the Kuskokwim found

their way to the Bering Sea. Raven did well, for otherwise there would never have been this vast plain built on the rivers' sediments, sprawling across western Alaska from Kuskokwim Bay to Norton Sound. There would never have been these winding sloughs and lakes and potholes by the thousands speckling the tundra from the Kilbuck Mountains north to the Nulato Hills. And probably, too, there would never have been this whirring of feathered wings in the springtime as Raven's multitudinous children—brant and scaup and eider and oldsquaw and pintail and teal, emperor and white-fronted and Canada geese—came down from the flyway to nest in the tussocks where the Yupik crouched, waiting with his *qilamitaaq*. For Raven had taught the Eskimo hunter how to catch a low-flying bird when his family was hungry for fresh red meat. Raven had shown how to make weights out of whalebone or walrus ivory. Each of five weights was tied to a braided sinew, and the sinews were fastened at their unweighted ends to a single grip made of wing feathers. When the hunter hurled his *qilamitaaq* aloft, the sinews cut through the air like whips, and woe to the duck or the goose that happened to get in their way. This is how Raven turned the Yupik people into waterfowlers. They were good at it, too; though not as good as they would be after Raven and the *qilamitaaq* were replaced by Remington and his shotgun.

It seems a place more splendid for birds than for people, the Yukon-Kuskokwim Delta. Fifty thousand square miles—an area the size of New York State—and half of it water, running to the sea or pooled in ponds and cutoff riverbeds running nowhere. Except for willow and alder, and spruce along the upland reaches of the two main rivers, trees eschew the Delta, leaving it instead to moss and lichens, to grass and sedge. As for mammals, apart from people, there are seals along the coast and furbearers inland. But moose and caribou are uncommon in the lowlands, and those that occasionally drift into the downstream country are regarded as migratory aberrations. Considering such circumstances, an Outsider might wonder why the ancient Yupiks selected this sparse country for their homeland, and why so many contemporary ones choose to remain. When the first whites—the *gussoks*—began to poke up

the rivers in their whaleboats, ten thousand Eskimos were living on the Delta. Now they are seventeen thousand. They live in villages called Platinum and Pilot Station and Nightmute and Aniak and Russian Mission and Crooked Creek, and for the most part they subsist on salmon. The salmon are dried on racks in the sun. After a long winter of eating dried fish, the Yupiks are eager for spring. When spring comes to the Delta, the Yupiks know that fresh red meat cannot be far behind.

They say that the first birds arrive at their nesting grounds even while snow still covers the tundra and the ponds remain locked in ice. One hundred and seventy species have been sighted in the Delta, shore and water birds mostly, maybe as many as 100 million individuals in a given season. Of all swans winging the Pacific flyway, eight of ten are believed to nest in the Yukon-Kuskokwim Delta. And eight of ten of the continent's emperor geese nest here, too. During fall migration, some birds from the Delta set course for, and ultimately touch down on, most of the Canadian provinces, all of the contiguous United States, Mexico, Central and South America, many of the Pacific islands, and much of eastern Asia. The U.S. Fish and Wildlife Service guesses that nowhere else in the world is there an area of similar size "as critical to so many species."

Migratory game-bird hunting regulations for Alaska are promulgated by the Fish and Wildlife Service; and by Outside standards, they are fairly liberal. In the Delta region, the season for waterfowl runs from September 1 to December 16. The daily bag limits are ten to fifteen ducks, depending on the species; four white-fronted or Canada geese, singly or in aggregate; six emperor geese, four brant, and two cranes. Researchers figure that half of all the waterfowl harvested throughout Alaska in the course of a year are taken in the Yukon-Kuskokwim Delta, which half adds up to about 125,000 birds. Of these, most are shot out of season, in the spring. In a study of harvest patterns in the mid-1960s, David R. Klein of the University of Alaska figured that the typical Yupik hunter probably killed about seventy-eight ducks and geese each year, and that more than half of these were taken during the illegal spring season. Nowadays, the individual harvest may be even higher. And the

total harvest most certainly is. Since 1964, the human population of the Delta has doubled, and some demographers expect it to top forty thousand by the year 2000. If it should, and if the harvest should increase proportionately, Delta hunters could be taking more birds than the resource can safely afford to lose.

For certain champions of the subsistence life style, it is difficult to place much stock in the dour projections when ducks and geese seem to rise like thick clouds of smoke across the Delta horizon. Once, in Washington, D.C., I raised the question of numbers with a lobbyist for one of the Alaskan Native organizations, and he said to me: "It can't happen. To make a dent in those birds, you'd need a battery of Gatling guns in every village." And yet in some villages, there are hunters who fear that it *can* happen; that, in fact, a great diminishment of numbers has already begun. Not necessarily because of shotguns on the Delta; because of what is happening to the birds Outside. At the Delta village of Hooper Bay, Raphael Murran said to me: "According to the older men, each spring fewer and fewer of the birds come back from where they have wintered. There is much stress on the birds in the south. Look at California. All chemicals and pollution, and they fill the marshes with cement. And down there are many sport hunters. They outnumber us. They take more birds. What use do they have for the birds? They don't *need* them. They take them for fun."

There is considerable misunderstanding between the subsistence waterfowlers of Alaska and the sportsmen Outside. Oregonians and Californians, camouflaged in their October duck blinds, also note a diminishment of numbers, and they curse bush Alaskans for shooting "their" birds out of season in May. The sports wonder why the hunters of the Delta cannot hold their fire until the first of September. Yet when the hunters of the Delta hear this complaint, they are incensed. I'd be incensed, too. By the first of September, many of the birds are not only out of range but out of Alaska, already on their way toward the blinds of California. There is also a matter of feathers. Outside, the sports have this theory that Eskimos waste honkers in order to market the goosedown to Eddie Bauer and L. L. Bean. In the Yupik villages, elders note youths returning from

Anchorage with parkas and sleeping bags lofted with down, and, knowing it is not they who supply the material, suspect it must be those white-face hunters at the other end of the flyway. (In fact, most of the down used commercially for garments and sleeping bags comes from domestic geese in Canada, Germany, and the People's Republic of China.)

And finally it would seem that the bird in the bush gets the can of worms, for there is confusion and misunderstanding as well in the matter of international treaties. An accord signed in 1916 by the United States and Canada prohibited the hunting of most species from March 10 to September 1. A 1936 treaty with Mexico outlawed the taking of ducks during the same period, but said nothing of geese or swans, or of subsistence, for that matter. In Alaska, federal fish and wildlife agents were thoroughly bewildered. One year there was token enforcement, the next year there wasn't. At Barrow, in 1960, they arrested an Eskimo for shooting ducks out of season. Two days later, 138 other Eskimos shot ducks, then presented themselves for arrest. After some legal maneuvering, charges against all of them were dropped. The feds warned that further violations would be prosecuted. But they were not, for the game wardens turned the other way. And now there was another treaty, with Japan. It provided for subsistence use of migratory birds by Alaskan Indians and Eskimos, but not by Aleuts or bush whites; and it further proscribed the taking of fowl during their principal nesting season. In effect, the treaty gave with one hand and took away with the other. Next came an agreement with the Soviet Union, which sanctioned the taking of migratory birds and their eggs, under U.S. Department of the Interior regulation, by indigenous Alaskans for their own nutritional and other needs in remote villages. And which also inspired the United States and Canada to amend their old 1916 accord with similar language. But before the Secretary of the Interior can issue subsistence regulations legalizing a spring-summer hunt by bush Alaskans—thereby gaining some measure of control over the harvest—the Japanese and Mexican treaties must likewise be amended. Toward that end, negotiations proceed slowly at the bargaining table. No doubt the diplomats involved might act more expeditiously were they to spend a winter in a Delta village, dining on dried salmon, dreaming of meat.

Chevak is a Delta village located halfway between the mouths of the Yukon and Kuskokwim rivers. It sits on a low bluff above its own meandering river, nameless on most maps, about six miles inland from the mud flats of Hooper Bay. The population is three hundred, more or less. Most of the people eat salmon and whitefish and seal and berries, and birds in the spring. And there is always some *gussok* food at the general store for those who can afford it. For those who, affording it, can stomach it.

The birds had come to Chevak ahead of me. Now they were out on the tundra making their nests. Most of the shooting was over, at least for a while, for the first king salmon had just been taken near Hooper Bay and soon the fish would be making their run; and the people had put away their shotguns in order to ready their boats and nets for the crucial catch. We walked down from the airstrip into the village and straightaway saw some birds that would not be nesting. They hung from the drying racks upside down, plucked and brown, and wrinkled by the sun—the layaway surplus of a harvest of fresh meat. Then a cool wind came off the river, and the drying birds turned slowly under the racks, each like a small chicken charred on a roasting spit.

Chevak is a relatively new village, dating to 1951. Oldtimers still think of themselves as the *Qemirmuiit*, the people from the hills, and they remember the place called Kashunuk, to the south, where there were houses made of driftwood and tundra sod, and everyone went to fish camp after the birds came in May, and when it took all day to reach the ocean, going for seals, paddling first with the current and then against the tide, instead of an hour or two with the revved-up power of a hundred horses slung from the back of one's boat. Going back generations, there are stories of Russian traders who exchanged their rifles for the Eskimos' furs—how the bargain was struck

when the *gussok* held the rifle straight up, butt on the ground, and the Yupik trapper piled his skins one upon another until the stack of furs was level with the rifle's muzzle. One stack for one rifle. It cost that much, even then.

It is different now, in Chevak, though not altogether. The houses are made of plywood and particle board and tar paper in the eclectic *gussok* style of poor man's Anchorage, or Albuquerque, or Appalachia. It is not an efficient way to live, warm, in the subarctic; but it is the way now nonetheless—sod insulation having been decreed unsuitable for civilized people according to the wisdom of missionaries and government meddlers over the years. And besides, there is oil for the stoves, though warmth may cost a small family two hundred dollars a month, and often more. And there is the big generator of the Alaska Village Electrical Cooperative, fired by Number One oil beside the general store, and the power lines in frostproof conduits running along the boardwalks and into the houses to light the lamps and service the freezers where some of the wild foods are stored.

There is television in Chevak. It comes by relay out of Bethel, though at the time of my visit it was not in operation. The translator device, the village's central receiver, was on the fritz and the village council had voted not to repair it, at least for the duration of the summer. I was informed that the decision was in the best interest of the children. True, there was much to be learned from television about the world Outside. But television was best for the winter, to keep the children quiet and out of mischief indoors. Now the days were long and warm, and it was better that the children learn a thing or two about their own outside while the Sonys and Sylvanias stood darkly silent in the corners of the thin frame houses. And as I strolled through the village that first evening, I watched the children in scattered groups chattering delightedly, each individual taking his or her turn, at whatever they happened to be playing, without the peevish competitive bawling I generally associate with prepubescents gaming in the backyards of my own experience. "Hi!" they called in English when they spied me watching. "What's *your* name?" Dark eyes and ruddy cheeks

turning my way. Tummies full of bird meat, probably. Too young yet to wonder about treaties and regulations, or about the forces that would soon be pulling them, one way or another, between the old and the new. The gentle people, I remembered someone saying of the Yupiks. The gentlest in the harshest of all possible worlds.

"My father saw the ocean as a plate." It was mealtime, and Leo Moses sat at the kitchen table of his home in Chevak. With the tips of his fingers, he lightly touched the edge of a plastic dinner plate set before him. Resting in the center of the plate were a bowl of fish soup and the breast and thighs of a dried ptarmigan. The fingers tiptoed across the plastic to the food. "The ocean was a plate," he said, "and you always took the first bite from the edge that was closest to you." The fingers took hold of a piece of the bird and held it up for his inspection. "We were told never to finish all the food that was in the plate," he went on. "The big one, out there. The ocean. We were told not to do that so there would always be something left for tomorrow." Leo Moses stared for a long time at the piece of meat, and then he said, "Excuse me," and ate it. Watching, I wondered if the apology was being offered to us. Or to the bird.

Moses is an uncommon Eskimo in that he has tasted not only of the white man's world, both Inside and Out, but also of the bitter sauce of making regulations. For a time, by appointment of former Governor William Egan, he sat as a member of the then joint Board of Fish and Game. It was a painful experience. "There were laws then that we were violating and are still violating," he said. "Like barter." I interrupted to explain that it was my understanding that trade and barter of wildlife was now permissible under the new legal definition of subsistence, but he dismissed the information. Perhaps he felt that while the language of the law might have changed, the intent in Juneau, still, was to restrict the Eskimo's bartering custom. As if nothing had changed, he said, "The law says you cannot barter subsistence food. But it is our way. What is the difference? Salmon or money. They are the same."

"Except that you can eat the salmon," I said.

"But first you must buy the net," he replied. "With money."

Was there no need, then, for any regulations? Should the people be allowed to take whatever, whenever they wanted?

"Of course not," said Moses. "There *must* be regulations, but they must make sense. It's not like it used to be in the old days. There is no longer plenty of everything left out there. You hear of wanton waste. Sure, but we're not wasting. You have more than you need, you share it. Of course—birds. Some are just killing off too many. I know damn well they're not *that* hungry. Good thing shotgun shells are rising in cost." He laughed, then came out of it, suddenly, with a frown. "Why are the geese depleting so fast? In my time, when I was young, there used to be *lots. Geese!* Right now, you go out hunting and you see a few flying around. What is there going to be twenty, thirty years from now? It's a joy to kill those animals, to eat them, but how do you preserve enough so that everybody will be satisfied? And cranes. Cranes are going down, too. Man, there used to be cranes just like music." Moses lifted his face toward the ceiling, mimicked the crane with a guttural cry. And was silent for a while before saying, "We're in a race with a dying world. Not here so much. There's a lot you can see flying from here to Bethel, and from Bethel to Anchorage, and Anchorage to Juneau. There's a lot of land here in Alaska no one has ever set foot on. No one. But when I flew from Tacoma to D.C., I look down there and the whole earth is just like a checkerboard. I get lost out there. Sure. We're taking a lot more than we used to. Before the shotgun time, we were told, 'Do not rejoice that the birds are flying, for they aren't going to come falling down on you.' Now, because of the equipment, the shotguns and the outboard motors, when the geese molt the boats go out there and get all they want. And there's a lot more families than we had years ago, too. The problem is, what will we eat if we don't watch out what we're doing? Some people don't think. They're alive, but just day to day. They don't know how to look to the future."

Village elders share Leo Moses's concern for the future, as well as his reverence for the past. The oldest among them is Joe Friday, who was seventy-seven the spring I spoke with him in Chevak, one of the last of the Kashunuk people. David Friday, his son, turned the English into Yupik, and back again, as we sat by the stove. I had a feeling of redundancy sitting there, as all Outsiders who come to Chevak to learn of subsistence eventually wind up beside the Friday stove. Congressman Morris Udall, the d-2 architect, had lowered his six-foot-four frame through this same doorway to speak with Joe Friday, and, forgetting the scale of an Eskimo's house, cracked his head on the doorjamb going out. Members of the entourage were amused, for across the obstruction a bumper sticker proclaimed the Fridays' allegiance: "Save Alaska's Wilderness." As Udall went out, he said he was grateful for the reminder.

I learned this about Joe Friday. When school is in session in Chevak, twice each week he leaves the side of his stove and goes down the boardwalk to the classrooms to tell the children about the old times at Kashunuk, about the traders and the piles of fur, the whales on the beach, the journeys by dogsled and kayak, the adventures of Raven, and the way it was when the stoves burned driftwood, the lamps were filled with seal oil, and walls were made of tundra sod to turn back the winds of December. I learned that Joe Friday does not tell the children that this is the way it can be again, or even ought to be, only that they should know this was the way their grandparents had come, and that the things of the land and the sea—of the air, too—were the Eskimo's strength, and always would be, until they were Eskimo no more. Should it ever come to that. And sometimes, when schoolboys are of a certain age, Joe Friday invites them to join him and the elders at the *qasgiq*, the fire bathhouse that is sunk in the ground, with a deep pit for the willow logs, the hot smoky air flushing the senses, the hunters imparting the wisdom of their accumulated years. They would speak of the birds, and how each hunter had to be careful to dress himself in the colors of the tundra, then crouching and using only one's voice to bring the birds into range. Then, on the tundra, when the birds were on their nests with eggs, it was

said that "the whole world is food." But now such a thing is said only in the *qasgiq*. Now, with shotguns and baskets on the tundra, to say such a thing would not only be foolish. It would make people sad.

Alaska, as anyone who isn't a Texan might already have guessed, is a state of superlatives. Among other distinctions, it has the highest per capita income in the nation, a fast two thousand bucks beyond the U.S. average. And it used to be higher, proportionately, when pointy-toe boots were taking a shine off the pipeline between Prudhoe Bay and Valdez. The bucks come and the bucks go, also with distinction, for Alaska matches its blue-ribbon incomes with a cost of living higher than that of any other state in the Union. Shelf prices on some items in Anchorage are 60 percent higher than in Seattle; in Bethel, 40 percent higher than in Anchorage. By the time a box of cereal or a gallon of gasoline reaches Chevak, the value of the Seattle dollar may have deflated 130 percent. Which might be acceptable if there were adequate income in Chevak. But there isn't. For more than half of the Native families of the Yukon-Kuskokwim Delta, incomes fall below the national bottom line, otherwise known as the Poverty Level. The figure for Native poverty statewide, as measured by family dollars, is nearly 40 percent. So here in this great wealthy state are these gaping holes into which government sticks its welfare and food stamp programs. And Raven only knows how much more it might cost—Tom Lonner guessed $100 million—if most of the poor ones did not already prefer to help plug the holes with their shotguns and rifles and nets.

Some of the sports in Fairbanks and Anchorage do not like to dwell intellectually on this side of the bush economy. They seem to prefer to traffic in tales of Eskimos at Barrow riding in taxicabs, full-fare, to the sea to shoot at ducks; of hunters from Anaktuvuk flying in chartered planes, courtesy of the Bureau of Indian Affairs, to shoot at caribou; and of Tlingit fishermen on holiday in Hawaii, surfing on a surfeit of cash from the salmon of Alaska's Southeast. The sports like to see it that way. There

are sports who drive taxis in New York City. The way they tell it, the people of Harlem have rocking chairs on Easy Street. Because once or twice there was this black man in a Cadillac outside the Plaza Hotel, and the sun just happened to sparkle on the rings on his fingers when the cabbie cruised by. I suppose some people see only what they want to see.

In the bush, nothing is easy. Not now. For if one takes a job for cash wages, then he has scant time for the hunting. And if one does *not* have a job, or income from furs or fish, then he may have all the time in the world, but not enough cash to hunt. Consider the facts as assembled by Michael Nowak, a researcher who spent five summers on Nunivak Island, southwest of Hooper Bay, appraising the hunters of Mekoryuk. At the time of his observations, about three quarters of the men were employed, full- or part-time, mostly in small public works projects. Nowak's objective was to ascertain the cost to these men of acquiring (on holidays and weekends for the fully employed) about 2,000 pounds per family of traditional Eskimo foods. In his computations, equipment expense was amortized over a "primary life-span" of four years (at 1975 prices). The checklist included a .222 rifle at $190, a 12-gauge shotgun at $230, and a 20-gauge at $180; one boat, with two outboards and fuel tanks, at about $2,200, plus maintenance; a snowmobile at $1,800; a fishnet at $120, and assorted lines and lures for taking tomcod through the ice in winter. Ammunition for the three weapons was calculated at the rate of about $28 for sixty shells, and fuel for the engines at $1.10 a gallon. Nowak then shuffled these expenses into five separate decks of subsistence activity: the taking of seal, reindeer (harvested by permit from a managed herd on Nunivak Island), salmon, tomcod, and birds, and came up with the following results.

To kill five seals for 620 pounds of dressed meat and oil, the Mekoryuk hunter had to spend $812. The cost per pound: $1.31. To kill four reindeer, total weight 400 pounds, $450. And cost per pound: $1.13. To net 375 pounds of salmon, dried weight, $525. Cost per pound: $1.40. To catch 250 pounds of tomcod, $150. Cost per pound: $0.60. And to take 25 geese, 60 ducks, and 25 ptarmigan, $688. Cost per pound: $1.91. Nowak

figured all this hunting and fishing added up to about 76 days afield per hunter-fisher. But the value of man-hours was not fed into the computations.

So, what did it all mean? To Nowak it meant [illegible] while subsistence was costly, it was far less costly than the [illegible] ar-ket shelf. While the price of fresh, frozen, and canned *gussok* meats and fish averaged out at $2.19 a pound, the Mekoryuk hunter's game averaged $1.30. And Nowak observed: "In parts of southwestern Alaska where income levels are lower, the economic significance of traditional subsistence activities is even greater. There a family with an income of $4,500, obtaining 2,000 pounds of traditional game, could save a little over 39 percent of that income." There was, however, a certain grim prospect in this, for Nowak also found that inflation was affecting major equipment costs to a greater extent than groceries. If the trend should accelerate, he warned, "the present savings realized through pursuit of traditional foods will continue to diminish until at such time in the future they may cease to exist at all." In which case, should it come to that, the cost-benefit ratios might have to take something else into account—namely, nutrition.

It is a lopsided contest, game vs. *gussok* food. Seal meat has ten times more iron than beef does. A ptarmigan has twice the vitamin B of a chicken. Stack a steer against a moose, and Old Bossie turns out to have twelve times the saturated fats of the wilder ungulate, and only one third the protein, gram for gram. Stack the steer against a caribou and the point spread is even greater.

Nutritionists have been fascinated and awed by the high-protein, low-carbohydrate diet of traditional northern peoples ever since the early Arctic explorers faltered on scurvy while their Eskimo guides remained healthy and strong. Possibly the Native stomach had evolved but little, biochemically, from glacial times when there were few greens to eat. Whatever the adaptive reason, fish and meat have always brought vigor to Arctic people. But some of the old strength is going out of them because of the white flour, the sugared breakfast cereals, the soda pop and candy so many are now bringing home from the

gussok's shelf. There are better items to choose from, but not better by much. Problems of transportation and winter supply are such in the North that many of the foodstuffs must come to the bush in cans, and half of the contents are either water or additives. "In rural Alaska," says Michael Holloway, an Anchorage physician who works on Native health problems, "there's only one word to describe the imported food. It's junk."

The effects of junk are beginning to show among the young—in anemia, in dental cavities, in otitis media (the ear disease said to be triggered, in part, by high sugar intake), in vitamin deficiency. A survey conducted for the Yukon-Kuskokwim Health Corporation by nutritionist Barbara Knapp of Bethel found that the dietary compositions of five Delta villages, including Hooper Bay, have changed drastically over the past two decades. Comparing her own findings with those of a similar survey in 1961, Knapp discovered that protein intake had decreased overall by 50 percent, only to be replaced by "low nutrient" carbohydrates. Intake of calcium and iron was well below the recommended daily allowance, and dangerously so for women of child-bearing age. And this was occurring even among families in which at least half the food eaten was obtained from the subsistence harvest.

The effects of junk are beginning to show, too, in rural Alaska's rising rate of alcoholism. Not that eating canned tuna makes one any more disposed to the bottle than caribou does. It is just that the switch in the supply systems—the substitution of food stamps for foraging—leaves some of the people with nothing to do. At a hearing in Anchorage on Morris Udall's House Bill 39, the d-2 icebreaker, one of those giving statements was Don Mitchell, an attorney for the Alaska Federation of Natives. Mitchell spoke of the subsistence resource, and what it might cost to replace that if the resource were lost. Maryland congressman Goodloe Byron listened to Mitchell, then wondered aloud about food stamps. "We are talking," said Byron, "about a free food stamp program for all Americans who make less than four thousand dollars a year. You don't have to buy anything any more. It's given to you. Wouldn't that draw in the food industry?"

Mitchell replied: "I doubt that very much when you are talking about villages of two or three hundred people way out on the end of the economic food chain. More important, even if it did, I think the fundamental issue about subsistence—and why Native people are so upset about it, and they are not upset about it because of our statistics about dollars—[is that] the only reason those villages exist, the only purpose they have, is to allow a convenient staging area for a group of people who have lived together over hundreds of years to get game in their area. If you take away that function, there is no reason to be there. The severe alcohol abuse problems in rural Alaska are ungodly. I wouldn't want to sit around all day reading paperback books and waiting for someone to bring me something to eat. I'd go nuts."

"I think," said Ohio congressman John Seiberling, "it is very difficult for a person who has never lived in a Native village to comprehend that the subsistence life style is the foundation of the Native culture. If we substitute food stamps, even if they are free, even if they are adequate, even if we can get the food up there, we have destroyed their culture."

Apropos of going nuts, a story is told of an Eskimo village on a northern river where the elders would as soon turn back the clock as watch their people be wasted by too much leisure. I cannot vouch for the tale's accuracy, and since I do not wish to slander the place I shall leave it unnamed. In any event, I am told that some years ago the village council decided to take a giant step forward into the Age of Petroleum by installing tanks for the storage of heating oil. The oil would replace firewood in the villagers' stoves, after conversion of the hardware, and those who could afford the oil seemed delighted, for now they would not have to forage by snow machine or sled for the logs that had warmed them through the cold in traditional times. The first winter came and went, and the second and third. Then the village council members began to brood. Something had taken the happiness out of the people. It wasn't a shortage of money; some of the men had jobs on the pipeline. It was a surge of drinking and drugs and divorce. The councillors went about knocking on doors, asking the people why it had

come down to this. Then they pooled the responses. And were stunned to learn that some of the people were troubled because, in the fall and winter, there was nothing to do. Before the oil tanks, some of the people had spent as much as half of their cold-weather time gathering wood. After the tanks, they sat inside their houses, looking at calendars. Or bottles.

"What's the solution?" a council elder asked of his colleagues.

The youngest replied, "Simple. We blow up the tanks and tell the people to go out and get wood."

Going for Uguruk

It is June in Kivalina on the shore of the Chukchi Sea, in the land of the saltwater people. It is the time when the sun is high above the drifting ice and the air is warm; a time, too, for the sky to play tricks on a stranger. Beyond the lead of open water and the edge of the ice, a great white wall looms above the horizon, as though it were cantilevered on a cushion of air. Landward, over the barren hills between Kivalina and Cape Krusenstern, tall mountains hover like faraway clouds. This is a puzzlement for the stranger, to see things that he knows cannot possibly be, for the mountains in reality and substance are sixty miles beyond the limit of human vision, screened by the curve of the earth. What is it, then, that makes such a liar of the sky? The Eskimo hunters smile. It is *innipkak,* they say in Inupiat, the tongue of the North, which is different from Yupik. It is the mirage that occurs when the wind is from the west and sunlight refraction causes an image beyond the horizon to hover above it. *Innipkak,* now, is a very good sign. It means that the succulent, red-bellied Arctic char will be running again down the Wulik River; that the leads will be widening in the rotting sea ice; and that the time has come at last for the hunters to be out in their boats, as we are, going for *uguruk.*

Uguruk—the bearded seal in *gussok* words, *Erignathus barbatus* in the taxonomist's—commands a place of honor on the